SPORTS AND COMPETITION LAW IN SOUTH AFRICA: THE NEED TO ACCOUNT FOR THE UNIQUENESS OF SPORT WHEN APPLYING THE COMPETITION ACT 89 OF 1998 TO THE SPORTS INDUSTRY

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ABSTRACT

Regulation of sport as an economic activity has become increasingly prevalent in a number of foreign jurisdictions. This thesis considers the applicability of competition law to the sports industry from a South African perspective. Although the Competition Act 89 of 1998 is yet to be applied in the context of organisation of professional sport, the sector is not free from the scrutiny of competition law authorities. It is necessary to subject sports organisers and governing bodies to competition law in order to ensure that their administrative powers, which effectively place them in positions of market dominance, are not misused for their own commercial interests. On the other hand, the unique characteristics of sports should also be taken into account when applying competition law to the sector. In particular, it should be noted that sporting activities are not purely economic in nature, and that they are also conducted in order to achieve various social objectives. This thesis examines foreign jurisprudence that have dealt with the relevance of purely sporting justifications under competition law, and conclude that South Africa law should take into account the unique nature of sport when determining whether a conduct should be *per se* prohibited under the Competition Act, as well as when the rule-of-reason enquiry is conducted. This would require an amendment to the Act, a draft of which is proposed in this thesis. Finally, the proposed approach is applied in the context of the player transfer rules in football, in order to highlight problematic aspects of the transfer system even when considered in light of the unique nature of sports.

"Sport can create hope, where once there was only despair."

Nelson Mandela

Inaugural Ceremony Laureus Lifetime Achievement Award, 2000

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ABBREVIATIONS

A	Appellate Division (SA)
AC	Appeal Cases (UK)
AD	Appellate Division (SA)
All ER	All England Reports
All SA	All South African Law Reports
ALR	Australian Law Reports
BBC	British Broadcasting Corporation
C	Cape of Good Hope Provincial Division
CA	Court of Appeal (UK)
CC	Constitutional Court
cf	Compare
CIES	International Centre for Sports Studies
CJ	Chief Justice
CPD	Cape of Good Hope Provincial Division
D	Durban & Coast Local Division
E	Eastern Cape Provincial Division
e.g.	For example
E.U.	European Union
ECLR	*European Competition Law Review*
ed	Edition; or editor
ER	English Reports
et al	And others
FIFA	Fédération Internationale de Football Associatio
FIFPro	Fédération Internationale des Associations de Footballeurs Professionnels
fn	Footnote
GN	General Notice
HC	High Court
i.e.	That is
ibid	In the same place
ICASA	Independent Communications Authority of South Africa
IFAB	International Football Association Board
J	Judge; or Justice
JA	Judge of Appeal
JOL	Judgments Online
LAWSA	The Law of South Africa
Ltd	Public Company
N	Natal Provincial Division
NPD	Natal Provincial Division
NSL	National Soccer League (SA)
NZLR	New Zealand Law Reports
para	Paragraph
PSL	Premier Soccer League (SA)
(Pty) Ltd	Private Limited Company
s	Section
SA	South African Law Reports
SAFA	South African Football Association
SAFPU	South African Football Players Union
SAJEMS	*South African Journal of Economic and Management Sciences*
SALJ	*South African Law Journal*
SAPA	South African Press Association
SCA	Supreme Court of Appeal (SA)
T	Transvaal Provincial Division
TPD	Transvaal Provincial Division
U.K.	United Kingdom
U.S.	United States; or United States Reports
UEFA	Union of European Football Associations

UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
Vol	Volume
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CHAPTER 1

INTRODUCTION

When Leicester City F.C. won the English Premier League in 2015/16, it was seen as a truly astonishing sporting achievement.[1] After all, the bookmakers had placed their odds of winning at 5,000-1.[2] For all the talk of big clubs dominating the English top flight, Leicester's success shows that competition in football is not dead.

Competition law deals with a different kind of competition. It is concerned with market competition between firms in the economic sense. So how does it intersect with competition in the sporting sense?

This thesis argues that economic competition also exists in sport, and must be regulated by competition law. This is hardly revolutionary. However, it is also concerned with the approach which competition authorities should adopt in sports-related cases. In particular, it asks how the Competition Act[3] should account for the unique characteristics of sport.

1.1 Context of research

There is little doubt that sport is big business.[4] In addition to its growing contributions to the economy, sport is also sociologically significant due to its social and education functions.[5] For South Africa, in particular, the successes of its national sports teams have been described as a unifying factor for a post-Apartheid nation.[6]

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[1] FA Premier League "2015/16 Season Review" (2016) https://www.premierleague.com/history/2015-16?utm_source=premier-league-website&utm_campaign=website&utm_medium=link (accessed 22 October 2016).

[2] G Rayner and O Brown "Leicester City win Premier League and cost bookies biggest ever payout" *The Telegraph* 02 May 2016 http://www.telegraph.co.uk/news/2016/05/02/leicester-city-win-premier-league-and-cost-bookies-biggest-ever/ (accessed 22 October 2016).

[3] Act 89 of 1998.

[4] J Horne *et al Understanding Sport: A Socio-cultural Analysis* 2 ed (2012) 140.

[5] J Cronjé "Sport in society" in JAA Basson and MM Loubser (eds) *Sport and the Law in South Africa* (2000) 1.7.

[6] L Mpati "Sport, public policy and the role of the state" in JAA Basson and MM Loubser (eds) *Sport and the Law in South Africa* (2000) 2.10.

At the same time, regulation of the economic aspects of sport is imperative. Most sports leagues are dominant in their respective markets, as they have no reasonable substitutes.[7] This allows them, and the clubs that form the sports leagues, to exercise considerable economic power over their employees (the athletes) and consumers (the fans).[8] In practice, sports leagues and clubs do exercise this power, by adopting restrictive measures in the labour and product markets.[9] Examples of these measures include salary caps, contractual restrictions and collective selling of media rights.

These practices tend to have the effect of transferring wealth from athletes and consumers to the sports organisers and clubs, as well as restricting competition in the market. However, foreign case law reveals that these *prima facie* anti-competitive practices have occasionally been permitted on the ground that they promote sporting objectives. This justification appears to be a unique form of exemption not seen in other industries.[10] Another explanation for sport's peculiar position under competition law is that while teams compete, in the sporting sense, against each other on the field, their economic cooperation off the field is essential in establishing their sporting contests as a product in the first place.[11]

It is submitted that the time has come for South African lawmakers to examine the relationship between sport and competition law, even though the Competition Act is yet to be applied to a sports related case.[12] The need to regulate restrictive practices in sports is becoming increasingly relevant, as illustrated by the following issues: Firstly, the Premier Soccer League[13] has debated the idea of introducing a salary cap on numerous occasions in recent

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[7] SF Ross "Anti-competitive aspects of sports" (1999) 7 *Competition & Consumer Law Journal* 1 at 2.

[8] SF Ross "Competition law as a constraint on monopolistic exploitation by sports leagues and clubs" (2003) 19 (4) *Oxford Review of Economic Policy* 569 at 569.

[9] D Forrest and R Simmons "Outcome uncertainty and attendance demand in sport: The case of English soccer" (2002) 51 (2) *The Statistician* 229 at 230.

[10] A Vermeersch "All's fair in sport and competition? The application of EC competition rules to sport" (2007) 3(3) Journal of Contemporary European Research 238 at 239.

[11] A Louw *Sports Law in South Africa* (2010) 395.

[12] Louw *Sports Law* 392. On the other hand, the Act has recently been applied in the sports infrastructure sector. The Competition Commission has investigated claims of collusive tendering against firms involved in the construction of stadiums used for the 2010 FIFA World Cup. The proceedings are currently ongoing, with settlements already reached for some of the firms. See, *inter alia*, *Competition Commission v WBHO Construction (Pty) Ltd* (017061) [2013] ZACT 74 (22 July 2013); *Competition Commission v Guiricich Bros Construction (Pty) Ltd* (016972) [2013] ZACT 77 (23 July 2013); *Competition Commission v Murray & Roberts Ltd* (017277) [2013] ZACT 75 (22 July 2013); and L Steyn "World Cup stadium construction cartel gets its comeuppance" *Mail & Guardian* 04 December 2015 http://mg.co.za/article/2015-12-03-remaining-2010-world-cup-stadium-colluders-face-prosecution (04 December 2015).

[13] The PSL is the highest professional football league in South Africa.

years.[14] If adopted, the system would have obvious implication on clubs' ability to acquire the services of football players.

Secondly, competition authorities have expressed their concerns regarding the sale of sports broadcasting rights in the pay-TV market.[15] The Independent Communications Authority of South Africa's ongoing investigation of the subscription television market should elucidate whether the exclusive sports broadcasting agreements are compatible with competition law.[16]

Thirdly, the International Federation of Professional Footballers ("FIFPro") has recently lodged a complaint regarding the player transfer system in football to the European Commission.[17] The challenge was based on competition law, contrary to previous cases dealing with footballers' transfer rules which were considered under the law relating to contracts in restraint of trade.[18] The outcome of this issue is likely to have global impact for both sport and competition law.

The rules relating to transfer of football players are imposed by the International Federation of Association Football ("FIFA"). They stipulate, *inter alia*, that an under-contract player may not transfer to another club without his current employer's consent, which, in practice, is obtained when the prospective club agrees to pay the former club a "transfer fee".[19] This means that clubs cannot acquire the services of footballers unless they are willing to match the demanded compensation amounts, which have been shown to bear no relation to players' earning capacity or clubs' costs of training them.[20] As a result, transfer fees are an artificial interference with the

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[14] See "PSL on a mission to cap players' salaries" *News 24* 05 December 2010 http://www.news24.com/Archives/City-Press/PSL-on-a-mission-to-cap-players-salaries-20150429 (accessed 17 February 2015) and "Talks of PSL introducing salary caps" *Iono FM* 26 March 2015 http://iono.fm/e/153586 (accessed 28 March 2015).

[15] ICASA Discussion Paper *Review of Sports Broadcasting Rights Regulations* GN 1238, *Government Gazette* 31483, 02 October 2008; and Competition Commission "Comments on the National Integrated ICT Policy Discussion Paper" (2014) http://www.mediamonitoringafrica.org/images/uploads/Supplementary_signed_-_Part_2.pdf (accessed 01 June 2015) para 7.5.2.8.

[16] ICASA "ICASA conducts an inquiry into subscription television markets" (2016) https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/ICASA-launches-inquiry-subscription-tv-broadcasting/Default.aspx (accessed 25 June 2016).

[17] FIFPro "FIFPro legal action against FIFA transfer system" (2015) https://www.fifpro.org/news/fifpro-takes-legal-action-against-fifa-transfer-system/en/ (accessed 19 September 2015).

[18] R Siekman "The specificity of sport: sporting exception in EU law" (2012) 49 (4) *Collected Papers of the Law Faculty of the University of Split* 697 at 702.

[19] Article 17 of FIFA "Regulations on the Status and Transfer of Players (2016)" (2016) http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransferofplayersjune2016_e_neutral.pdf (accessed 21 September 2016).

[20] M Spink "Blowing the whistle on football's domestic transfer fee" 1999 *Juridical Review* 73 at 84.

supply forces in the market for footballers' services, and have an adverse effect on consumers, who indirectly bear the high cost of transfers as clubs attempt to raise additional revenue.[21]

If such a system was implemented in any other industry it would not be permissible under competition law. However, several sporting objectives have been offered as justification for the rules. Firstly, it has been argued that the rules promote contractual stability, without which team performance may suffer due to a high rate of player mobility.[22] Secondly, it has been argued that the system is justified by the clubs' need to recoup investment in training, which serves as an incentive for developing young players.[23] Lastly, it has also been argued that the rules promote competitive balance within football leagues. Without the rules, dominant teams are more likely to attract talented players, thereby widening the gap between the wealthy and the average teams.[24]

Two South African cases have dealt with transfer restrictions in football, and found sporting justifications to be irrelevant in the context of restraint of trade. In *Highlands Park Football Club Ltd v Viljoen*,[25] the court explicitly rejected the argument that contractual restraints in professional football warrant special consideration, and held that its effect on the training of footballers is not a relevant factor.[26] Similarly, in *Coetzee v Comitis*,[27] the court did not consider any justifications for the restraints of footballers' contractual freedom, as none were placed before the court.[28]

This can be contrasted with the approach adopted in a number of foreign jurisdictions. For example, in the U.S., courts have recognised that sports-related cases should be examined under the rule of reason, even when the conduct in question would otherwise constitute a *per se* prohibited practice.[29] The courts have also recognised that the promotion of competitive

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[21] S Camatsos "European sports, the transfer system and competition law: will they ever find competitive balance?" (2005) 12 *Sports Law Journal* 155 at 175.

[22] R Poli *et al* "Club instability and its consequences" (2015) 1 *CIES Football Observatory Monthly Report* 1 at 1.

[23] HA Jordaan and MM Loubser "Sport: The Law of Employment and Competition Law" in JAA Basson and MM Loubser (eds) *Sport and the Law in South Africa* (2000) 8.41.

[24] Camatsos 2005 *Sports Law Journal* 156 and 173.

[25] 1978 (3) SA 191 (W).

[26] *Ibid* 201.

[27] 2001 (1) SA 1254 (C).

[28] Paras 39-40.

[29] See, for example, *National Collegiate Athletic Association v Board of Regents of University of Oklahoma* 468 US 85 (1984) 100-101.

balance within a sports league is a legitimate justification for restrictive practices.[30] An example of this is the entry draft systems in American sports,[31] which allow teams that have performed poorly in the previous season to have first "pick" of amateur athletes who wish to enter professional sport.[32] While these systems undoubtedly restrict players' contractual freedoms, they have been justified on the ground that they promote the competitiveness of weaker teams.[33]

E.U. law also permits a sporting justification for restrictive practices, provided that they achieve a legitimate sporting objective in a proportionate manner.[34] Similar to U.S. jurisprudence, the European Court of Justice has recognised the promotion of competitive balance as a legitimate objective.[35] In addition, E.U. authorities have also acknowledged the importance of financial solidarity between amateur and professional sports along with the recruitment and training of young athletes.[36] However, courts have emphasised that while these "specificities of sports" should be taken into account, no general exemption should be granted to sports-related practices, and that each case must be determined on its own merits.[37]

While both U.S. and E.U. jurisdictions take the unique characteristics of sport into account when examining restrictive practices, their approaches on this matter are by no means identical. U.S. courts have emphasised that sporting justifications must yield economic benefits, such as increases in output.[38] On the other hand, European authorities have accepted that social and educational objectives are also inherent to the functions of sports bodies, and should be accepted as legitimate justifications.[39]

The legal positions of these two jurisdictions are not the only competition law approaches to sport either. Canada, for example, has amended its competition legislation with a provision that

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[30] See, for example, *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club Inc* 351 F Supp 462 (E D Pa) (1972) 486.

[31] The system is found in American football, baseball, basketball and hockey.

[32] RB Terry "Application of antitrust laws to professional sports' eligibility and draft rules" (1981) 46 (4) *Missouri Law Review* 797 at 798.

[33] *Ibid* 825.

[34] *Meca-Medina & Majcen v Commission* Case C-519/04 [2006] ECR I-6991 para 26.

[35] *Ibid* paras 43-45; *Union Royale Belge des Sociétés de Football Association v Bosman* Case C-415/93 [1995] ECR I-4921 para 106.

[36] European Commission Decision No. 2003/778/EC (*COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League*), 2003 O.J. L 291/25 paras 131 and 165; *Olympique Lyonnais v Bernard* Case C-325/08 [2010] ECR I-2177.

[37] *Meca-Medina v Commission* para 28.

[38] *NCAA v Board of Regents* para 97.

[39] *Olympique Lyonnais v Bernard* para 40. See also Article 165(1) of European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.

specifically deals with professional sport.[40] Cases from Australia, India and New Zealand have also provided useful insight. Therefore, determining an appropriate approach for South African competition law requires not only resolving whether the uniqueness of sport is relevant, but also which characteristics are relevant and how these characteristics are to be evaluated under competition.

1.2 Goals of the research

This thesis will argue that restrictive practices in professional sport are subject to judicial scrutiny through the application of competition law. It will examine whether non-economic factors reflecting the uniqueness of the industry should be considered, under the analytical framework of the Competition Act, so as not to inhibit the sociological functions of sports.

Arguing that such non-economic considerations are indeed permissible, the thesis will then deduce general principles for determining which characteristics should be regarded as relevant. These principles will then be integrated in order to produce a proposed amendment of the Competition Act. Finally, the proposed approach will be applied to a topical issue, in order to demonstrate its implications in practice.

1.3. Methodology

This thesis is a theoretical, secondary study. Literature review will be the main method of research. The sources of review will consist of primary and secondary legal authorities, as well as non-legal sources.

Review of primary sources will focus on South African law. The Competition Act will be the determinative framework, while relevant case law will be used for interpretative guidance. Competition law in other foreign jurisdictions will also be examined, with American and European laws as the main sources of comparison.

Secondary sources will mainly consist of commentaries on sports issues in foreign law, due to the scarcity of domestic commentary on the topic. South African sources will be used to interpret the Act generally.

[40] Section 48 of the Competition Act R.S.C., 1985, c. C-34.

Some non-legal sources will also be used, as the topic has many issues specific to the fields of economics and sports. However, these sources will be used for explanatory and descriptive reasons, rather than constructive and analytical purposes.

In terms of the form of the research, the first part of the thesis will be exploratory and descriptive, in order to identify the controversial areas of the law. Some quantitative empirical evidence will be used to support the claims, but this will be secondary data gathered from other authors.

The rest of the thesis will consist of constructive research. Existing and possible solutions will be reviewed and compared under an analytical framework. The study will adopt a realist to rationalist approach in order to propose solutions that are both theoretically and practically sound.

1.4 Overview of the thesis

In order to illustrate the uniqueness of sport, Chapter 2 explores the sociological aspects of sport. The chapter focuses on sport's social and educational functions, as well as its role in South Africa both during and after the Apartheid period. The Department of Sport and Recreation's commitment to develop the socio-economic aspects of the industry is also examined.

However, if the priority of sports development is related to social objectives, then why should the sector be subject to competition law at all? After all, sport has been shown to be unsuitable for a strict "command-and-control" model of governance, while past attempts to indirectly intervene in sports through the introduction of rival leagues have also proven unsuccessful.[41] Chapter 3 argues why regulation of the industry is preferable to a *laissez-faire* approach in sports.

Even if regulation is preferable, previous cases relating to restrictive practices in sports have been dealt with under the common law on contracts in restraint of trade. Therefore, it must be shown why the application of competition law would not be redundant in this area. Chapter 4 addresses this issue, as well as the dilemma that litigants may face when both sources of law are available.

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[41] SF Ross "Competition law as a constraint on monopolistic exploitation by sports leagues and clubs" (2003) 19 (4) *Oxford Review of Economic Policy* 569 at 570.

Chapter 5 examines the jurisdictional elements that must be met before the substantive provisions of the Act can be applied. In the sports context, the requirement of "economic activity" may be a particularly challenging issue. In addition, foreign cases dealing with the "single-entity" defence and the joint-venture argument suggest that there are also other jurisdictional issues in sports.

The remainder of the thesis considers the uniqueness of sport argument. Chapter 6 examines cases and statutes from Australia, Canada and the U.S. that deal with practices that are ordinarily considered *per se* prohibited under the respective jurisdictions. Chapter 7 examines case law from India, New Zealand and the E.U., in order to compare how non-economic sporting justifications are dealt with by competition authorities in these jurisdictions.

Chapter 8 incorporates the findings from the previous chapters, in order to determine the appropriate approach for South African competition law. It focuses on three issues, namely the applicability of a *per se* exemption, the consideration of purely sporting justifications and the evaluation of sporting benefits against anti-competitive effects.

The approach suggested in Chapter 8 is crystallised into a proposed new section to be inserted into the Competition Act. The proposed approach is then applied, in Chapter 9, to determine whether the player transfer system in football is compatible with competition law. Finally, Chapter 10 concludes the thesis, and offers suggestions for both future research and practical actions.

CHAPTER 2

SOCIOLOGICAL SIGNIFICANCE OF SPORT: A SOUTH AFRICAN PERSPECTIVE

This chapter examines some of the sociological aspects of sport, in order to illustrate why it is different from other economic sectors in the traditional sense, despite being one of the largest industries in the world today.[1] Sport's important and distinctive role in society is what arguably warrants special consideration when competition law and other economic regulations are applied to the sector. The following sections of this chapter discuss the historical development and the functions of sport, before placing its social significance in context with a historical and present overview of sport in South Africa.

Before doing so it is necessary to first discuss what "sport" is. A precise definition of sport may be difficult, as it includes a broad spectrum of activities that are associated with a range of objectives. Participation can encompass both the active engagement in sports activities, and the passive enjoyment of them as a form of consumption.[2] UNICEF has defined the term as "all forms of physical activity that contribute to physical fitness, mental well-being and social interaction. These include play; recreation; casual, organized or competitive sport; and indigenous sports or games".[3] A similarly expansive definition is provided by the Department of Sport and Recreation South Africa ("SRSA" or "the Department"):

> "[S]port is defined as any activity that requires a significant level of physical involvement in which participants engage in either a structured or unstructured environment for the purpose of declaring a winner, though not purely so; or purely for relaxation, personal satisfaction, physical health, emotional growth and development".[4]

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[1] JI Cronjé "Sport in society" in JAA Basson and MM Loubser (eds) *Sport and the Law in South Africa* (2000) 1-4.
[2] SRSA "A Case for Sport and Recreation" (2009) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/Case%20for%20Sport%20-%20Oct%202009%20(Final).pdf (accessed 13 March 2015) 10.
[3] UNICEF "Sport, Recreation and Play" (2004) https://www.unicef.org/publications/index_23560.html (accessed 13 March 2015) 7.
[4] SRSA "A Case for Sport" 10.

As the Department itself recognises, however, this definition does not take into account the consumers of sport, whose interests and contributions are no less significant from a socio-economic perspective.[5] For the purpose of this thesis, therefore, the impact of sport and sports-related regulations on both active participants and passive consumers are considered.

2.1 The sociological development of sport

In order to understand the social significance of sport, an overview of its historical development is necessary. Sport is a product of human needs, which can be divided into different levels of hierarchy, according to sociologists and psychologists. Broadly speaking, there are three levels of human needs: survival, socialisation and self-actualisation, all three of which are intrinsically connected to the development of sport.[6]

The first level concerns physiological and safety needs. In order to fulfil the basic needs of food, clothing and shelter in the early stages of civilisation, humans had to engage in physical activities such as hunting, fishing, running and swimming.[7] Later, advancement in technology rendered some of these activities unnecessary, as the same needs could be fulfilled through other forms of labour. Nonetheless, the innate drive to perform these activities did not disappear, and have transformed into some of the sports and games that we recognise today. Therefore, it is not difficult to see the origins of archery, angling, marathons and competitive swimming.[8]

The second level concerns interpersonal needs. Once the basic needs are fulfilled, humans have the drive to be part of a group or society.[9] Sports and games provided a natural opportunity for people to socialise with people outside of their own family (although they can take place within the family unit as well). Early sporting spectacles served this purpose well, as large stadiums and coliseums were built, and held events that attracted large crowds.[10] Socialisation continues to be an important part of amateur as well as spectator sports today.[11]

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[5] SRSA "A Case for Sport" 10.

[6] AH Maslow *Motivation and Personality* 3 ed (1987) 35.

[7] Cronjé *Sport and the Law* 1.4.

[8] MP Lombardo "On the evolution of sport" (2012) 10(1) *Evolutionary Psychology* 1 at 3.

[9] Cronjé *Sport and the Law* 1.1.

[10] *Ibid* 1.11.

[11] JM Casper and WC Menefee "Prior sport participation and spectator sport consumption: Socialization and Soccer" (2010) 10(5) *European Sport Management Quarterly* 595 at 596.

The third level concerns the need to attain self-esteem and self-actualisation. The scope of this need is highly complex, but for present purposes, it suffices to say that it includes people's' drive to develop their potential to the fullest.[12] As Maslow succinctly puts it, "What a man can be, he must be."[13] This can be achieved through a number of different ways, including the development and display of one's own talents.[14] While this is most easily associated with professional athletes who strive to shave milliseconds off their performances in today's competitive world, it can also be satisfied when a team of amateur players wins a Sunday league football game.

The sporting landscape as we know it today has not only been shaped by humans' physiological and psychological needs, but also their various social institutions. Religion, economy and politics have all significantly influenced the development of sport, and their roles are discussed below.

Religion's impact on sport was most influential during the Middle Ages, when the Church considered certain sports to be immoral and commanded their prohibitions.[15] However, after the Industrial Revolution, religion was responsible for the popularising sports such as football and rugby in church schools, as physical exercise was thought to be a healthy distraction for the minds of young children.[16]

Non-western religions also had a role to play in the practice of sport. For example, the Igbo people in West Africa had developed very deep integration between sport and religion. During their wrestling contests, the religious oracles and priests or priestesses were involved in the ceremonies, and the people believed that the outcomes of these matches were determined by the spirits who were present during the ceremonies.[17] Sport also had religious significance for certain tribes in Mexico. During periods of drought, people in these tribes would play various games, in the belief that such activities would bring rain to their lands.[18]

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[12] Cronjé *Sport and the Law* 1.2.
[13] *Motivation and Personality* 91.
[14] Cronjé *Sport and the Law* 1.2.
[15] *Ibid* 1.3.
[16] *Ibid.*
[17] IN Jona and FT Okou "Sports and religion" (2013) 2(1) *Asian Journal of Management Sciences and Education* 46 at 49.
[18] *Ibid.*

Even in contemporary times, religious institutions continue to play a part in the development of sport. For example, in South Africa, many churches (the Dutch Reformed Church in particular) used to hold the belief that no sport should be played on Sundays.[19] In fact, this was considered to be unacceptable until fairly recently.[20] On the other hand, religious organisations such as Sport for Christ Action South Africa (SCAS) are active promoters of youth participation in sport today, and are widely known for their positive contributions in this regard.[21]

While religious institutions affected sport on a mostly amateur level, economic institutions played a central part in its professionalisation. In 2015, the size of the global sports industry was estimated to be approximately USD 1.5 trillion.[22] Professional sport is now one of the largest industries today, thanks to the vast and rapidly increasing amounts in prize money, rewards and payments to athletes.[23] These are in turn funded by economic institutions through sponsorships, donations and direct involvement.[24] As this thesis is focused on the market regulation of these institutions, these types of involvement will be more closely examined in the chapters that follow.

As influential as religion and economy have been, political institutions have probably had the most impact on the development of sport. Cronjé attributes this to the power of political institutions to regulate and establish social order.[25] Early examples of this type of interaction include the Olympic Games in ancient Greece, chariot races in ancient Rome, and jousting in the Middle Ages.[26] Modern history also has examples aplenty where sporting events were coloured by political motivations. The Olympic Games have frequently been used as an opportunity to make political statements. Notable instances include the near boycott of the 1936 Summer Olympic Games in Berlin,[27] the 1980 and 1984 boycotts of the Games in

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[19] This belief was reflected in legislation. For example, the Sunday Observance Ordinance (Cape) No 1 of 1938 prohibited gatherings for the "purpose of playing at any game" on Sundays, while the Sunday Law (Transvaal) No 28 of 1896 similarly prohibited people from playing sport in a public place on Sundays.

[20] Cronjé *Sport and the Law* 1.4.

[21] *Ibid.*

[22] Plunkett Research "Sports industry statistic and market size overview, business and industry statistics" (2015) https://www.plunkettresearch.com/statistics/Industry-Statistics-Sports-Industry-Statistic-and-Market-Size-Overview/ (accessed 21 November 2016).

[23] Cronjé *Sport and the Law* 1.4.

[24] *Ibid.*

[25] *Ibid* 1.5.

[26] *Ibid.*

[27] The host country was, at the time, under Nazi regime, and had covertly barred its athletes of Jewish descent from representing the country. Several countries threatened to boycott the event, which infamously led to the former U.S. IOC President Avery Brundage to declare that "politics has no place in sport". See A Rippon *Hitler's Olympics: The Story of the 1936 Nazi Games* (2012) Chapter 4.

Moscow and Los Angeles by the USA and the Soviet Union, respectively,[28] and the kidnap and killing of Israeli athletes by a Palestinian terrorist group at the Munich Games in 1972.[29]

South Africa itself is no stranger to political controversies in sports. As will be described in more detail below, the Basil D'Oliveira affair and the participation of Maori players in New Zealand rugby sides are only two of many politically-motivated incidents that took place during South Africa's isolation from the world stage from 1960 to 1991. Crucially, these events have also had a lasting impact on the country's political landscape. Even today, team selections in various sport codes are influenced by a quota policy.[30]

It is submitted law may be considered a fourth major influence on the development of sport. It was not too long ago that the former Secretary of the English Football Association decried the involvement of law in sports, and claimed that sports law is a fictitious invention of academics.[31] However, as judicial decisions and legislative actions began to apply legal concepts such as the restraint of trade, liability for personal injuries, and stadium safety to sport organisers, it became increasingly clear that the development of sports was not free from legal scrutiny.[32]

Today, these issues still exist, along with new problems, including doping and illegal gambling, that require the attention of the law. South Africa, like many other countries, has enacted a number of sports-specific pieces of legislation to address some of these issues.[33] In addition, the common law remains applicable in appropriate cases. For example, the law relating to covenants in restraint of trade has been applied to restrictive contracts between professional

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[28] NE Sarantakes *Dropping the Torch: Jimmy Carter, the Olympic Boycott, and the Cold War* (2011) Chapter 2.

[29] This incident was commonly known as the "Munich massacre", and led to the escalation of military confrontation between the two countries. See S Reeve "Olympics Massacre: Munich - The real story" *The Independent* 22 January 2006 http://www.independent.co.uk/news/world/europe/olympics-massacre-munich-the-real-story-5336955.html (accessed 12 March 2015).

[30] Cronjé *Sport and the Law* 1.5.

[31] E Grayson "The historical development of sport and law" (2011) 2(3) *Sport & Law Journal* 61 at 61.

[32] *Ibid* 62 and 64.

[33] For example, the South African Institute for Drug-Free Sport Act 14 of 1997 deals with the issue of doping, the Safety at Sports and Recreational Events Act 2 of 2010 concerns stadium safety, while the Prevention and Combating of Corrupt Activities Act 12 of 2004 has provisions which specifically aims at eliminating illegal gambling in sports. The South African Boxing Act 11 of 2001 provides for regulation in the sport of boxing and other combative sports, although the Act may soon be repealed and replaced by the South African Combat Sport Bill, 2015. The most important sport-related legislation, however, may be the National Sport and Recreation Act 110 of 1998, which was introduced to promote the interest and development of the sector in general.

football clubs and players,[34] while sportspersons who cause injuries through excessive force may also be liable under both delict and criminal law.[35]

This thesis argues for the regulation of sport through competition law, in a manner that accounts for the unique characteristics of sports. As a case study, Chapter 9 examines the rules in association football that govern the transfer of professional players between football clubs. These rules, collectively referred to as the transfer system, have already undergone several drastic revisions since their early days, due to their incompatibility with various areas of the law. More changes may be on the way, however, as the European Commission is currently entertaining a complaint that the rules are in violation of the Community competition law.

2.2 The functions of sport

As the above discussion illustrates, sport is intricately linked to our social institutions in both historical and modern societies. The social significance of sport becomes more obvious when one examines the functions of sport, which include physical exercise and development, competition, entertainment and recreation.

The health benefits derived from physical activities in sports are significant. Short term physiological effects from participation in sports include improved cardiorespiratory and muscular fitness, and physical coordination skills.[36] In the long term, there is strong evidence that such exercises aid in the prevention of coronary heart diseases, type-2 diabetes, high blood pressure, and certain forms of cancer.[37] Physical activities also provide mental benefits, with studies showing that they have a positive effect on people's cognitive abilities as well as psychological well-being.[38] SRSA has recognised that investment in, and the encouragement of, mass participation in sports can lead to significant potential savings to the economy due to the long-term health benefits.[39]

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[34] See Chapters 4 and 9 below.

[35] M Dendy "Sport and Recreation" in WA Joubert and M Kuhne (eds) *LAWSA* Vol 25(1) 2 ed (2011) 223.

[36] U.S. Department of Health and Human Services "2008 Physical activity guidelines for Americans" https://health.gov/paguidelines/pdf/paguide.pdf (accessed 12 April 2015) 9.

[37] M Reiner *et al* "Long-term health benefits of physical activity – A systematic review of longitudinal studies" (2013) *BMC Public Health* 813.

[38] Researches show that participation in sports decreases the risks of Alzheimer's disease, depression and stress disorders. See U.S. Department of Health "Physical activity guidelines" 9.

[39] SRSA "A Case for Sport" 6.

In addition to health benefits, the physical development of the body is also one of the original purposes of sport. This can be evidenced by the ancient Olympic Games, where participants competed nude, in order to emphasise the beauty of the human body, which could be improved through physical exercise.[40] Today, sports such as weightlifting and bodybuilding still emphasise on the physical development aspect.[41] In fact, amateur participation in these activities has crept into mainstream culture, as weight training for aesthetic purposes has become a popular phenomenon.[42]

Sport is also an avenue for people to channel their spirit of competition. Humans have a psychological drive to compete with themselves and the rest of society.[43] Some sports, such as running and weightlifting, have a strong focus on self-improvement, which allows participants to challenge themselves. Other sports, such as football and rugby, are presented as game scenarios with determinable winners and losers, which allow participants to compete with others in the traditional sense. Competition can easily be expanded to national and international levels, as evidenced by the prestige of global sporting events such as the football World Cup and the Olympic Games.[44]

From a sociological perspective, it has been argued that the competitiveness in sport between nations can be considered as a peacetime substitute for war.[45] However, it ought to be noted that unlike war, the concept of fair play has always been a central value in sport.[46] On the other hand, it is undeniable that norms in sport can change, as they are shaped by the cultural context of the participants.[47] In the professionalised world of sport today, the "winning at all costs" mentality is becoming increasingly common, as the financial and political implications of results are enormous.[48]

Entertainment is the third major function of sport. Since ancient times, sporting events have always been spectacles that entertained large numbers of people. However, in recent years, there has been much heavier emphasis on the entertainment value of sport, as competitive

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[40] Cronjé *Sport and the Law* 1.7.
[41] *Ibid.*
[42] R Stokvis "The emancipation of bodybuilding" (2006) 9(3) *Sport in Society* 463 at 465.
[43] Cronjé *Sport and the Law* 1.7.
[44] *Ibid.*
[45] J Mangan *Militarism, Sport, Europe: War Without Weapons* (2003) 2.
[46] Cronjé *Sport and the Law* 1.6.
[47] *Ibid* 1.2.
[48] PK Thornton *et al Sports Ethics for Sports Management Professionals* (2012) 13.

games are now commonly presented as dramatic narratives, where sports fans can be overjoyed or frustrated with the performance of their supported teams.[49] Sports such as football have become popular around the world precisely because they are simple to understand, yet exciting to watch due to the game's constant action.[50] Some sports have even developed new formats, such as the introduction of limited-overs cricket, in order to attract new fans.[51]

The entertainment value of sport is both socially and economically significant. Game attendance draws people together as part of the socialisation process, as spectators are able to interact with others who are there doing something that is important to all of them.[52] This can easily be witnessed in English football, where fans demonstrate support for their teams through unique chants.[53] The passionate following of football and rugby in South Africa is a testament of the socialisation aspect of sport in this country. As the history of South African sport shows, sporting success can even be a unifying force within the society, by breaking down social barriers and bringing people of different cultural backgrounds together.[54] Interestingly, the lack of political heroes in the modern era means that sporting heroes are becoming increasingly celebrated and function as role models for youngsters.[55] Off the field, sport has become both a "bearer" and "builder of culture", as sporting culture has, in many parts of the world, integrated with popular cultures.[56] Basketball in the U.S. is a prominent example of a sport that has influenced people's fashion, arts and lifestyle cultures.[57]

In addition to its social influences, sport's entertainment value has also allowed its various stakeholders to reap financial rewards. Gate receipts during live sporting events are directly dependent on spectators who are eager to support their favourite teams or athletes in person, while merchandise sales have also become a significant stream of revenue for sportspersons, professional clubs and event organisers, due to the industry's integration with popular

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[49] Cronjé *Sport and the Law* 1.8.
[50] *Ibid* 1.9.
[51] *Ibid* 1.8.
[52] GS Kenyon and BD McPherson "Becoming Involved in Physical Activity and Sport: A Process of Socialization" in G Rarick (ed) *Physical Activity: Human Growth and Development* (1973) 324.
[53] Cronjé *Sport and the Law* 1.11.
[54] SRSA "A Case for Sport" 6.
[55] Cronjé *Sport and the Law* 1-13. See also C Biskup and B Pfister "I would like to be like her/him: Are athletes role-models for boys and girls?" (2009) 5(3) *European Physical Education Review* 199 at 202.
[56] Cronjé *Sport and the Law* 1.13.
[57] M Domke "Into the vertical: basketball, urbanization, and African American culture in Early-Twentieth-Century America" (2011) 4 *AS Peers* 131 at 148.

culture.[58] However, indicative of the current digital age that we live in, the sale of media broadcasting rights in sports will inevitably surpass these revenue sources, as consumers can now be entertained within the comfort of their own homes.[59]

Finally, the last major function of sport is recreation. When a child plays football for the first time, he is not motivated by physical development, competition or entertainment – he is purely enjoying the fun of kicking a ball. Even for adults, taking part in sport allows them to momentarily escape from the stressful jobs that they might have, and simply relax.[60] Therefore, amateur participation in sport still performs an important social function, and should be actively encouraged.

2.3 Historical overview of sport in South Africa

As outlined above, sport has played a significant role in the sociological development of human society. Its relation with politics, in particular, could be witnessed in early civilisations, but has become even more apparent in modern history. Sport and political stability tend to mutually affect each other, for better or worse. The latter can be illustrated by South Africa's own past in this regard, where organisation and participation in sport were separated along racial lines.[61]

It should be noted that even before the National Party came into power in 1948, and thereby commenced the implementation of *apartheid*, sport was already segregated in South Africa.[62] This was a natural consequence of the Blacks (Urban Areas) Consolidation Act,[63] which imposed "influx control" on black men in the urban areas, which were designated as "white". The Nationalist government adopted further legislation which effectively prohibited mixed

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[58] S Olenski "The power of global sports brand merchandising" *Forbes* 06 February 2013 http://www.forbes.com/sites/marketshare/2013/02/06/the-power-of-global-sports-brand-merchandising/#65d4cd681456 (accessed 13 March 2015).

[59] M Futterman "Media rights are set to surpass the gate" *The Wall Street Journal* 19 October 2015 http://www.wsj.com/articles/media-rights-are-set-to-surpass-the-gate-1445293029 (accessed 20 October 2015).

[60] Cronjé *Sport and the Law* 1-8.

[61] L Mpati "Sport, Public Policy and the Role of the State" in JAA Basson and MM Loubser (eds) *Sport and the Law in South Africa* (2000) 2.1.

[62] *Ibid.*

[63] Act 25 of 1945. The Act consolidated two previous pass laws legislations, being the Blacks (Urban Areas) Act 21 of 1923 and Blacks (Urban Areas) Act 25 of 1930, respectively.

sport, with the Group Areas Act[64] and the Reservation of Separate Amenities Act[65] among those with the most repressive effects.[66]

These laws were then supported by executive policies in the years that followed. In 1956, the then Minister of the Interior, Dr Eben Dönges, declared the separate organisation of white and non-white sports in South Africa by decree.[67] It became a matter of policy and custom that no mixed sport was to be allowed within the country, and that no mixed sport team may be permitted to compete abroad.

The policy was confirmed by one of Dönges' successors, Minister Jan de Klerk, in a speech before the Parliament in 1962, with the addition that foreign teams comprising of mixed athletes would be prohibited from entering and competing within South Africa as well.[68] The policy finally became law when a Proclamation under the Group Areas Act was issued in February 1965. It not only prohibited mixed participation in sport, but also outlawed black people from attending sporting events where spectators from other racial groups were present, unless a special permit was obtained.[69] Domestically, the segregation of sport was complete.

The policy was enforced in the diplomatic context as well. In the same year that the Proclamation was issued, then Prime Minister Dr Hendrik Verwoerd refused to accommodate a New Zealand rugby team from touring in South Africa, as it included both white and Māori players within its squad.[70] This was shortly followed by the so-called "D'Oliveira affair", in 1969. John Vorster, during his tenure as the Prime Minister, publicly declared that an England cricket team including Basil D'Oliveira, a coloured cricketer born in South Africa, would not be permitted to visit the country during the team's 1968/69 tour.[71] The political controversy surrounding the incident eventually led to the tour's cancellation, and is seen as a watershed

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[64] Act 41 of 1950.

[65] Act 49 of 1953.

[66] A number of other legislations which restricted the free movement of the black population, such as the Native Laws Amendment Act 54 of 1952, also contributed towards the segregation of sport. See Mpati *Sport and the Law* 2.1-2.2.

[67] *Ibid* 2.2.

[68] *Ibid.*

[69] *Ibid* .

[70] G Thompson "Certain Political Considerations" in S Cornelissen and A Grundlingh (eds) *Sport Past and Present in South Africa: (Trans)forming the Nation)* (2012) 14. Mixed-race New Zealand rugby teams were permitted to play in South Africa on two occasions in the 1970s. The Nationalist government by-passed the issue of mixed-race sport by officially designating players of Māori and Samoan backgrounds as "honorary whites". See Mpati *Sport and the Law in South Africa* 2.2.

[71] D Booth "The South African Council on Sport and the political antinomies of the sports boycott" (1997) 23(1) *Journal of South African Studies* 51 at 53.

moment in the international sporting boycott of South Africa, as it accelerated the momentum of international resistance and domestic change.[72]

Opposition to segregated sport had, however, begun many years previously. The sport movement for non-whites had been active since the 1940s, with many inter-race boards for the various sport codes formed by black, coloured and Indian athletes. In 1958, the first national sport organisation for black people, the South African Sports Associations (SASA) was established, with the aim of coordinating and advancing non-white sport.[73] It sought to achieve proper recognition and the right for national selection for athletes on a non-racial basis.[74]

The organisation eventually formed the South African Non-Racial Olympic Committee (SANROC) in 1963, with the aim of persuading the International Olympic Committee (IOC) to expel the all-white South African Olympic Committee.[75] The new organisation was quickly forced into exile, but continued to campaign for the boycott of South African sport internationally, resulting in continuous demonstrations against South African white sportspersons during their tours abroad.[76] Its aim was partially achieved in 1964, when the IOC suspended South Africa from participating in the Summer Olympics in Tokyo.[77]

While SANROC, along with many other political organisations,[78] was banned and exiled, the South African Council on Sport (SACOS) was formed in 1973 to co-ordinate sport on a non-racial basis.[79] It operated domestically, and was described as the "internal sports arm of the liberation movement".[80] The organisation was recognised abroad as well, as it became an associated member of the Supreme Council of Sport in Africa, and accepted by the then Organisation of African Unity.[81] Along with SANROC, and other organisations such as the

[72] Mpati *Sport and the Law* 2.2.
[73] *Ibid.*
[74] *Ibid.*
[75] SRSA "South African Non-Racial Olympic Committee (SANROC)" http://www.srsa.gov.za/pebble.asp?relid=1781 (accessed 23 March 2015).
[76] Mpati *Sport and the Law* 2.3.
[77] B Kidd "The campaign against sport in South Africa" (1988) 43(4) *International Journal* 643 at 652.
[78] Such as the African National Congress, Pan Africanist Congress and the South African Communist Party.
[79] Booth 1997 *Journal of SA Studies* 54.
[80] Mpati *Sport and the Law* 2.3.
[81] *Ibid.*

Halt All Racial Tours and the Campaign Against Race Discrimination in Sport (in England), SACOS campaigned for the isolation of South African sport from the international stage.[82]

The increased level of international opposition forced the government to alter its policy. In the 1970s, the Ministry of Sport implemented a "multi-national" approach in sport in an effort to return South Africa to international competitions.[83] The approach was so named as people were still divided along racial lines into different "nations". Therefore, the new policy was still within the *apartheid* government's separate development strategy.[84]

Under the multi-national policy, some sporting bodies began to persuade non-white sportspersons to join their white counterparts and form a multi-racial team to play against international opponents.[85] While some groups agreed to the alliance, sporting bodies that advocated a non-racialism policy emphatically rejected the invitations, under the slogan "no normal sport in an abnormal society".[86]

However, segregation in sport did begin to disappear as a result of the political pressure and international isolation. In 1976, the three separate cricket bodies[87] joined and formed a single Union, which was soon replaced by a non-racial South African Cricket Board. In 1992, the South African Rugby Football Union was also formed after receiving encouragement from the African National Congress and the National Sports Congress.[88] This was soon followed by other sporting bodies.

Finally, after the Nationalist government announced the unbanning of political organisations in 1990, South Africa returned to the international sporting arena, and participated in the 1992 Summer Olympics in Barcelona, Spain.[89]

Since the country's re-introduction onto the international stage, South Africans have celebrated a multitude of sporting and hosting successes. In 1995, the country hosted, and famously won,

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[82] A Louw *Sports Law in South Africa* (2010) 24.
[83] Mpati *Sport and the Law* 2.3.
[84] *Ibid.*
[85] Mpati *Sport and the Law* 2.3.
[86] J Nauright *Sport, Cultures, and Identities in South Africa* (1997) 131.
[87] Namely the South African Cricket Board of Control, the South African Cricket Board and the South African Cricket Association.
[88] Nauright *Sport, Cultures, and Identities* 160.
[89] Mpati *Sport and the Law* 2.4.

the Rugby World Cup,[90] a trophy that the Springboks would win again in 2007.[91] In football, Bafana Bafana won their first African Cup of Nations in 1996 on home soil.[92] The country would host the tournament again in 2013,[93] three years after it became the first African nation to host the prestigious FIFA World Cup.[94] South Africa has also hosted the ICC Cricket World Cup,[95] and the Proteas have been ranked as the world's top test cricket team in recent years.[96]

In addition to the three popular team sports, South Africa has also had a good track record in athletics in recent years.[97] Furthermore, the Commonwealth Games will be held in Africa for the first time, when Durban hosts the event in 2022.[98] Established events, such as the Comrades and the Two Ocean Marathons, have also continued to prosper, whilst welcoming participants from more countries than ever.[99] The manner in which South Africa has embraced the international dimension of sport marks a stark contrast to the isolationist and exclusionary policies of its past.

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[90] D Smith "Nelson Mandela and the rugby hero who rejected the prejudices of a white childhood" *The Guardian* 08 December 2013 https://www.theguardian.com/world/2013/dec/08/nelson-mandela-francois-pienaar-rugby-world-cup (accessed 13 March 2015).

[91] J Standley "World Cup final 2007" *BBC* 20 October 2007 http://news.bbc.co.uk/sport2/hi/rugby_union/7052822.stm (accessed 13 March 2015).

[92] SA History Online "Bafana Bafana, SA's National soccer team, wins the Africa Cup of Nations Final" (2014) http://www.sahistory.org.za/dated-event/bafana-bafana-sa%E2%80%99s-national-soccer-team-wins-africa-cup-nations-final (accessed 13 March 2015).

[93] AFP "CAF hails South Africa's hosting of Afcon 2013" *Mail & Guardian* 11 February 2013 http://mg.co.za/article/2013-02-11-caf-hails-south-africas-hosting-of-afcon-2013 (accessed 13 March 2015).

[94] FIFA "2010 FIFA World Cup South Africa" http://www.fifa.com/worldcup/archive/southafrica2010/index.html (accessed 13 March 2015).

[95] B Morgan "Cricket in South Africa" http://www.southafrica.info/about/sport/cricket.htm#.WECX1flEk2w (accessed 13 March 2015). South Africa shared hosting responsibilities with Zimbabwe and Kenya.

[96] *Ibid.* See also SAPA "'438' Game voted best ever by fans" *Times Live* 05 January 2011 http://www.timeslive.co.za/sport/cricket/2011/01/05/438-game-voted-best-ever-by-fans (accessed 13 March 2015).

[97] See, for example, "Rio Olympics 2016: Caster Semenya wins 800m gold for South Africa" *BBC* 21 August 2016 http://www.bbc.com/sport/olympics/36691465 (accessed 13 March 2015); C Moreton "London 2012 Olympics: Oscar Pistorius finally runs in Games after five year battle" *The Telegraph* 04 August 2012 http://www.telegraph.co.uk/sport/olympics/athletics/9452280/London-2012-Olympics-Oscar-Pistorius-finally-runs-in-Games-after-five-year-battle.html (accessed 13 March 2015); and P Hazlewood "SA sprinters seize relay gold" *Mail & Guardian* 06 September 2012 http://mg.co.za/article/2012-09-06-paralympics-prepares-for-battle-of-the-blade-runners (accessed 13 March 2015).

[98] AFP "Durban first African city to host Commonwealth Games" *Mail & Guardian* 02 September 2015 http://mg.co.za/article/2015-09-02-durban-first-african-city-to-host-commonwealth-games (accessed 13 March 2015).

[99] L Burnard "South Africa runs to a clean sweep at the Comrades" *Mail & Guardian* 01 June 2015 http://mg.co.za/article/2015-06-01-south-africa-dominates-the-comrades (accessed 01 June 2015). "Old Mutual Two Oceans Marathon History since 1970" http://www.twooceansmarathon.org.za/history (accessed 13 March 2015).

2.4 Sport organisation in South Africa today

The organisation of sport has remained important to the government in post-*apartheid* South Africa. This can be seen from the creation of a state department solely responsible for this purpose, despite arguments that the responsibility for sport organisation should be assigned to departments such as Education (which was the case in the past).[100] The Department of Sport and Recreation South Africa has the primary responsibility for designing policy for, and the provision of, sport and recreation.[101]

Encouragingly, the Department has placed a strong emphasis on the social relevance of sport in its policy. It acknowledges the imbalance in infrastructure and access to sport between the advantaged urban communities and the disadvantaged rural communities,[102] as well as the need to increase the level of participation in sport.[103] As a result, in its May 1998 White Paper, it adopted the theme of "Getting the Nation to Play".[104]

Since then, the Department has published and adopted other policy documents, including a 2012 White Paper,[105] which builds on the foundation of its earlier theme, and the National Sport and Recreation Plan, which expands on three new core objectives, namely "an active nation; a winning nation; and an enabling environment".[106] The principles of these documents were subsequently reviewed and affirmed in SRSA's 2015-2020 Strategic Plan.[107]

The core objectives are also reflected in the Department's strategic goals. In addition to maximising South Africa's probability of success in international sporting events, SRSA also aims to achieve several social objectives, including the increase of participation in sport and

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[100] Mpati *Sport and the Law* 2.4 and 2.10.

[101] The Department currently derives its authority from the National Sport and Recreation Act 110 of 1998. Prior to the Act's introduction, the Department lacked the authority to intervene in sporting matters, and frequently faced the dilemma whether such courses of action were advisable. See *Ibid* 2.7.

[102] SRSA "Annual Performance Plan 2016/17" (2016) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/SRSA%20APP%202016_17%20LR.PDF (accessed 12 September 2016) 16.

[103] *Ibid* 30.

[104] SRSA "Sport and Recreation White Paper" (1998) http://www.gov.za/documents/sport-and-recreation-white-paper (accessed 13 March 2016).

[105] SRSA "The White Paper on Sport and Recreation for the Republic of South Africa" (2012) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/23%20WHITE%20PAPER%20FINAL%20August%202012.pdf (accessed 13 March 2015).

[106] SRSA "National Sport and Recreation Plan (Final August 2012)" (2012) http://www.srsa.gov.za/pebble.asp?relid=1439 (accessed 13 March 2015).

[107] SRSA "Sport and Recreation South Africa Strategic Plan 2015-2020" (2015) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/STRAT%20PLAN.pdf (accessed 28 March 2015).

recreation, the raising of sport's profile in the face of conflicting priorities, and promoting the role of sport as a tool to reduce crime.[108]

In order to achieve these objectives, additional governance structures are in place to deal with connected policy matters. The legislative powers in sport lie with Parliament, where the Minister and the Portfolio Committee on Sport and Recreation are responsible for defining overall policy and approving budget allocation.[109] The Portfolio Committee, in particular, has responsibility for advancing the sporting cause in Parliament, and it does so by monitoring government policy, introducing debates, suggesting enabling legislation, as well as advising on international trends in sport.[110]

The Department then has the executive duties, as it promotes and implements the policy adopted by Parliament. It does so by funding its various agents, including the South African Sports Confederation and Olympic Committee (SASCOC), the Sports Commission and the national federations for different sport codes.[111] Specifically, the Department's duties include making sport accessible to all, providing the necessary sporting infrastructure, designing programmes for developing talents, providing incentives for sporting excellence, and entering into international agreements for sharing technology, skills transfer and development of sport.[112]

Additionally, the Department must also co-operate with other organs of state. Interaction with local authorities, who have the primary responsibility for creating infrastructures such as stadiums and sporting facilities, is particularly important. Similarly, the Department works in tandem with the South African Student Sports Union and the United School Sports Association of South Africa, in co-ordinating sport at the tertiary and school levels.[113]

Finally, the Department fulfils its international liaison duties. SRSA is responsible for providing administrative and procedural guidance to any city or organisation bidding for the hosting rights of international sporting events, and ensure that they comply with the relevant

[108] Mpati *Sport and the Law* 2.4.
[109] Mpati *Sport and the Law* 2.5.
[110] *Ibid.*
[111] SRSA "Overview of SRSA" http://www.srsa.gov.za/pebble.asp?relid=29 (accessed 13 March 2015).
[112] Mpati *Sport and the Law* 2.5.
[113] *Ibid* 2.6.

regulations.[114] It is also currently implementing UNESCO's Quality Physical Education Programme, aimed at addressing issues of sports participation at youth and grassroots levels, after South Africa was selected as one of the five countries to pilot the programme for 2016/17.[115]

2.5 Conclusion

This chapter examined the sociological aspects of sport. It explored sport's socio-economic significance, from the perspectives of both active participants and passive consumers. It was demonstrated that the development of sport was initially rooted in humanity's basic psychological needs, and later informed by its social institutions. As a result, sporting activities perform wide-ranging functions that achieve both individual and social objectives. The latter was particularly noticeable throughout the history of South Africa, where political agendas were advanced under the guise of sports policies, and activists have used the same platform to propel social changes. Sport was both affected by, and in turn altered, the political landscape in the country.

Today, the Department of Sport and Recreation is tasked with realising the social benefits of sport. It has sought to achieve this by working with other national state organs as well as international bodies. So far, it has prioritised strategic objectives, such as transformation and grassroots participation in physical activities, that promote more equitable access to sports.

Therefore, it is clear that the Department has a vital task. Fortunately, it is guided by a regulatory framework which recognises the importance of sport to society. Why then, one may ask, should sport be subject to further regulation from other areas of the law, including competition law? This is the question considered in the next chapter, while subsequent chapters examine the even more pertinent question, that if economic regulation of sport is necessary, how may it be adapted in the sporting context, so as to not obstruct its development?

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[114] See the Bidding and Hosting of International Sport and Recreational Events Regulations, GN R433, *Government Gazette* 33211, 28 May 2010.

[115] UNESCO "Promoting quality physical education policy" (2016) http://www.unesco.org/new/en/social-and-human-sciences/themes/physical-education-and-sport/policy-project/ (accessed 21 September 2016).

CHAPTER 3

APPLICABILITY OF COMPETITION LAW TO SPORT

Chapter 2 discussed some of the social benefits of sport, including the public health, educational, cultural and recreational functions that it fulfils. It also examined the regulatory functions of the SRSA, which has the responsibility of realising these potential benefits, in coordination with other organs of state. It was clear, however, that the Department is primarily concerned with social objectives in its strategic priorities. Therefore, it is necessary to consider how other facets of the sector, including the economic aspects of sport, are to be properly regulated.

This thesis concerns the relationship between competition law and sports. Before addressing the question posed above, however, two preliminary issues must be examined: Firstly, should such regulation apply to sport at all, considering any economic control would likely have huge social implications? Secondly, if regulation is desirable, is the application of competition law in particular appropriate, considering the traditional analysis of sports cases through the law on covenants in restraint of trade?

This chapter focuses on the first of these two questions. It begins by considering the practical implications of economic deregulation in sports, before examining the benefits and harm of such an approach. Chapter 4 then explores the issue of current jurisdiction under competition law and the law of contract.

3.1 Economic deregulation in sports: A *laissez-faire* approach?

Due to the social significance of sport, any attempt to regulate the economic aspects of the sector must take its social context into account. The application of the law in this regard will necessarily be complex. However, if this is the case, one must ask whether the courts are indeed the most appropriate forum for deciding these intricate issues.

The most obvious policy alternative is that the government should do nothing, and simply leave the sports industry alone. This is known as the *laissez-faire* approach. It is founded on the

classical economic theory that free markets are efficient, and the assumption that the sports sector is a free market (or a combination of free markets).[1] Therefore, it is argued, state intervention is more likely to cause inefficiencies than solve any.[2] Adopting a *laissez-faire* approach in sports, on the other hand, would allow state organs and sports governing bodies to develop sports along purely sporting considerations, unconstrained by the "distraction" of other forms of regulation.

Before the correctness of the above argument is considered, it may be necessary to provide some examples where sport has been exempted from various forms of market regulation in practice. To be sure, deregulation does not mean legislative inaction. In order to exempt restrictive practices in sports from economic regulation, legislation must be enacted in order to exclude the courts' jurisdiction in such instances. Therefore, these practices cannot be challenged in a court of law, although they may be subject to dispute in the internal dispute resolution mechanisms established by sports governing bodies.[3]

As far as the author is aware, there exists no jurisdiction where sport is completely exempted from state regulation. This is true in South Africa as well. While various pieces of legislation regulate certain social and professional aspects of sports in South Africa, there are currently no sport-specific regulations that deal with the sector's economic dimensions.[4] However, this does not mean that sport is exempt from economic regulation, as other sources of law are still relevant.[5] Two High Court cases, *Highlands Park Football Club Ltd v Viljoen*[6] and *Coetzee v Comitis*[7], both dealing with contractual restraints in football, confirm this point.[8]

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[1] The classical economic theory that markets are self-sufficient and welfare-maximising is founded on Adam Smith's *magnum opus An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

[2] P Sutherland and K Kemp *Competition Law of South Africa* Issue 20 (2000) 1.7. In the context of the sports industry, see SF Ross "Competition law as a constraint on monopolistic exploitation by sports leagues and clubs" (2003) 19 (4) *Oxford Review of Economic Policy* 569 at 572.

[3] Section 13(1) (*a*) of the National Sport and Recreation Act 110 of 1998 provides that "[e]very sport or recreation body must, in accordance with its internal procedure and remedies provided for in its constitution resolve any dispute arising among its members or with its governing body." For example, the National Soccer League has a Dispute Resolution Chamber, in accordance with FIFA's Regulations. This remedy must be exhausted before disputant can approach the courts, although the latter's jurisdiction is not entirely excluded. See F Razano "Keeping sport out of the courts: The National Soccer League Dispute Resolution Chamber – A model for sports dispute resolution in South Africa and Africa" (2014) 2 *African Sports Law and Business Bulletin* 1 at 2.

[4] See the discussion in 2.4 above.

[5] These include the Competition Act 89 of 1998, the common law doctrine on covenants in restraint of trade, and of course, the Constitution of the Republic of South Africa, 1996.

[6] 1978 (3) SA 191 (W).

[7] 2001 (1) SA 1254 (C).

[8] These two cases are discussed in the next chapter.

Nevertheless, despite the fact that complete exemption for sport is rare, partial competition law exceptions have been granted in certain jurisdictions. As will be seen below, these exceptions do not entirely exclude, but only limit the application of certain laws to sport, either in scope or to specific sport codes. Furthermore, in both the E.U. and the U.S., the jurisprudences have evolved where previously exempted sports cases are now within the courts' jurisdictions.

3.1.1 Applicability of E.U. law to sports

In European case law, the somewhat confusing concept of the "sporting exception" was introduced in *Walrave and Koch v Union Cycliste Internationale*,[9] where the European Court of Justice ("ECJ") held that "the practice of sport is subject to Community law only in so far as it constitutes an economic activity", and that questions of "purely sporting interest … has nothing to do with economic activity", and remain outside the scope of European law as long as they are limited to their proper objectives.[10]

This has led the European Commission to suggest that exemptions for certain practices in sports are possible in principle. In its Helsinki Report on Sport,[11] the Commission referred to three types of practices within the context of sports organisations, namely practices that "do not come under the competition rules",[12] practices that are prohibited by the competition rules in principle,[13] and most interestingly for present purposes, practices which are "likely to be exempted from the competition rules". According to the Commission, the last category refers to restrictive practices that are designed to achieve legitimate sporting objectives, which are likely to be regarded as lawful despite their restrictive nature.[14]

However, this approach was emphatically rejected in the so-called "*Meca-Medina*" case. This matter concerned, *inter alia*, the application of competition law to the doping-control rules of the International Olympic Committee ("IOC"). The Court of First Instance (as it was then known), relying on *Walrave* and the Helsinki Report, held that the rules regarding the

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[9] Case C-36/74 [1974] ECR 1405 ("the *Walrave* case") .

[10] *Ibid* paras 4, 8 and 9.

[11] Commission of the European Communities "Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework ('The Helsinki Report on Sport')" COM (1999) 644 final.

[12] According to the Commission, these practices include rules which are inherent to sport, such as the "rules of the game", and which do not aim to distort competition. See *ibid* 8.

[13] These are the "restrictive practices in the economic activities generated by sport". See *ibid.* This illustrates even the "sporting exception" concept does not permit a complete exemption for the sector.

[14] *Ibid.* The Commission also cites the recruitment model of athletes, the transfer system and the joint sale of broadcasting rights in sports as possible examples of "exempted" practices.

prohibition of doping were outside the scope of competition law, because they were "based on purely sporting considerations" and did not constitute an economic activity.[15] The following passage is of particular interest:

> "It must also be made clear that sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport. In other words, the prohibition of doping and anti-doping rules concern exclusively, even when the sporting action is performed by a professional, a non-economic aspect of that sporting action, which constitutes its very essence."[16]

On appeal, the ECJ held that the mere fact that a practice is purely sporting in nature does not exclude it from the scope of competition law.[17] Instead, applicability of competition law depends on whether the normal jurisdictional elements are met:

> "[W]here engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC [the then-equivalent of Articles 101 and 102 TFEU], whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States."[18]

The above *dicta* confirms that each practice must be examined on its own merits, and that the distinction between purely sporting rules and economic rules of a sport is irrelevant, as even purely sporting practices may have economic repercussions, and cannot be categorically exempt from European law.[19] Subsequently, this approach has been adopted by the European

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[15] *Meca-Medina and Majcen v Commission* Case T-313/02 [2004] ECR II 3291 para 47.
[16] *Ibid* para 45.
[17] *Meca-Medina and Majcen v Commission* Case C-519/04 [2006] ECR I-6991 para 27.
[18] Para 30.
[19] A Vermeersch "All's fair in sport and competition? The application of EC competition rules to sport" (2007) 3(3) *Journal of Contemporary European Research* 238 at 243. See also R Siekman "The specificity of sport: Sporting exception in EU law" (2012) 49 (4) *Collected Papers of the Law Faculty of the University of Split* 697 at 715.

Commission in its White Paper on Sport,[20] which affirmed the view that a general exemption for sports from the application of E.U. law cannot be justified.[21]

3.1.2 Exemptions of sport in the U.S.

Similarly, no general exemption for sports is granted in American jurisprudence. However, specific exemptions have occasionally been granted, either by the legislature or the judiciary. For present purposes, three exemptions will be discussed, namely the baseball exemption, the Major League Soccer exemption, and the sports broadcasting exemption.

The baseball exemption is an example of a court-granted exemption. In the 1922 case of *Federal Baseball Club of Baltimore v National League*,[22] the U.S. Supreme Court held that the business of providing baseball games was purely a state affairs, and did not constitute interstate commerce.[23] As a result, it was held that the Sherman Antitrust Act[24] (which is one of three principal U.S. federal statutes on competition law)[25] was not applicable to professional baseball.[26]

It should be noted that the Supreme Court's refusal to apply the Sherman Act was not based on any unique characteristics of baseball, but rather that the game was not an interstate affair at the time.[27] While the expansion of the sport since 1922 has meant that this is no longer the case, the baseball exemption has been subsequently confirmed in *Toolson v New York Yankees*[28], and again in *Flood v Kuhn*[29]. In both cases, the Supreme Court held that although the reasoning in *FBC Baltimore* no longer holds true, the exemption nevertheless had to be upheld as the

[20] European Commission "White Paper on Sport" COM (2007) 391 final. This was the Commission's first comprehensive strategic document in sports. For its development history, see Siekman 2012 *Collected Papers of the Law Faculty of the University of Split* 704.

[21] European Commission "White Paper on Sport" 13. See also *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Dimosio* Case C-49/07 [2008] ECR I-04863.

[22] 259 U.S. 200 (1922).

[23] *Ibid* 208.

[24] 15 U.S.C. §§ 1-7.

[25] Along with the Clayton Antitrust Act 16 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 and Federal Trade Commission Act 15 U.S.C. §§ 41-58.

[26] Section 1 of the Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[27] The Sherman Act only applies to interstate commerce, while individual states may adopt their own antitrust legislations. See the Federal Trade Commission "The antitrust laws" https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (accessed 02 April 2015).

[28] 346 U.S. 356 (1953).

[29] 407 U.S. 258 (1972).

legislature had seen fit not to overrule it, which meant that it was not for the courts to do so either.[30]

As a result of these judgments, the Curt Flood Act[31] was eventually enacted in 1998 in order to revoke the exemption. However, the exemption was not completely revoked, as it only provides for the rules relating to labour restrictions in Major League Baseball to be subject to antitrust law, which means that restrictive practices in Minor League Baseball and those unrelated to labour in the Major League are still exempt.[32] The same exemption has been sought in other sports as well. However, in those instances, the courts have held that baseball was only exempt due to its unique history of judicial deference, and that the same argument could not apply elsewhere.[33]

Following the enactment of the Curt Flood Act, through which Congress finally indicated its intention not to exempt any sport on a *per se* basis, sports governing bodies in the U.S. began to pursue a different line of argument. In *Fraser v Major League Soccer*,[34] the league organisers relied on the argument that American soccer clubs formed a single entity, and were thus legally incapable of conspiracy within the meaning of the Sherman Act.[35] The league succeeded on this argument, which meant it became the first major professional sports league in the U.S. to be exempt from antitrust law based on merits.[36]

It should be noted, however, that since the outcome in this case was based on the generally accepted principle that firms in a single entity are not competitors among themselves,[37] the MLS immunity is not a sports-specific one. In other words, the argument here is a purely economic one, rather than an appeal to the social significance of sport. Furthermore, it should also be noted that the MLS operates in a unique manner, whereby the "owner" of each team is, in fact, a shareholder in the league itself, and both the teams and player contracts belong to the

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[30] *Toolson v New York Yankees* 357, and *Flood v Kuhn* 282.

[31] 15 USC § 27a.

[32] JG Hylton "Why baseball's antitrust exemption still survives" (1999) 9 *Marquette Sports Law Journal* 391 at 391.

[33] See *United States v International Boxing Club of New York* 348 U.S. 236 (1955) and *Radovich v National Football League (NFL)* 352 U.S. 445 (1957).

[34] 284 F.3d 47 (2002).

[35] See *Copperweld Corp. v Independence Tube Corp.* 467 U.S. 752 (1984).

[36] See also *Fraser v Major League Soccer* 537 U.S. 885 (2002), where the petition for *certiorari* was denied by the Supreme Court.

[37] See, for example, s 4(5) for a similar provision under the Competition Act.

MLS as well.[38] This can be contrasted with (association) football leagues in other countries, where the league and member clubs are independently owned.[39] This was a decisive factor for the Court of Appeals, who also considered the fact that unlike other major sports leagues in the U.S., the MLS had to compete with clubs in other countries for services of professional players.[40] Therefore, when the same argument was used by the NFL in *American Needle Inc. v National Football League*,[41] the Supreme Court, in a unanimous judgment, had no difficulty in finding that the league was not a single entity.[42]

It does not appear, therefore, that courts are likely to grant similar sports-related exemptions in the future. On the other hand, potential litigants may lobby for statutory immunities as an alternative. The sports broadcasting exemption represents an example of the latter. In *United States v National Football League*,[43] a District Court held that the NFL's rule preventing individual clubs from selling television broadcasting rights to stations in the home territories of other clubs in the league was overly restrictive, and violated the Sherman Act. Seven years later, when the league planned to implement a system of collective broadcasting rights sales, the court held that the proposal would constitute a violation of its original decree.[44] This prompted the league to persuade the Congress to enact the Sports Broadcasting Act.[45]

This statute provides that antitrust laws do not apply to agreements relating to the sponsored telecasting of organised professional sports.[46] However, the exemption does not apply to all television broadcasting in sports. Firstly, the Act only deals with professional (American) football, baseball, basketball and hockey,[47] which means that broadcasting in amateur sports (such as those organised by the National Collegiate Athletic Association) and other

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[38] MLS "About Major League Soccer" http://pressbox.mlssoccer.com/content/about-major-league-soccer (accessed 02 April 2015).

[39] See, for example, Article 29 of the NSL Constitution, which prohibits individuals from having an interest in both the league and a member club.

[40] *Fraser v MLS* 55.

[41] 130 S. Ct. 2201 (2010).

[42] *Ibid* 2214-2216.

[43] 116 F. Supp. 319 (E.D. Pa. 1953).

[44] *United States v National Football League* 196 F. Supp. 445 (E.D. Pa. 1961).

[45] 15 U.S.C. § 1291. For a history of the Act, see GR Roberts "The evolving confusion of professional sports antitrust, the rule of reason, and the doctrine of ancillary restraints" (1988) 61 *Southern California Law Review* 943 at 950.

[46] 15 U.S.C. § 1291.

[47] *Ibid.*

professional sports are still subject to antitrust law.[48] Secondly, there is also some uncertainty as to whether the exemption only applies to free-to-air television or both free- and pay-TV.[49]

The above constitutes the three forms of sports-related exceptions in U.S. antitrust law. While the exact scope of these exemptions will continue to be subject to debate, it is clear that the judicial trend is against the granting of immunity in sports. The uncertainty regarding the U.S. exemptions may also be contrasted with Canadian law, which provides a much more explicit, albeit still partial, sporting exception.

3.1.3 Sports under the Canadian Competition Act[50]

Canada's Competition Act contains a special provision that applies in certain situations related to professional sports. This section is examined in detail in Chapter 6 below. For present purposes, it suffices to say that s 45 of the Act, which deals with conspiracy between competitors by default, does not apply to an agreement between professional clubs belonging to the same sports league, if the said agreement relates to one of the matters set out in s 48 of the Act.[51]

However, the conduct in question is not entirely exempted from the Act. Instead, s 48(1) becomes applicable, and the agreement must be subjected to a test of reasonableness. During the enquiry, sporting objectives listed under s 48(2) may also be considered in order to determine whether the agreement is permissible. Therefore, it is clear that this is not an exemption in the true sense of the word, but rather an instance where competition law is tailored in order to accommodate the interests of sport development.

In addition to the above provision, s 6 of the Act also exempts amateur sport from the scope of competition law. Here, "amateur sport" is understood to be events where participants receive no remuneration in exchange for their services.[52] However, it is doubtful that the exception is

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[48] See, for example, *NCAA v. Board of Regents of the University of Oklahoma* 468 U.S. 85 (1984), discussed in Chapter 6 below.

[49] SF Ross "An antitrust analysis of sports league contracts with cable networks" (1990) 39 *Emory Law Journal* 463 at 468-469.

[50] R.S.C., 1985, c. C-34.

[51] Section 48(3) of the Act.

[52] Section 6(2).

necessary in practice, since participation in such events is unlikely to have any substantial economic effect which can distort market competition.[53]

Having examined some examples of partial exemptions in sports, it is now possible to consider whether such an approach is commendable.

3.2 Advantages of the *laissez-faire* approach

Three arguments may be presented against economic regulation of sports. Firstly, courts may over-estimate the economic harm of restrictive practices in sport; secondly, the autonomy of sports organisers and governing bodies should be respected in order to maintain their independence from the state; and thirdly, the regulation of sports along economic principles may jeopardise the achievement of legitimate social and sporting objectives. These issues are discussed in turn.

The first argument relates to the abovementioned basis for *laissez-faire* in general: that regulatory interventions cause economic inefficiencies. It may be argued that the courts (or the legislators, as the case may be) are not sufficiently familiar with the unique structure of sports leagues and the relationship between the constituent teams.[54] Sports teams often have revenue-sharing mechanisms, make joint decisions regarding the business of their leagues, and depend on each other's strengths in order to be successful.[55] Additionally, empirical studies suggest that sports teams are not profit-maximising entities, and generally seek to achieve a minimum level of profit, while prioritising their sporting performances.[56] Therefore, they are not competitors in the traditional business sense, and treating them as ordinary competitors would be inappropriate.[57]

The above view perceives the individual teams as the decision-making entities. An alternative view, which presents a sports league as one economic unit comprising of the individual teams

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[53] See, for example, s 3(1) (*e*) of the South African Competition Act.

[54] RB Terry "Application of antitrust laws to professional sports' eligibility and draft rules" (1981) 46 (4) *Missouri Law Review* 797 at 825.

[55] *Ibid.* See also the discussion in Chapter 6.

[56] A Samagaio *et al* "Sporting, financial and stock market performance in English football: An empirical analysis of structural relationships" (2009) *Centre for Applied Mathematics and Economics, Technical University of Lisbon* at 28 https://www.researchgate.net/publication/228337085_Sporting_financial_and_stock_market_performance_in_English_football_an_empirical_analysis_of_structural_relationships (accessed 20 March 2015). However, as the authors explain at 29, teams do not ignore their financial performances, as they attempt to generate sufficient revenue in order to cover operating costs and invest in player recruitment.

[57] *Ibid.*

(the so-called "single-entity" argument) has also been argued. Under this view, the case for the *laissez-faire* approach would be even stronger, as a single entity can be presumed to make operational decisions in its own interest, and that such decisions will be the most efficient ones, even if they are restrictive in effect.[58] Therefore, allowing the courts to "second-guess" the league's business decisions may lead to uncertainty and inefficiency to the detriment of consumers.[59]

However, as the *Fraser* and the *American Needle* cases discussed above show, leagues resorting to this argument have been met with mixed success. This is because only leagues with truly unique organisational structures will be considered a single entity, and that even an extensive degree of integration in competitions like the NFL will not warrant such a finding.

The second argument in favour of deregulation is that sporting bodies should be granted the autonomy to govern their respective sport codes in a manner that they see fit. These entities are experienced and knowledgeable in matters relating to the advancement of the sporting cause, and it is arguable that their expertise cannot be replaced by the wisdom of the courts. Such reasoning clearly permeates the thinking of sports governing bodies themselves, as they have shown a tendency to stipulate internal dispute resolution mechanisms in their constitutions.[60]

In the *Coetzee* case, Traverso J recognised the legitimacy of internal regulations within sports, subject to the requirement that they were "in a manner which is reasonable and in a manner which does not violate the constitutional rights of individuals".[61] Although the court did not spell out what would constitute a reasonable manner of regulation, it was clear that it did not think a sports league or federation has an unlimited freedom to do as it pleases.[62]

Lastly, subjecting restrictive practices to economic regulation also means that legitimate, non-economic objectives of the practices in question may be ignored. After all, while many restrictive rules have economic repercussions, they are not necessarily designed to restrict trade or competition.[63] These rules are frequently implemented in order to achieve purposes such as

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[58] Roberts 1988 *Southern California Law Review* 990.
[59] *Ibid* 991.
[60] See, for example, FIFA "Dispute Resolution Chamber" http://www.fifa.com/governance/dispute-resolution-system/index.html (accessed 02 April 2015).
[61] Para 27.
[62] *Ibid.*
[63] S Weatherill "Anti-doping rules and EC law" (2005) 26 *European Competition Law Review* 416 at 420.

the promotion of competitive balance within the league, the encouragement of the training of young athletes and financial solidarity between professional and amateur sports.

Unfortunately, these objectives are not always relevant under competition law. For example, a rule of reason enquiry under competition may necessitate a comparison of an agreement's anti-competitive effects against its pro-competitive gains, but a benefit may only qualify as the latter if it in fact enhances the state of competition in the market. As the cases discussed in later chapters show, courts have often dismissed arguments relating to sporting objectives on the ground that they do not enhance competition. Clearly, then, economic regulation of sport has the potential to inhibit its development.

3.3 Disadvantages of the *laissez-faire* approach

On the other hand, exempting sport from economic regulation can also be problematic. The above discussion deals with three arguments in favour of a *laissez-faire* approach in sports. This section addresses each of these arguments in turn, from the opposite perspective.

The first argument is economic in nature. As mentioned above, two assumptions are necessary for the the *laissez-faire* approach to be valid: Firstly, that a free market is efficient, and that secondly, the sports market is "free". A discussion regarding the soundness of the first assumption is beyond the scope of this thesis. Suffice to say, the entire field of competition law may be redundant if this assumption holds true, as there would be no need to prohibit collusion between competitors or questionable monopolistic practices.[64]

The state of the sports market(s), however, does warrant some attention. It is submitted that most sports leagues have domestic market dominance, due to the lack of reasonable product substitutes.[65] This allows them, and the individual clubs, to exercise considerable economic power over the athletes and the fans.[66] In practice, sports leagues and clubs do exercise this power by adopting restrictive measures, such as salary caps, contractual restrictions and collective selling of broadcasting rights, in the labour and product markets.[67] These practices

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[64] Sutherland and Kemp *Competition Law* 1.63.

[65] For example, fans of domestic rugby do not necessarily consider foreign rugby leagues or domestic football as substitutes. See SF Ross "Anti-competitive aspects of sports" (1999) 7 *Competition & Consumer Law Journal* 1 at 2.

[66] Ross 2003 *Oxford Review of Economic Policy* 569.

[67] D Forrest and R Simmons "Outcome uncertainty and attendance demand in sport: the case of English soccer" (2002) 51 (2) *The Statistician* 229 at 230.

have the effect of transferring wealth from athletes and/or consumers to the clubs, as well as restricting competition in the market.

Therefore, due to the ease with which clubs can impose restrictive conditions on other parties, there is clear potential for market abuse. However, even the assumption that clubs can freely compete, among themselves, for various services and/or consumers may be questioned. Chapter 9 below examines the player transfer market in football, and as the discussion in that chapter demonstrates, football clubs' ability to compete for the services of professional footballers is largely dependent on their financial resources. Therefore, wealthy clubs have significant market power, especially when the services of elite athletes are concerned.

The state of imbalance has an impact on the performances of clubs in downstream markets as well. In other words, clubs that are unable to acquire the services of the top players will struggle to generate revenues comparable to those that can, thus becoming trapped in a downward spiral. Therefore, even without any regulation, it is questionable whether the state of competition is optimal in the sports sector.

The above also partly addresses why it is irrelevant that clubs are not profit-maximising entities. To elaborate, clubs that do not seek to maximise profits may still look to maximise their revenue streams, since the money generated can be used to acquire the services of better players, and thus improve their sporting performances. Furthermore, it is not uncommon for sports clubs to be publicly listed on stock exchanges.[68] With regards to these public limited companies, it will be difficult to accept that they are not profit-maximising entities, since they owe their shareholders this very same responsibility. It is evident that the financial ambitions of clubs have evolved since the days when members' subscription fees were the primary source of income for sports clubs.[69]

Despite their economic independence, it must be conceded that cooperation and joint decision-making are important features among sports clubs. The single entity argument was already dismissed in 3.2 above, but it is evident that professional sports leagues possess characteristics similar to those of a joint venture. However, this does not mean that economic regulation would be inadvisable, since joint ventures are frequently examined under the lense

[68] A Egger and C Stix-Hackl "Sports and competition law: A never-ending story?" (2002) 23(2) *ECLR* 81 at 84.
[69] *Ibid.*

of competition law, even in the sporting context.[70] In fact, of all the criticisms directed against the economic regulation of sport, the argument that the organisational structures in sports are unique is perhaps the one mostly easily accommodated under competition law.[71]

Regarding the second argument, that it is important for sports bodies to retain their autonomy, it is submitted that this is of some persuasive force. However, as the *Coetzee* judgment quoted above demonstrates, it is important to strike a balance between self-governance and regulatory oversight. This is necessary, because without the latter, it becomes possible for the types of market abuses described above to take place. More serious infringements may also occur. Cases dealing with contractual freedom of professional sportspersons, such as *Coetzee* and the famous *Bosman* ruling,[72] have shown that judicial scrutiny has the potential to eliminate practices that violate fundamental rights of individuals.[73] Discarding this possibility altogether would arguably constitute discrimination against these individuals, as they would enjoy the protection and benefit of the law but for the fact that they work in the sports industry.[74]

However, cases dealing with sport have not been consistent in exercising a degree of judicial restraint in matters that should be reserved for sports governing bodies. This relates to the third argument outline above, namely the possible inhibition of sports development by economic regulation. This is perhaps the most difficult obstacle that must be overcome if competition is to apply to sport. Crucially, a *prima facie* reading of most competition statutes, including the South African Competition Act, do not permit an interpretation that calls for the consideration of purely sporting arguments. This means that the type of harm alleged by the third argument here is a real possibility.

Alternatively, faced with the impracticality of prosecuting such cases, competition authorities may choose to overlook the sports industry as a matter of convenience. This would also be problematic, as the situation would be no different from outright exemption.

Fortunately, not all sports-related jurisprudences have ignored the relevance of non-economic justifications. Since no judicial precedent exists with respect to this issue in South Africa yet, it

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[70] See the discussion in Chapter 6 on *Mackey v National Football League* 543 F.2d 606 (1976).

[71] RS Khemani "Application of competition law: Exemptions and exceptions" (2002) UNCTAD Report for the United Nations Conference on Trade and Development, TD/UNCTAD/DITC/CLP/Misc.25 at 32.

[72] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* Case C-415/93 [1995] ECR I-4921.

[73] See the discussion in Chapter 7 below.

[74] From a South African perspective, this would violate s 9(1) of the Constitution of the Republic of South Africa, 1996.

is simply a matter of making the correct call, either by the courts, or more likely, the legislature. As to what this call is, Chapter 8 explores this question after surveying examples from foreign jurisdictions.

3.4 Conclusion

The above discussion shows that regulating sports through instruments such as competition law is not without risk. Nevertheless, it is apparent that regulation is preferable to a complete exemption in sport, as the latter can expose sports clubs, athletes and consumers to harm in an industry susceptible to market abuse. In order to minimise any impact on the development of sport, however, it is necessary for lawmakers to consider how legislation may be adapted so as not to undermine the realisation of sporting objectives and the autonomy of governing bodies.

This chapter also examined instances where partial exemptions have been granted in other jurisdictions. It appears that currently, only U.S. law provides any form of genuine immunity in certain areas of sport. This is partly due to the judicial precedents set in the early days of professional sport, and partly due to the unique league structure in American sports. For practical purposes, therefore, the "sporting exception" does not present itself as a viable alternative for the development of sports.

Having concluded that economic regulation of the sports industry is necessary, there remains one other preliminary obstacle to be overcome before competition law can be applied to sports. The next chapter explores the jurisdictional overlap between the Competition Act and the common law doctrines relating to contracts in restraint of trade, and examines its implication for sports cases.

CHAPTER 4

CONCURRENT JURISDICTION UNDER THE COMPETITION ACT

The previous chapter argued that the economic regulation of the sports industry is a necessity. In South Africa, the Competition Act[1] is one of the key regulatory frameworks in this regard. The Act was enacted to promote and maintain competition in order to achieve a range of market-related and other socio-economic objectives.[2] As the discussion on foreign case law in the following chapters will show, the application of competition law to sports is a relatively recent phenomenon, with the exception of U.S. law. Earlier instances of judicial scrutiny in sports-related cases have relied on the law relating to agreements in restraint of trade.

This chapter examines the relationship between these two areas of law. The discussion below deviates somewhat from the attention on sports, and focuses on domestic case law that has dealt with the issue of concurrent jurisdiction. It first considers the practical implications when both areas of law are applicable in a particular case, before reviewing how such instances have been treated by the South African courts and competition law authorities.

4.1 The implication of concurrent jurisdiction

In many scenarios involving restrictive practices in sports, both the Competition Act and the law on agreements in restraint of trade may be applicable. In such cases, potential litigants face the classic choice-of-forum dilemma , in that they must select one avenue over another. This is partly due to the fact that the Competition Tribunal and the Competition Appeal Court exercise exclusive jurisdiction over competition matters. Section 65(2) of the Competition Act provides that:

> "If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and –
>
> (a) …

[1] Act 89 of 1998.
[2] Section 2 of the Act.

(b) … the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that –

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action."

The implication of the above provision is that, in a case concerning the enforcement of an agreement in restraint of trade, the party seeking to be released from the contract may allege that the contract in question is prohibited in terms of the Competition Act, in which case the matter must be referred to the Competition Tribunal.

Such cases are not infrequent in the commercial setting, particularly in the context of restraint of trade clauses pursuant to a sale of business agreement. For example, a contract may stipulate that following the sale of the business, the seller may not engage in the relevant market within a specified time and geographical limit. As shown below, such agreements have at least the potential to constitute acts of market division within the meaning of s 4(1) (*b*) (ii) of the Act, depending on the actual wording of the agreement in question.

Such scenarios are foreseeable in the sporting context as well. Chapter 9 below deals with the transfer rules in football, which regulate the movement of professional players between football clubs. The chapter examines whether these rules have the anti-competitive effects of, *inter alia*, artificially preventing the efficient allocation of athletes among teams and preserving the competitive advantage of dominant clubs. Presently, it suffices to say that for jurisdictional purposes, the rules would constitute an agreement between competitors (i.e., the football clubs) and/or a decision by an association of firms (i.e., the relevant football associations), in terms of s 4(1) of the Act.

On the other hand, these rules are enforced, at the most basic level, through employment contracts between clubs and players. These contracts provide that a player must remain with his employer-club for the duration of his contract, unless the conditions as stipulated in the transfer rules are met. As such contracts limit players' freedom to play for other clubs, they are also susceptible to analysis under the law on agreements in restraint of trade. Therefore, a player may also approach a civil court by alleging that such restraints are unreasonable.

So there are two scenarios in which potential litigants are faced with a choice in forum. In the first case, a club may seek to enforce its employment contract with a player that wants to join another team. In such a case, the player might allege that there are relevant competition law issues, in which event the court must refer the matter to the Tribunal in accordance with s 65(2)(*b*) of the Act. As this is dealt with by the Act, such a scenario does not really present any challenge, save for the possibility of protracted litigation.

In the second case, the player may wish to challenge the legality of the transfer rules, which he may do by either approaching a civil court on the basis of an unreasonable restraint of trade, or alleging a contravention of the Competition Act. The former is relatively unproblematic, since the other party – usually the employer-club of that player – is unlikely to allege that its contract has competition law implications. Problems arise when, in a case before the competition authorities, the club alleges that the matter should be dealt with as a restraint of trade by a civil court.

This problem is a peculiar one, because theoretically, the allegation is irrelevant. As long as the dispute contains competition law issues, the Tribunal has the (exclusive) jurisdiction to hear the matter, even if it is perhaps more appropriately dealt with as a restraint of trade matter. This can be contrasted with a civil court's obligation to refer a matter to the Tribunal whenever a competition issue is properly raised. The benefit of this is that, by approaching the competition authorities in cases of concurrent jurisdiction, potential litigants have a higher chance of obtaining finality, as complaints cannot be met with an objection to the adjudicating forum's jurisdiction.

Unfortunately, this is not necessarily the case in practice. The Competition Tribunal may, it seems, dismiss a matter on the basis that it is more suitable to a restraint of trade analysis.

4.2 *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd*

The case of *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd*[3] demonstrates, in theory, the overriding application of the Competition Act over the law on agreements in restraint of trade. This case involved an application for an interim order to suspend the operation of a restraint of trade clause between the applicant and the third respondent, who are both manufacturers of automotive fasteners.[4] The clause was part of the agreement under which the applicant

[3] Unreported Competition Tribunal case no. 85/IR/Oct05.
[4] Para 2.

purchased its business from the third respondent's parent company. Under the agreement, the seller undertook not to manufacture certain products listed in an annexure, while the applicant undertook, to both the seller and the third respondent, that it would only manufacture those listed products.[5] The restraint had an operative period of 10 years, during which competition for the relevant products was effectively eliminated between the parties.[6]

The applicant, seeking to suspend the operation of the restraint clause, alleged that as it was precluded from manufacturing fasteners outside the listed products, the clause operated to divide the fastener market, thereby constituting a market allocation between competitors in terms of s 4(1) (*b*) (ii) of the Act.[7]

The third respondent raised two substantive defences. Firstly, it contended that the parties were not actual competitors at the time of the agreement.[8] Secondly, it alleged that market division requires reciprocal undertakings between the parties, which was absent *in casu* (as only its parent company, and not the third respondent itself, undertook not to manufacture the applicant's products).[9]

The Competition Tribunal dismissed both arguments, and held that the Act required neither reciprocity nor an actual competitive relationship between the parties prior to the act of division.[10] It remarked that the characterising test in such a case is whether competition has been lessened by the act of market division.[11] It found that the applicant had indeed established this fact *in casu*.[12]

For present purposes, it is interesting to note that the third respondent also raised two further arguments relating to the contractual nature of the dispute. Firstly, it was argued that the balance of convenience, which is one of the factors that the Tribunal must consider before granting an interim relief,[13] cannot favour a party seeking to extricate itself from its contractual obligations when a final judgment is pending. The third respondent contended that it would be left without a remedy if the applicant was released from its contractual obligations by way of

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[5] Para 10.
[6] Para 14-15.
[7] Para 41.
[8] Para 44.
[9] Para 46.
[10] Paras 44 and 48.
[11] Para 47.
[12] Para 50.
[13] Section 49C (2) (*b*) (iii) of the Act.

interim relief.[14] This is similar to its second contention, namely that the suspension of a contractual clause is not a competent form of interim relief. This is based on the argument that the order would have an irreversible effect, as damages cannot be claimed for the period of suspension.[15]

In essence, it would appear that the third respondent's two contentions amounted to the following: the Tribunal may, in a final hearing, decide that the agreement is not prohibited by the Act, in which case the firm may sue the applicant, in a civil court, for breaching the restraint of trade. However, an interim order suspending the contract would limit any remedies that the firm may have in future.

The Tribunal pointed out that this is based on an incorrect interpretation of the Act that an interim order may not have any irreversible effect.[16] Furthermore, it found that the balance of convenience was shifted in favour of the applicant, who undertook to keep in trust any profits generated as a result of the suspension of the restraint clause.[17] As a result, it dismissed the third respondent's arguments and granted the interim relief.

The *Nedschroef* judgment demonstrates that once the provisions of the Competition Act are successfully invoked against an agreement in restraint of trade, the latter is no longer enforceable, regardless of whether the restraint is reasonable under common law.[18] According to Saner:

> "It will at once be appreciated that the principle of *pacta sunt servanda* was not held to be sacrosanct by the Tribunal. The provisions of the Competition Act were held to be paramount and, as a result, the applicant was able to escape the effects of the restraint it had entered into freely and voluntarily, and after the payment of a consideration therefor."[19]

However, subsequent judgments, particularly the *RTG* case, have shown that the application of competition law in such scenarios is not as simple as this.

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[14] Para 55.
[15] Para 58.
[16] Para 63.
[17] Para 56.
[18] J Saner *Agreements in Restraint of Trade in South Africa Law* (2012) 15.34.
[19] *Ibid* 15.36.

4.3 *Replication Technology Group (Pty) Ltd v Gallo Ltd*

The first of these cases is *Replication Technology Group (Pty) Ltd v Gallo Ltd*,[20] in which the Competition Tribunal, again, had to consider an application for interim relief. The applicant, Replication Technology Group ("RTG"), sought to interdict the respondent, Gallo, from enforcing a restraint of trade clause.[21] The clause emanated from an agreement between the two parties whereby RTG sold its shares in a company that it jointly owned with Gallo to the latter.[22] The company, Compact Disc Technologies (Pty) Ltd ("CDT"), was established by the major South African music industry firms, and became the largest domestic company in the CD and DVD market for music and film home entertainment.[23]

Under the restraint of trade clause in issue, RTG, as the seller, agreed to refrain from competing with CDT for a period of two years.[24] However, the restraint was limited in two respects: firstly, RTG was only restrained from rendering services to CDT's listed customers at the time of the agreement, although the Tribunal found that this covered the most significant customers in the market;[25] secondly, the restraint only applied to services that were rendered by CDT and those of a similar nature, although in reality, this covered all but the CD/DVD market relating to the niche market of adult entertainment.[26] Furthermore, the restraint could be lifted with Gallo's prior written consent.[27]

RTG, having decided that it wished to re-enter the market, challenged the legality of the restraint, which it alleged constituted an allocation of market under s 4(1) (*b*) (ii) of the Act.[28] The contention failed to impress the Tribunal, which considered it to be an attempt to "opportunistically abuse the provisions of the Competition Act" in order to escape one's contractual obligations.[29]

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[20] [2008] JOL 21431 (CT).
[21] Para 5.
[22] Para 2.
[23] Paras 9 and 12.
[24] Para 3.
[25] Para 21.
[26] Para 14.
[27] Para 3.
[28] The section provides that "[a]n agreement between...firms...is prohibited if it is between parties in a horizontal relationship and if – (*a*) ... (*b*) it involves any of the following restrictive horizontal practices: (i) ... (ii) dividing markets, by allocating customers, suppliers, territories, or specific types of goods or services...".
[29] Para 27.

In dismissing the application, the Tribunal found that there was no evidence of any prohibited practice.[30] Lewis PM considered the restraint's reasonableness *inter partes*, and held that the clause was not unduly restrictive.[31] In particular, it was found that the duration of the restraint was relatively short (as opposed to a period of 10 years in *Nedschroef*), and that RTG was in any event free to compete for customers in parts of the market that were not listed in the agreement.[32] It concluded that the agreement in question was nothing more than a "common garden variety restraint of trade normally associated with the sale of a business".[33]

However, as Sutherland and Kemp point out, the Tribunal does not explain why s 4(1) (*b*) would not apply to these types of agreements.[34] If the purpose of the provision is to prevent abuse of market power through allocation of customers,[35] then the reasonableness of the restraint between the contracting parties cannot be used as a determinative factor. Strictly speaking, even pro-competitive gains arising from such restraints are irrelevant under the enquiry.[36] The proper test in such a context, it is respectfully submitted, ought to remain whether an act of market division as occurred. This is because s 4(1) (*b*) (ii) prescribes a *per se* prohibition which cannot be justified by the reasonableness of the conduct in question.[37]

The Tribunal was keen to emphasise the nature of the restraint, which it remarked was typical in a sale of business agreement.[38] To construe it as a cartel, according to Lewis PM, would be to "elevate form over substance".[39] The presiding officer sought to distinguish the clause in question from the *Nedschroef* case, which was described as a "hard-core market allocating cartel" presented as an ordinary restraint of trade.[40]

With respect, the Tribunal's reasoning is open to criticism. Its attempt to distinguish ordinary agreements in restraint of trade from market-allocating agreements seems to suggest that they are mutually exclusive. That is to say, an ordinary (and, under the law of contract, reasonable)

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[30] Para 29.
[31] Para 22.
[32] Paras 20-21.
[33] Para 19.
[34] P Sutherland and K Kemp *Competition Law of South Africa* Issue 20 (2000) 5.71 fn 488.
[35] *Malefo v Street Pole Ads (SA) (Pty) Ltd* 35/IR/May05 para 33.
[36] See para 26 of the decision.
[37] J Neethling and BR Rutherford "Maintenance and Promotion of Competition" in WA Joubert and JA Faris (eds) *LAWSA* Vol 2(2) 2 ed (updated) (2003) para 242.
[38] Para 27.
[39] *Ibid.*
[40] Para 28.

restraint of trade cannot, by nature, constitute a prohibited practice in terms of the Competition Act.

However, there does not appear to be any legal basis for such a distinction. While contract law and competition law are two distinct legal areas, it is not difficult to envisage scenarios where the principles of both subjects may be simultaneously applicable. Reasonableness under the former does not preclude illegality under the latter. Furthermore, attempting to categorise agreements will be inherently difficult, as there will inevitably be cases that yield no clear answer.

For example, Sutherland and Kemp have found the Tribunal's attempt to distinguish the agreement from *Nedschroef*, based on the differences in duration and the relationship between the parties, to be unconvincing.[41] The learned authors also cite the consent order judgment in *Competition Commission v Zip Heaters (Australia) (Pty) Ltd*,[42] which involved a restraint of trade emanating from a sales agreement not dissimilar to the *RTG* case, but resulted in the imposition of an administrative penalty upon the respondent (who attempted to enforce the restraint).

Nevertheless, the outcome in the *RTG* case does not appear to be a controversial one. It is submitted that, rather than emphasising the reasonableness of the restraint *inter partes*, a more acceptable justification for the Tribunal's decision would be that the sale agreement itself is not prohibited under s 4(1) (*b*) (ii), and that the restraint is incidental to that agreement. As will be seen in Chapter 8 below, however, South African law is not yet settled as to whether the latter constitutes a justification to *per se* prohibitions.

4.4 *Afgri Operations Ltd/Pride Milling Company (Pty) Ltd*

Another case which, at first sight, appears to employ similar reasoning to *RTG* was *Afgri Operations Ltd/Pride Milling Company (Pty) Ltd*.[43] Unlike *Nedschroef* and *RTG*, this was not an interim application matter. Here, the Competition Tribunal had to consider whether Afgri Operations' proposed acquisition of Pride Milling's yellow maize milling production ought to be approved as a large merger under s 16 of the Act.

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[41] Sutherland and Kemp *Competition Law* 5.71 fn 488.
[42] 17/CR/Feb07 12/03/2007.
[43] [2012] JOL 28925 (CT).

As part of the merger, the parties also agreed on a clause in restraint of trade. The clause stipulated that upon concluding the merger, Pride, the target firm, would be prohibited from entering the South African market for the milling of "grits" (a type of milled yellow maize products) for a period of two years.[44] The Tribunal held that this clause did not contravene s 4 of the Act, because the restraint was limited in both duration and scope.[45] Regarding the scope, the Tribunal found that the restraint only applied to the "grits" sector of the yellow maize market, and concluded that it would not result in market foreclosure.[46]

It is submitted that although the Tribunal's analysis in *Afgri* appears to be based on the reasonableness of the clause in restraint of trade, its focus was different to that in *RTG*. In the latter case, the Tribunal examined the reasonableness of the agreement *inter partes*, before reaching the conclusion that the restraint was an ordinary restraint of trade clause in a sale of business agreement, rather than an act of market division. In *Afgri*, the Tribunal accepted that the clause in restraint of trade was part of a sale of business agreement, but proceeded to examine the reasonableness of the restraint, not between the parties, but in terms of its effect on the market.

The difference between the two approaches may be very subtle. Indeed, sometimes the same set of facts may be used to prove both reasonableness between the contracting parties and reasonableness – or to be more precise, the absence of anti-competitive effects – from a market-orientated perspective. For example, the limited nature of the restraint in *Afgri* may indicate that the selling firm was not unduly restrained, but more importantly for competition law purposes, it may also show that it will not have a foreclosure effect on the market. Other times, however, reasonableness of the agreement *inter partes* will not necessarily equate to compliance with the Competition Act, which also requires a consideration of the agreement's impact on consumers and other competitors.[47]

It is submitted that the reasoning in *Afgri* reflects an approach closer to the second one mentioned above, which would provide some clarity in the relationship between competition law and agreements in restraint of trade. At the same time, one must be wary of reading too

[44] Para 12.

[45] Para 13.

[46] Paras 13 and 20.

[47] Therefore, as a hypothetical example, one may imagine a market in which there are only two major suppliers, one of whom then proposes to purchase the other's goodwill as a going concern. As part of the transaction, the selling firm would have to agree to refrain from entering the relevant market for a period time. In such a scenario, factors that prove reasonableness of the clause between the parties will not indicate whether the market will be harmed as a result.

much into the judgment, which primarily dealt with foreclosure in the vertically affected market.

4.5 *International Quality & Productivity Centre (Pty) Ltd v Tarita*

The above cases dealt with restraints of trade ancillary to sale of business agreements. However, restraints may also arise in the context of employment contracts, in which employees agree to not compete with their former employers upon termination of their contracts. These scenarios are particularly relevant to this thesis. As the example of the transfer system in football illustrates, legal disputes in sport frequently occur between parties in an employment relationship.

The *Nedschroef* case above shows, at least in a limited number of cases, that restraint of trade clauses pursuant to sale of business agreements may contravene the Competition Act. In theory, this would also apply to restraints in employment contracts. However, following the High Court decision in *International Quality & Productivity Centre (Pty) Ltd v Tarita*,[48] it appears that this will very rarely be the case.

The case concerned an employer's urgent application to enforce a restraint of trade agreement against its former employees.[49] This was met by the novel defence of the employees and their new employer (who was a competitor of the applicant) that the High Court lacked the jurisdiction to hear the matter, as the restraint in question constituted a prohibited practice in terms of s 4 of the Competition Act.[50] As a result, the respondents alleged, the court was required to refer the matter to the Competition Tribunal under s 65(2) (*b*) of the Act.[51]

The respondents' argument for the application of the Act was partly based on the *Nedschroef* decision.[52] In particular, it relied on the Tribunal's statement that in order to constitute a horizontal relationship, the Act does not require the parties to be actual competitors, and that potential competitors will suffice for the purposes of s 4.[53] The respondents alleged that the

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[48] [2006] JOL 18294 (W).

[49] Para 1.

[50] Para 5.

[51] This section provides that where, "in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and ... must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that – (i) the issue has not been raised in a frivolous or vexatious manner; and (ii) the resolution of that issue is required to determine the final outcome of the action."

[52] Para 18.

[53] Para 21.

scope of the Act was broad enough to also encompass restraints of trade in employment contracts, because upon termination of their employment contracts, former employers and employees become potential competitors.[54]

The court, however, was not persuaded by the argument, and correctly so in the author's submission. Scwhartzman J held that the Act was not applicable *in casu*, because employers and employees are neither competitors nor potential competitors in the sense that was described in *Nedschroef*.[55] After reviewing both the Tribunal decision and European jurisprudence, the learned judge held that "potential" in *Nedschroef* means that a firm has the latent ability to become a competitor but for the restraint (by, for example, reorganising its assets), rather than the capacity to develop into a competitor in the future.[56] It was held that the application of s 4 of the Act to restraint of trade agreements required, at the least, that the firms have the ability to compete with each other at the same level of market structure.[57] As former employees and, subsequently, employees of a competitor, the respondents had never competed with the applicant at any market level, and that their potential to develop into competitors in the future was irrelevant.[58]

The court also briefly examined the merits of the respondents' allegation that s 4 was contravened, before concluding that there was no market division in any event. At para 28, Swhartzman J remarked:

> "...it appears to me, [that the Act] was not intended to change the common law of employer/employee restraints, which are more than adequately protected by the ongoing development of our common law on such restraints. In the circumstances, this is not a statute to which the law of unintended consequences can or should be invoked to give a benefit to persons for whom the Act was not primarily intended."

As a result, the learned judge held that the respondents' argument in this regard was "hopeless".[59] The judge then cited, with approval, the *dictum* in *S v Cooper*[60] that one who conducts a hopeless case acts frivolously. In accordance with s 65(2) of the Competition Act,

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[54] Para 16.
[55] Paras 22 and 26.
[56] Para 25.
[57] *Ibid.*
[58] Para 26.
[59] Para 29.
[60] 1977 (3) SA 475 (T) 476D-G.

the court was not required to refer the matter to the Competition Tribunal as it was satisfied that the issue was raised in a frivolous manner.[61]

With respect, it is submitted that while the court was correct in its approach to the issue of employers and employees as potential competitors, its exercise of jurisdiction in this matter is somewhat difficult to reconcile with the provisions of the Act. The issue raised *in casu* was not simply a question of fact (i.e., whether a horizontal relationship existed between the relevant parties), but also a question of law. Essentially, the court was asked to decide whether a horizontal relationship encompasses the form of competition between a firm and its former employee.

This question is clearly a matter of statutory interpretation. However, s 62(1) (*a*) of the Act provides that the Competition Tribunal and the CAC share exclusive jurisdictions in respect of, *inter alia*, the interpretation and application of provisions under Chapter 2. The High Court's reliance on foreign sources[62] indicate that the meaning of "potential competitors" was not yet settled in South African law. As the interpretation of this term was central to the dispute, it appears that the respondents' argument, even if incorrect, was perhaps not a hopeless one. Therefore, it is submitted that the court had erred in not referring the matter to competition authorities in accordance with s 65(2) of the Act.

On the other hand, if the *dicta* of *International Quality* is accepted as correct, its implication is that there will be very few instances where former employers and employees will qualify as potential competitors.[63] At the same time, this does not mean that football players are precluded from alleging that the transfer system is in contravention of the Competition Act. As Scwhartzman J held, the restraint agreement in *International Quality* may create a vertical relationship, not governed by s 5 of the Act, due to the respondents' employment with the applicant's competitor.[64] The point was not elaborated further, as the respondents only alleged the existence of a horizontal relationship, and it is unclear whether the learned judge considered employees to be suppliers of services to their employers.

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[61] Para 29.

[62] See paras 24-26.

[63] However, this does not mean that such contracts may never constitute agreements between competitors. It is submitted that if a key employer departs a monopolistic firm with the intention of starting his own rival company, a restraint of trade agreement barring him/her from doing so may be analysed under both s 4 and s 8 of the Competition Act, as the agreement would have a market foreclosure effect.

[64] Para 22.

However, for the purposes of the football transfer scenario, a more obvious approach for potential litigants would be to contend that the transfer rules constitute a horizontal agreement between professional football clubs, and that the rules themselves are harmful to competition. Players or their representatives would not lack the *locus standi* to make such an allegation, as s 49B(2) (*b*) of the Act provides that "[a]ny person may ... submit a complaint against an alleged prohibited practice...". If the approach in *Nedschroef* and, apparently, *Afgri* are to be preferred to the one in *RTG*, then the existence of a reasonable restraint of trade agreement between the players and the clubs would not bar the institution of a competition law suit.

4.6 Conclusion

This chapter examined situations where potential litigants have both the avenues of competition law and the law of contract available to them. Although cases such as *RTG* and *International Quality* show that provisions of the Competition Act cannot be used to automatically circumvent one's obligations under an agreement in restraint of trade, it is submitted in cases where the jurisdictional elements of the Act are present, litigants must be permitted to rely on competition law, even if the restraint is reasonable *inter partes*. Furthermore, when such an agreement is scrutinised under competition law, the parties' arguments should focus on market and other competition issues, so as not to conflate the two areas of law.

There are legitimate reasons why litigants may prefer resorting to competition law remedies. For example, Chapter 9 provides an historical overview of the development of transfer rules in football, where it is demonstrated that players aggrieved by the rules have traditionally challenged them on the ground that they constitute unreasonable restraint of trade. This eventually culminated in the *Bosman* ruling, where the ECJ held that the "retain-and-transfer" system under the old rules violated professional footballers' economic freedom. This resulted in an overhaul of the transfer system by the sport's governing body, who also obtained the approval of the European Commission when the new rules (which substantially reflect the system that exists today) were adopted.

Therefore, if the present transfer system does restrict one's freedom of trade, it appears that the E.U. authorities are likely to regard the restraint as a reasonable one. However, as the recently launched complaint by FIFPro shows, the rules may also be susceptible to competition law review, an issue which was not considered in the *Bosman* case.

Having determined the viability of competition law as an avenue for legal challenges in sport, it is now possible to examine the requirements that must be met in order to sustain such a challenge. The next chapter discusses the jurisdictional elements of competition law in the sports context, while the substantive aspects are dealt with in the chapters that follow.

CHAPTER 5

JURISDICTIONAL ELEMENTS

The previous two chapters argued why competition law should apply to sports. However, the Competition Act[1] will not apply to all sports-related activities. It contains certain jurisdictional requirements, which must be fulfilled before the substantive provisions can be applied. Some of these elements are general, meaning that they must be present in all cases examined under the Act. These are considered, in the context of sports-related practices, in 5.1 below.

Other jurisdictional elements are specific to the type of conduct in question. For example, the application of s 4 depends on the existence of a horizontal relationship between the parties involved, while the application of s 5 depends on the existence of a vertical relationship. These section-specific elements can be further categorised into those that relate to the subjects of the conduct (i.e., "who the parties are"), and those that relate to its objects (i.e., "what the parties did"). 5.2 and 5.3 below discuss these elements from a sporting perspective.

Lastly, a relevant market must also be established before a case can be considered on its merits. Strictly speaking, this is not a jurisdictional requirement, because the existence of an applicable market is not in doubt. Instead, the enquiry is concerned with the exact scope of the relevant market. However, as this determination must precede the substantive arguments, the topic is included in this chapter and discussed in 5.4 below.

5.1 Applicability of the Act in general

5.1.1 "Economic activity"

Section 3(1) of the Competition Act states that the Act "applies to all economic activity within, or having an effect within, the Republic". Unfortunately, South African competition authorities are yet to provide a definitive test for what constitutes an economic activity.[2] This is understandable for two reasons. Firstly, in most cases, the economic nature of the conduct will

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[1] Act 89 of 1998.

[2] P Sutherland and K Kemp *Competition Law of South Africa* Issue 20 (2000) 4.28.

not be in question. Courts are rarely presented with challenging borderline cases.[3] Secondly, the concept of "economic activity" is notoriously difficult to define, as both domestic and foreign case law indicate.[4] In *Standard Bank Investment Corporation Ltd v Commission*,[5] one of the few South African judgments which discussed the term "economic activity", Schutz JA simply remarked that it encompasses "countless forms of activity which people undertake in order to earn a living".[6] The court did not decide whether the term should be widely or restrictively interpreted, since that was not necessary for the purpose of that dispute.

Fortunately, the term does have comparative counterparts in foreign jurisdictions. In the U.S., ss 1 and 2 of the Sherman Act only apply to conduct that constitutes "trade and commerce". That phrase is not explicitly defined either, and courts are required to consider various factors, including the organisational structure of the entity in question and whether it is motivated by profit.[7] However, the non-profit nature of an entity does not necessarily mean that its activities are non-commercial. For example, in *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma*,[8] the Supreme Court held that the NCAA, a non-profit body responsible for organising inter-collegiate sports, was subject to the Sherman Act.[9]

However, as Sutherland and Kemp correctly point out, the difference between the two terminologies demands the exercise of caution when drawing parallels from U.S. cases.[10] The authors argue that "economic activity" under the South African Act has a narrower scope than "trade and commerce", because U.S. courts are permitted to hear cases involving activities which are not purely commercial, and compensate for this by employing the rule of reason even when the alleged violation would be prohibited *per se* otherwise.[11] Such an approach is, of course, not permitted under our Act. As a result, the authors argue, "economic activity" ought to be narrowly interpreted.

However, activities which are not purely commercial must be at least partly commercial in order to pass the U.S. jurisdictional test. There is no evidence to indicate whether or not the

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[3] However, sports-related practices may be an example of "hard cases".
[4] Sutherland and Kemp *Competition Law* 4.20.
[5] 2000 (2) SA 797 (SCA).
[6] Para 9.
[7] *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma* 468 US 85 (1984) 98-104.
[8] 468 US 85 (1984).
[9] *Ibid* 100.
[10] Sutherland and Kemp *Competition Law* 4.29.
[11] See, for example, *United States v Brown University* 5 F 3d 658 (3rd Cir 1993).

drafters of the Competition Act intended to exclude these kinds of activities from the scope of the Act. Therefore, the argument above does not appear to be entirely conclusive.

The term "economic activity" is also relevant under E.U. law. Articles 101 and 102 TFEU (which deal with competition rules within the Union) apply to actions of undertakings and associations of undertakings. An undertaking has been defined by the ECJ as to include "every entity engaged in economic activity" in *Höfner and Elser v Macrotron GmbH*.[12] Therefore, economic activity is also a jurisdictional requirement under E.U. competition law, albeit in an indirect manner.[13]

The term is often the starting point in many E.U. cases. In the context of sport, for example, the ECJ has held, in as early as 1974, that the "practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of [the then] Article 2 of the Treaty".[14] In *Commission v Italy*,[15] it was held that economic activity means any activity involving the "offering good and services on a given market".[16] This is a widely-cast definition, and like the U.S. courts, the European authorities have often considered the profit motive of the entity in question as a relevant factor. However, profit motive is not necessarily conclusive.[17] In the matter of *Distribution of Package Tours During the 1990 World Cup*,[18] which concerned ticket arrangement during an international football tournament, the European Commission found that economic activity includes "any activity, whether or not profit-making, that involves economic trade".[19]

The relevance of a profit motive as an indicator of economic activity is particularly interesting in the current context, as many sports regulatory bodies and individual clubs (including professional ones) do not have profit-making as a primary objective. Whether their conduct fall within the scope of the Competition Act therefore depend on the correct interpretation of the term "economic activity".

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[12] Case C-41/90 [1991] ECR I-1979 para 21.
[13] M Lorenz *An Introduction to EU Competition Law* (2013) 67.
[14] *Walrave and Koch v Union Cycliste Internationale* Case C-36/74 [1974] ECR 1405 para 4.
[15] Case C-118/85 [1987] ECR 2599.
[16] Para 7.
[17] *P & I Clubs* [1989] 3 CMLR 178 para 50. See also *Federacion Nacional de Empresas de Instrumentacion Cientifica Medica Tecnica y Dental v Commission* [2003] 5 CMLR 1 para 35.
[18] [1992] OJ L 326/31.
[19] Para 43.

As mentioned above, Sutherland and Kemp have argued in favour of a restrictive interpretation. Under this interpretation, activities which are "not conducted along commercial and competitive lines" are excluded from the operation of the Act, because they do not fit within the traditional principles of competition law.[20] This means that a distinction must be drawn between economic and non-economic activities.[21]

It is submitted that while not every activity with economic consequences should be regarded as an economic activity, an overly narrow and compartmentalised approach to the issue would incorrectly exclude the so-called "hard-cases" from the outset. As the authors readily admit, because of ongoing expansion of non-governmental activities and growing commercialisation of previously non-economic activities, the distinction will be difficult to draw.[22] This is especially true in the sporting context, where governing bodies generate revenues that match those of many large multi-national companies.[23]

In order to prevent the activities of these entities from easily circumventing the Competition Act, it is submitted that a wider interpretation of "economic activity" is preferable. This may be combined with consideration for the non-economic dimensions of the conduct in question during the substantive analysis. Support for such an approach can be found in the E.U., in particular the *Meca-Medina* case[24] discussed in Chapter 3.[25]

This case concerned the legality of the International Olympic Committee's ("IOC") anti-doping rules. It was first dismissed by the Court of First Instance, on the ground that the fight against doping did not pursue an economic objective, since its purposes were to safeguard the health of athletes and preserve the spirit of fairplay.[26] In fact, the court went so far as to hold that "sport is essentially a gratuitous and not an economic act, even when the athlete performs it

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[20] *Competition Law* 4.28.
[21] *Ibid.*
[22] *Ibid.*
[23] A Egger and C Stix-Hackl (2002) "Sports and competition law: A never-ending story?" ECLR 81 at 84.
[24] *Meca-Medina & Majcen v Commission* Case C-519/04 [2006] ECR I-6991.
[25] See also *Barmi v Board for Control of Cricket in India* Case no. 61/2010, before the Competition Commission of India (08 February 2013) para 8.28, where the Competition Commission of India held that "all Sports Associations are to be regarded as an enterprise in so far as their entrepreneurial conduct is concerned and treated at par with other business establishments".
[26] *Meca-Medina & Majcen v Commission* Case T-313/02 [2004] ECR II 3291 para 44.

in the course of professional sport".[27] The CFI held that the economic consequences of the activity did not change its nature, which was purely sporting, and not economic.[28]

The court's reasoning was criticised by the ECJ on appeal, who, despite coming to the same eventual conclusion (in dismissing the challenge), engaged with the jurisdictional elements of the case.[29] The court held that the sporting nature of the rule in question did not exempt it from the scope of E.U. competition law.[30] The court refrained from drawing an artificial distinction between economic and non-economic aspects of the activity, and recognised that a sporting activity can involve both.[31]

In the South African context, however, the effect of s 3(1) (*e*) of the Competition Act must also be considered. This section excludes "concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose" from the scope of the Act. This provision has received little attention from the courts so far, but it is submitted that it should follow the general rule that exceptions to broad provisions are to be narrowly interpreted where possible.[32] The scope of the term "economic activity" would be unduly limited if a literal interpretation is given to s 3(1) (*e*).[33]

Therefore, activities which are only partially motivated by socio-economic objectives should not be excluded from the scope of the Act. Such an interpretation suffices to exempt purely non-economic activities, which are not uncommon in the sports context. For example, rules of the game, like the number of players permitted on each team, are exclusively of sporting interest, and should be outside the scope of competition law.[34] Participation in amateur sports, i.e. that for which no remuneration is received in exchange,[35] should not constitute economic activities either.[36] However, regulations governing the transfer of athletes among clubs and

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[27] *Ibid* para 45.

[28] *Ibid* para 57.

[29] *Meca-Medina & Majcen v Commission* [2006] ECR I-6991 paras 29-34.

[30] *Ibid* para 27.

[31] A Vermeersch "All's fair in sport and competition? The application of EC competition rules to sport" (2007) 3 (3) *Journal of Contemporary European Research* 238 at 243.

[32] Sutherland and Kemp *Competition Law* 4.43.

[33] For example, under a literal interpretation of the subsection, economic activity of the state would not be subject to the Act if they are at least partly motivated by socio-economic objectives. Section 81, which provides that the Act is binding on the state, indicates otherwise. See *Phutuma Networks (Pty) Ltd v Telkom (Ltd)* 37/CR/Jul10 para 24; *Cf AEC Electronics (Pty) Ltd v Department of Mineral Affairs* 48/CR/Jun09 para 19.

[34] Egger and Stix-Hackl 2002 *ECLR* 83.

[35] See the definition of "amateur sport" under Canadian law in Chapter 3.

[36] However, a professional club that comprises of amateur players (a so-called "semi-pro" team) would not escape the Act on the basis that its players have amateur status, because it is still carrying out economic activities.

decisions by a league to impose salary caps on its teams exceed the limit of purely sporting rules, and should be regarded as economic activities.[37]

5.1.2 Extra-territorial application of the Act

In addition to being an economic activity, the conduct in question must either be "within" South Africa or have an effect in the country before the Act is applicable.[38] This requirement affects the Act's extra-territorial application, and warrants some consideration from the sport perspective. This is because in many sports, international governing bodies have the power to dictate the rules applicable at national level. If these rules are found to have contravened competition law, then it is the decisions of the said international entities that must be invalidated. Whether a court has the authority to do so depends on the extent of the Act's extra-territorial jurisdiction.

It is submitted that the first jurisdictional ground under s 3(1), namely "economic activity within … the Republic", may be sufficient to cover sports rules issued by international bodies. This is because the ground not only encompasses conduct originated in South Africa, but also conduct which is implemented in the country.[39] Therefore, a national sports body may issue rules that govern domestic affairs, in which case the conduct evidently originates within the country. It may also enforce the rules issued by its international governing body, in which case the conduct is implemented in South Africa.[40]

The second jurisdictional ground, namely the "effects doctrine" as it is commonly known, must be relied upon if one is to argue that the domestic rules issued by other national sports organisers are also subject to South African competition law. To use the transfer system in football as an example, the argument here would be that the rules of foreign national associations restrict player movement in those countries, which in turn have the effect of preventing South African clubs from competing for services of foreign players.

Whether our competition authorities are likely to entertain such an argument would depend on the circumstances of each case. At the very least, parties relying on this argument must

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[37] Egger and Stix-Hackl 2002 *ECLR* 83.

[38] Section 3(1) of the Act.

[39] Sutherland and Kemp *Competition Law* 4.21.

[40] See the explanation on how the rules of FIFA are adopted by SAFA and the NSL at the national level in Chapter 11 below.

establish that foreign footballers form a substantial part of the market for players' services.[41] Rules limiting the number of foreign players that each team may field may be a relevant factor here.[42]

It has been argued that an additional consideration may be the principle of comity, as competition authorities should be cautious about over-extending their jurisdiction in matters that are more appropriately dealt with by foreign courts.[43] The Competition Commission has reached a number of Memoranda of Understanding with competition authorities in other countries regarding potential enforcement conflicts.[44] If the conduct involved originates from one of these countries, then the contents of the said agreements may determine whether South African authorities have jurisdiction in such cases.[45]

5.1.3 Industry-specific concurrent jurisdictions

One last issue remains to be considered regarding the overall application of the Act. Section 3(1A) (*a*) provides that the Competition Commission exercises concurrent jurisdiction in any industry over which another regulatory authority[46] also has jurisdiction over competition law matters.[47] Strictly speaking, this is not a jurisdictional requirement, as the Competition Act remains applicable under such a scenario. In practice, however, the Commission may be prepared to defer these matters to other regulatory bodies.[48] In any case, depending on the existence of a Memorandum of Understanding ("MoU") between the relevant authorities and

[41] *Competition Commission v American Natural Soda Ash Corporation* 87/CR/Sep00 para A.5.

[42] See, for example, Rule 34 of the National Soccer League.

[43] Sutherland and Kemp *Competition Law* 4.26. *Cf American Natural Soda Ash Corp v Competition Commission* 12/CAC/Dec01 paras 19–20.

[44] See, for example, Part IV of "the Memorandum of Understanding between the Directorate-General Competition of the European Commission and the Competition Commission of South Africa on cooperation in the field of competition law and enforcement" (2016) http://www.compcom.co.za/wp-content/uploads/2016/05/MOU-between-DG-Comp-and-CCSA-22-June-2016.pdf (accessed 01 November 2016).

[45] A list of these agreements can be found at Competition Commission "MoU international" http://www.compcom.co.za/mou-international/ (accessed 01 November 2016).

[46] "Regulatory authority" is defined, under s 1 (xxviii) of the Act, as "an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry".

[47] It should be clarified that the issue here is distinct from the discussion on concurrent jurisdiction in Chapter 4. The analysis in that chapter concerned scenarios when both competition law and the common law doctrine on contracts in restraint of trade are applicable. Here, "concurrent jurisdiction" refers to situations where more than one regulatory body exercises competition law authority over the industry in question.

[48] K Moodaliyar "Competition and regulatory overlaps: Experience of South Africa" http://www.cuts-ccier.org/IICA/pdf/Country_Paper_South_Africa.pdf (accessed 01 November 2016) 7.

the contents of such an agreement, the Commission will consult and cooperate with its counterpart when an investigation is conducted.[49]

Therefore, it is necessary to consider whether s 3(1A) is applicable to sports-related practices. The National Sport and Recreation Act ("the NSRA")[50] deals with the promotion and development of sport in general, and authorises SRSA to carry out various policy tasks under the Act.[51] However, this does not make sport one of the industries contemplated under s 3(1A). In order to qualify as a designated sector, the relevant legislation must specifically provide for the regulation of competition matters.[52] Such provisions are absent in the NSRA, and the Act's regulation of sports in general is insufficient to trigger the operation of s 3(1A).[53]

A less obvious statute that is relevant for present purposes is the Electronic Communications Act.[54] Section 67 of the Act authorises the Independent Communications Authority of South Africa ("ICASA") to deal with various competition matters with respect to relevant markets under the Act. The latter include the markets for broadcasting services,[55] which in turn, encompasses the broadcasting of sports content.[56] As the following chapters illustrate, sports broadcasting is a frequently contested issue in competition law.

Under the MoU between ICASA and the Competition Commission,[57] the former is responsible for imposing *ex ante* rules in the relevant markets, while the latter is in charge of conducting *ex post* investigations into alleged acts of violation.[58] The two authorities are also required to consult with and assist each other when necessary.[59] It should be noted that ICASA is currently

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[49] A list of the MoUs can be found at Competition Commission "MoU SA regulators" http://www.compcom.co.za/mou-sa-regulators/ (accessed 01 November 2016).

[50] Act 110 of 1998.

[51] See ss 8 and 9 of the Act.

[52] See, for example, s 67 of the Electronic Communications Act 36 of 2005, which authorises the Independent Communications Authority of South Africa ("ICASA") to deal with competition matters relating to relevant markets under the Act.

[53] *Competition Commission of South Africa v Telkom SA LTD* [2010] 2 All SA 433 (SCA) para 28. See also *Venter v Law Society of the Cape of Good Hope* 24/CR/Mar12 para 19.

[54] Act 36 of 2005.

[55] See Chapter 9 of the Act.

[56] Competition Commission "Comments on the National Integrated ICT Policy Discussion Paper" (2014) http://www.mediamonitoringafrica.org/images/uploads/Supplementary_signed_-_Part_2.pdf (accessed 01 June 2015) para 1.15.5.

[57] GN 1747, *Government Gazette* 23857, 20 September 2002.

[58] *Ibid* para 8.1.

[59] See, in general, *Competition Commission of South Africa v Telkom SA LTD* [2010] 2 All SA 433 (SCA) as to the binding nature of the MoU.

conducting an inquiry into the subscription television market,[60] and the broadcasting of sports content is likely to be a relevant issue.[61]

Nevertheless, under the terms of the MoU between the two authorities, a party wishing to lodge a complaint related to sports broadcasting must do so with the Competition Commission.[62] Therefore, from a jurisdictional point of view, the competition authorities' competence to hear such cases is no different than in other sports-related scenarios, where no concurrent jurisdictions are applicable.

5.2 Subjects of prohibited practices

Once it is determined that the Act is applicable in general, it is necessary to determine whether the jurisdictional elements of specific prohibited practices are present. Chapter 2 of the Act applies to conduct of "firms", therefore, it is necessary to determine whether sports entities qualify as firms within the meaning of the Act.[63]

The Act does not provide a definition of "firm". Section 1 merely states that the concept includes a "person, partnership or a trust". The Act does not distinguish between a juristic and a natural person under this section, which means that individuals are not excluded from the ambit of the Act by virtue of their status.

It appears that any entity may be a firm for the purpose of s 4, provided that it is a separate economic unit, and it performs economic activities.[64] In the context of sport, the determination of purely commercial businesses as firms will be unproblematic, even when their trade involves sport-related products or services. Examples of such firms include broadcasters of sport programmes and retailers of sports merchandise.

The difficulty arises when an entity performs both economic and non-economic activities, which is frequently the case for sports entities. For example, professional clubs conduct economic activities when they sell tickets to spectators and merchandise to supporters, while

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[60] ICASA "ICASA conducts an inquiry into subscription television markets" (2016) https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/ICASA-launches-inquiry-subscription-tv-broadcasting/Default.aspx (accessed 25 June 2016).

[61] See Competition Commission "Comments on Discussion Paper" para 7.5.2.8.

[62] Clause 3.1.

[63] It should be noted that under s 4, conduct involving an association of firms may suffice. In addition, s 5 only requires one of the parties to the agreement to be a firm, provided that the other party has a supply relationship with the firm.

[64] Sutherland and Kemp *Competition Law* 5.37.

their sporting activities, like participation in matches, are non-economic.[65] Athletes can also perform economic activities when they conclude personal sponsorship deals.[66] Lastly, regulatory bodies, responsible for the organisation of the sport, also deal with commercial aspects when they contract with commercial partners on behalf of their members.[67]

In order to determine whether these entities qualify as firms, it has been argued that one should not attempt to categorise an entity in its entirety.[68] In other words, an entity whose activities are predominantly non-economic may still qualify as a firm to the extent of its economic activities. However, from a theoretical perspective, it remains unclear whether the entity ceases to be a firm with regards to its non-economic activities, or whether it retains its status in such instances, but is merely unbound by the Act to the extent that its activities are non-economic. Nevertheless, the two approaches do not yield any practical differences in their outcomes.[69]

Therefore, entities in sport can be regarded as firms for the purpose of the Act in so far as they conduct economic activities. This is supported by E.U. jurisprudence, which had dealt with sporting bodies on numerous occasions. However, it should be noted that there is a difference in terminologies, as E.U. competition rules apply to "undertakings", rather than "firms".[70]

The term "undertaking" has been broadly interpreted by the European authorities. In *Höfner and Elser v Macrotron GmbH*, the European Court of Justice held that the term includes any entity "engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[71] As mentioned in 5.1 above, "economy activity" in the context of an undertaking has further been described as any activity that offers goods or services on a market.[72] Therefore, the entity need not be a profit-making body nor established for an economic purpose.[73]

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[65] It should be noted that even these non-economic activities are becoming increasingly connected to clubs' economic activities. Successful outcomes in training and tournaments can lead to higher revenues through prizes and transfer incomes. Egger and Stix-Hackl 2002 *ECLR* 84.

[66] The actual participation in sport can also be considered economic activities if a professional athlete receives remuneration in exchange for his/her services. See *Donà v Mantero* Case C-13/76 [1976] ECR 1333.

[67] Egger and Stix-Hackl 2002 *ECLR* 84.

[68] Sutherland and Kemp *Competition Law* 5.37.

[69] *Ibid* 5.37-5.38.

[70] Articles 101 and 102 TFEU.

[71] Case C-41/90 [1991] ECR I-1979 para 21.

[72] *Commission v Italy* Case C-35/96 [1987] ECR 2599 para 7.

[73] *Ambulanz Glöckner v Landkreis Südwestpfalz* Case C-475/99 [2001] ECR I-8089 para 19-21.

As a result of this broad and functional approach, sporting entities are likely to be considered undertakings.[74] With regards to professional clubs, the European Commission held, in the *ENIC/UEFA* case, that football clubs are undertakings, as they provide sporting entertainment (through matches against other clubs) against payment through various avenues of incomes, including stadium admissions, media broadcast, sponsorships, advertising and merchandising.[75] Clubs' status as undertakings was confirmed by the Court of First Instance in *Laurent Piau v Commission*, although the court did not elaborate on the point.[76]

Furthermore, former Advocate General Stix-Hackl has remarked that when considering the status of a sports club, the entity's objectives, which may include non-economic aims such as "sociability, prestige or a higher position in the [league] table", are irrelevant.[77] The club's actual activities ought to be the deciding factor. It is submitted that this approach is consistent with the South African position examined above.

Regarding the economic activities of clubs, it was pointed out that while these entities were funded through members' subscription fees in the past, they are predominantly financed by market activities (such as those outlined in *ENIC* case above) nowadays.[78] In addition, the training of players can also be considered an economic activity, because it is "ultimately directed to an economic aim".[79] For example, training can lead to improved performance, which will, in turn, lead to increased revenues. Alternatively, players who have improved their skills through training can also be transferred to other clubs at a profit.[80] Therefore, it is submitted that professional sport clubs ought to be regarded as firms within the meaning of s 4 when they carry on economic activities including those mentioned above.

The next group of entities to be considered consists of regulatory bodies, which may be either national associations or international federations governing a particular sport or responsible for the organisation of tournaments. These bodies may be regarded as firms on their own, or as associations of firms, depending on the activities that they are engaged in.[81]

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[74] Vermeersch 2007 *JCER* 248.
[75] Case COMP/37.806 (2002) para 25.
[76] Case T-193/02 [2005] ECR II-209 para 69.
[77] Egger and Stix-Hackl 2002 *ECLR* 84.
[78] *Ibid.*
[79] *Ibid.*
[80] See Chapter 10 below.
[81] Vermeersch 2007 *JCER* 249.

A regulatory body can be considered a firm when it embarks on economic activities itself.[82] For example, the European Commission has held that both FIFA and the Italian football association were undertakings in the context of the organisation of the 1990 World Cup, as they carried on economic activities when they negotiated the distribution of package tours for the tournament.[83] The CFI confirmed this point in *Scottish Football Association v European Commission*, when it held that the Scottish FA conducted economic activities by granting television rights to broadcasters.[84] It has been argued that the fact that regulatory bodies, such FIFA, often takes a share of their members' incomes is also a factor indicating that these entities have the status of firms.[85]

Furthermore, these bodies can also be regarded as associations of firms.[86] Section 4 of the Competition Act also applies to decisions by an association of firms. The term is not defined in the Act, and can be difficult to determine. Nevertheless, such a body must at least promote the interests of its members, which must be firms within the meaning of the Act.[87] However, the entity need not be a juristic person, and even bodies with public law status may qualify as an association of firms.[88] Furthermore, in contrast to the above, the entity need not carry on economic activities itself.[89] Therefore, even if a sports association cannot be considered a firm on its own (by not conducting any economic activities directly), its decisions are still governed by s 4 of the Act if its members (typically the domestic clubs or leagues) qualify as firms.

In E.U. jurisprudence, the CFI has recognised that sporting associations can be considered associations of undertakings as they are "groupings of football clubs for which the practice of football is an economic activity".[90] It has been argued, similar to the position in South African law, that the fact that these entities often exercise public functions do not affect their status as associations of undertakings.[91] In addition, international sporting federations, such as FIFA and

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[82] *Laurent Piau v Commission* para 71.
[83] Case IV/33.384 and IV/33.378 Distribution of package tours during the 1990 World Cup [1992] OJ L 326/31.
[84] Case T-46/92 [1994] ECR II-1039.
[85] Egger and Stix-Hackl 2002 *ECLR* 84.
[86] Vermeersch 2007 *JCER* 249.
[87] Sutherland and Kemp *Competition Law* 5.26.
[88] See, for example, *Venter v Law Society of the Cape of Good Hope* 24/CR/Mar12.
[89] Sutherland and Kemp *Competition Law* 5.26.
[90] *Laurent Piau v Commission* para 69.
[91] Egger and Stix-Hackl 2002 *ECLR* 85. See also *Commission v Italy* para 40.

the International Olympic Committee, can also be considered associations of associations of firms.[92]

Related to the issue of associations is the question of whether clubs, when forming a sports league together, are sufficiently integrated so as to warrant special treatment under competition law. There are two possible grounds on which a league (or similar competition structure) can rely on for exemption. The first argument is that the individual clubs have formed a single economic entity, and the second is their league is a form of joint venture. Each of these will be considered in turn.[93]

The basis for the single economic entity argument is to be found in s 4(5) of the Act, which provides that s 4(1) does not apply to any agreement between:

> "(*a*) a company, its wholly owned subsidiary … a wholly owned subsidiary of that subsidiary or any combination of them; or
>
> (*b*) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (*a*)."

The argument, for a league looking to escape liability under the Act, is that the league structure is a single unit comprising of individual clubs as firms within the meaning of paragraph (*b*). As a result, it is not capable of engaging in any prohibited restrictive practices under s 4(1). In order to examine whether there are any merits to this argument, the origin and rationale of the single entity defence must first be considered.

The defence appears to have originated in U.S. jurisprudence, where it was first held,[94] in *Copperweld Corp v Independence Tube Corp*,[95] that a parent company and its wholly owned subsidiary is incapable of conspiracy within the meaning of s 1 of the Sherman Act, because the parties have a "complete unity of interest", and that, in addition, the parent may assert full control of the subsidiary firm if the latter does not act in the former's best interest.[96] This

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[92] European Commission Decision No. 2003/778/EC (*COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League*), 2003 O.J. L 291/25 para 106.

[93] See also the discussion in Chapter 3 above.

[94] Before this, the U.S. courts have accepted, in principle, the possibility of intra-enterprise conspiracy. See *Kiefer-Steward Co v Joesph E Seagram & Sons* 340 US 211 (1951).

[95] 467 US 752 (1984).

[96] *Ibid* 771-772.

principle was later extended to firms which were not wholly owned as well, in cases such as *Aspen Title & Escrow Inc v Jeld-Wen Inc*[97] and *American Vision Centers v Cohen.*[98]

The concept has been further elaborated upon in E.U. jurisprudence, from where the term "single economic entity" originates. In *Imperial Chemical Industries Ltd v Commission*,[99] the court explained that a single economic entity is one where the individual firms do not independently decide their own conduct on the market, but carry out their instructions from the parent firm.[100] A further requirement was later added that the entities in such an organisation must be incapable of competing against each other.[101]

In the South African context, it has been argued that the exemption was explicitly stated in s 4(5) in order to provide firms in single economic entities the certainty of being able to co-ordinate their businesses without fear of possible contravention of the Act.[102] The Competition Appeal Court has held that activities such as joint purchasing and price-setting are precisely the type of activities that firms operating within a single economic entity should be able to conduct without competition law consequences.[103]

Unfortunately, "single entity" is an elusive concept, and there appears to be no clear test for determining whether an organisation qualifies as such an entity. The obvious starting point is the Act itself. Subsection (*b*) states that the entity should be similar in structure to those referred to in s 4(5) (*a*). In other words, it must be similar to the structure between a parent company and its wholly owned subsidiary or between wholly owned subsidiaries. While the comparison makes sense considering the origin of the single entity defence, its formulation is somewhat problematic, and has been criticised for focusing on the shareholding consideration rather than whether the organisation is a single entity.[104] One possible explanation is that legislators only intended to extend to the exemption to wholly owned companies and wholly owned firms that are not companies. However, it is submitted that this interpretation is too narrow, and does not reflect the rationale for the defence and its development in foreign jurisdictions.

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[97] 677 F Supp 1477 (D Orr 1987).
[98] 711 F Supp 721 (EDNY 1989).
[99] Case 48/69 [1978] ECR I-619.
[100] *Ibid* para 133.
[101] *Viho Europe BV v Commission* Case T-102/92 [1995] ECR II-17 para 47.
[102] Sutherland and Kemp *Competition Law* 5.39.
[103] *Loungefoam (Pty) Ltd v Competition Commission* 102/CAC/Jun10 para 65.
[104] Sutherland and Kemp *Competition Law* 5.43.

It has been argued, correctly it is submitted, that the determinative factor in such cases should the actual economic integration between the individual firms, rather than the level of shareholding.[105] The parties' business activities, management structure and flow of funds are all possible indicators of such integration.[106] However, as mentioned above, the firms must act with complete unity, and that simply sharing common economic interests is not sufficient.[107] It is submitted that, similar to the position in E.U. law, the constituent firms should be incapable of competing against each other.

For the purpose of a sports league, it is submitted that the individual clubs remain separate firms, and that the league should not be regarded as a single entity. Although the competition requires the cooperation of all the teams in order to function, and that decisions impacting the league are usually made with input from all the member clubs, there is not sufficient integration between the teams to justify an exemption under s 4(5).[108] In particular, the individual clubs are capable, and do, compete against each other. Here, competition does not refer to the on-field contest within the context of a championship, but rather economic competition "off-the-field". The manner in which clubs compete for the transfer of talented athletes has been described as an instance where the individual clubs display and pursue their own interests.[109] Other examples include merchandising and sale of broadcasting rights, where the gain of one team is usually at the expense of another. As foreign case law suggests, these actions should be regarded as agreements between firms or decisions by associations of firms, rather than an action carried out by a single entity.

However, this does not mean that a sports league can never constitute a single entity. For example, the football teams in the Major League Soccer were held to be sufficiently integrated so as to form a single entity.[110] Recently, SA Rugby announced that South Africa's Super Rugby franchises will implement structural changes in order to enable more centralised decision-making.[111] Under the new system, teams will be more closely integrated, although this

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[105] *Ibid* 5.41-5.42. However, the authors did concede that it would be difficult to find that a single economic entity exists if the parent firm has less than 50% of the voting rights in the subsidiary firms.

[106] *Ibid.*

[107] To illustrate, even members of an anti-competitive cartel can share common interests, but a cartel cannot be described as a single entity. See *ibid* 5.42.

[108] Egger and Stix-Hackl 2002 *ECLR* 86.

[109] *Ibid.*

[110] See *Fraser v Major League Soccer* F.3d 47 (2002) and the discussion in Chapter 3 above.

[111] L Burnard "Drafting on the cards for SA's Super Rugby franchises?" *News 24* 09 December 2016 http://www.sport24.co.za/Rugby/SuperRugby/drafting-on-the-cards-for-sas-super-rugby-franchises-20161209 (accessed 09 December 2016).

does not necessarily indicate the existence of a single entity. However, the governing body has expressed its intention to introduce further changes thereafter in order to reduce competition in off-field matters.[112] Depending on the eventual degree of integration, it is not impossible to imagine the *Major League Soccer dicta* being applied to rugby in the future.

Sports leagues may also argue that they are a special form of joint venture, and deserve special consideration because of that. However, it should noted that, unlike single entity defence, which is explicitly stated in s 4(5) (*b*) as a complete defence to restrictive horizontal practices, the Act makes no mention of "joint venture" as a possible consideration. Therefore, if the status of being a joint venture can be raised as a defence at all, it can only be applied during the rule-of-reason test in order to determine whether a conduct is, on a balance, pro-competitive.[113]

The next issue to consider is whether individual athletes may be regarded as firms within the meaning of the Act. As mentioned above, the definition of the term under s 1 explicitly includes "a person". Therefore, individuals who engage in economic activities will not be exempt from the application of the Act merely because they are natural persons. For example, in the sporting context, it is submitted that representatives (such as agents) of athletes and coaches will qualify as firms in their individual capacities. This is because they conduct economic activities when they receive remuneration for representing the financial interests of their clients.[114] The exception to this is where the individuals are employees of an agency or similar organisation, in which case it is the organisation that ought to be considered the relevant firm.

The question of whether the same conclusion can be made regarding individual athletes and coaches is somewhat more complex. There are two issues that need to be considered here. The first issue is whether these individuals are engaged in economic activities at all, and the second issue is whether individual sportspersons employed by professional clubs can be regarded as firms in their own capacities.

Regarding the first issue, it is submitted that the approach adopted above with respect to clubs should also be applied to individual athletes and coaches. In other words, one should accept

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[112] *Ibid.*

[113] See the discussion on the relevance of joint-venture arguments in Chapter 8.

[114] See the CFI and ECJ judgments in the E.U. case of *Laurent Piau v Commission* [2005] ECR II-209 and *Laurent Piau v Commission* [2006] ECR I-37 respectively, where the issue of football agents' regulation was considered. In particular, the CFI held, at para 6, that the activities of a football agent are economic, and not specific to the nature or international organisation of the sport.

that these people can carry out both economic and non-economic activities, and that each activity ought to be considered separately. It is arguable that an athlete is performing purely sporting activities when he or she participates in the actual sport competition, as is a coach when he or she is training the athletes. However, it is submitted that a better view may be that as these activities are performed in the course of the athlete's job, for which he or she receives remuneration in exchange, they are economic in nature.[115] In any case, there is no doubt that when these individuals are involved in contractual negotiations with their clubs or sponsors, they are clearly conducting economic activities.[116]

The second issue, the employee-status of the individual athletes and coaches, is important for two reasons. Firstly, the Competition Act excludes collective bargaining (within the meaning of s 23 of the Constitution) and collective agreement (within the meaning of s 213 of the Labour Relations Act[117]) from its scope.[118] Therefore, conduct involving athletes or coaches and their employer-clubs will not be subject to the Competition Act if they constitute either collective bargaining or collective agreement.

Secondly, for the purpose of s 4, the Act states that the practices prescribed under the section are only prohibited if they are between parties in horizontal relationships.[119] Section 1, in turn, defines a "horizontal relationship" as a relationship between competitors. On the other hand, s 5 only applies to agreements between parties in vertical relationships.[120] A "vertical relationship" is in turn defined as one that is between a firm and its suppliers, customers or both.[121] As discussed in Chapter 4 above, according to *International Quality & Productivity Centre (Pty) Ltd v Tarita*,[122] employers and employees are not "competitors" within the meaning of the Competition Act, and that although a vertical relationship does exist between them, it is probably not one governed by s 5 of the Act.[123]

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[115] See also *Deliège v Ligue francophone de judo et disciplines associees e.o.* Case C-191/97 [2000] ECR I-2549 paras 56-57, where it was held that athletes taking part in international competitions do perform an economic activity, even when they receive no remuneration in exchange.

[116] In the case of contractual negotiation with employer-clubs, however, it should be noted that these situations are likely to be governed by the Labour Relations Act 66 of 1995 rather than competition law. See ss 3 (1) (*a*) and (*b*) of the Competition Act.

[117] Act 66 of 1995.

[118] Sections 3 (1) (*a*) and (*b*) of the Competition Act.

[119] Section 4(1) of the Act.

[120] Section 5(1) of the Act.

[121] Section 1 definition of "vertical relationship".

[122] [2006] JOL 18294 (W).

[123] *Ibid* para 22. However, there is some doubt as to whether the court was competent to make such a finding.

As a result, sportspersons will not be considered "firms" within the context of their employment relationships. However, it is submitted that they are still subject to the Act when they conduct businesses in their own capacities. For example, it has been argued these individuals are pursuing their independent interests when they conclude personal sponsorship agreements.[124] Athletes participating in individual (as opposed to team) sports, such as golf, tennis and athletics, are also unaffected because they are not employees. Furthermore, conduct between, or concerning, clubs and their employed athletes or coaches may still be subject to s 4 if they also constitute horizontal agreements between clubs or decisions by an association of clubs, provided that they are not the subject of collective agreement or bargaining.

5.3 Objects of prohibited practices

In order to determine which, if any, provision of Chapter 2 of the Act is applicable in a given scenario, the conduct itself must meet certain section-specific requirements. Section 4 applies to three types of conduct, namely (1) agreements between firms in horizontal relationships, (2) concerted practices by firms in horizontal relationships, and (3) decisions by associations of firms in horizontal relationships.[125] Section 5 applies to agreements between parties in vertical relationships.[126] Lastly, ss 8 and 9 apply to actions of firms which are dominant in their markets and meet the threshold requirements under the Act.[127]

5.3.1 Jurisdictional elements under s 4

Section 4(1) applies when "[a]n agreement between, or concerted practice by, firms or a decision by an association of firms … if it is between parties in a horizontal relationship" is present. According to the definition of the term in s 1(1), a "horizontal relationship" is one between competitors. The CAC has regarded firms as competitors when they "compete in the same market in respect of the same or interchangeable or substitutable goods or services".[128] Therefore, it may be necessary to first define the relevant market where the firms' competitor status is not self-evident.[129] For the purposes of determining a horizontal relationship, it is

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[124] Vermeersch 2007 *JCER* at 249.
[125] Section 4(1) of the Act.
[126] Section 5(1) of the Act.
[127] Sections 6-7 of the Act.
[128] *American Soda Ash Corporation v Competition Commission* 12/CAC/Dec01 para 24.
[129] *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* 68/IR/Jun00 para -61.

submitted that the market definition should not be too narrow, and should account for parties who are potential competitors,[130] especially when an act of market division is alleged.[131]

The existence of a horizontal relationship clearly depends on the facts of each case. Nevertheless, some general remarks can be made in the context of sport. The competition between professional clubs has already been examined above. It should be noted that clubs can also compete with other sports entities. For example, many league organisers sell the collective media rights of sports events on behalf of their member clubs. The clubs are then either barred from selling individual rights, or permitted to do so subject to certain limitations.[132] In these cases, it is submitted that the clubs should be regarded as potential competitors to the leagues.

League organisers also compete in other sports-related markets, for example, the market for sponsorships. In addition, different sports leagues may also compete against each other when selling their respective broadcasting rights.[133] At the demand end of this market are the broadcasters of sports contents. It is submitted that these companies must also be construed as competitors, or at least potential competitors, provided that they would be competing for the sports media rights but for any external restrictions imposed.[134]

The type of cooperation between competitors is also relevant under s 4(1). As mentioned above, the section requires the existence of an agreement or concerted practice involving parties in a horizontal relationship, or a decision by an association of such parties.[135] The first form of cooperation, an agreement, includes "contract, arrangement or understanding, whether or not legally enforceable".[136] It is clear that this description is wide-ranging and non-exhaustive. In *Netstar (Pty) Ltd v Competition Commission*,[137] the following definition was provided:

> "[An] agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding,

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[130] See the discussion on the meaning "potential competitors" in Chapter 4 above.

[131] *Commission v United South African Pharmacies* 04/CR/Jan02 at 8.

[132] Competition Commission "Comments on Discussion Paper" para 7.5.2.8.

[133] However, this is dependent on the definition of the relevant market, particularly whether the broadcasting for that sport forms its own market.

[134] For example, a league may choose to deal exclusively with a particular broadcaster, instead of conducting a bidding process. See para Competition Commission "Comments on Discussion Paper" 1.15.5.

[135] It has been argued that the purpose of this requirement is to distinguish collusive conduct from genuine independent actions of firms. See Sutherland and Kemp *Competition Law* 5.11.

[136] Section 1(1) definition of "agreement".

[137] 97/CAC/May10.

> or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus."[138]

The consensus may be either tacit or verbal, and while it must create a sense of obligation among the parties, the agreement itself need not be legally binding.[139] The inclusion of "arrangement and understanding" further indicate that it has a wider meaning than the term is understood in contract law.[140] In fact, it may be difficult to conceive of a form of agreement that is not covered by the description in the Act.[141]

Whether a sports-related practice constitutes an agreement within the meaning of the Act depends on the facts of the case. In general, it can be remarked that the rules of sports leagues and governing bodies are open to the interpretation that they constitute arrangements between professional clubs.[142] This is because a club that does not abide by the provisions of the rules become liable to disciplinary sanctions, if other clubs lodge complaints about their non-compliance. Clearly, then, clubs consider themselves as being bound by these rules.

However, it may be preferable to regard the rules as decisions of associations of firms instead, provided that the requirements for the latter are met. This would more accurately reflect how the rules are adopted in practice, i.e. through decision-making bodies within league organisers and sports governing bodies.[143] At the same time, the distinction is only of academic interest, as it does not affect the jurisdiction of competition authorities to hear the matter.[144]

In addition to clubs, competing broadcasters may also decide, among themselves, which sports events each broadcaster may show. These schedules evidently constitute agreements within the

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[138] Para 25.

[139] J Neethling and BR Rutherford "Maintenance and Promotion of Competition" in WA Joubert and JA Faris (eds) *LAWSA* Vol 2(2) 2 ed (updated) (2003) para 242.

[140] Sutherland and Kemp *Competition Law* 5.21.

[141] *Ibid* 5.16.

[142] Egger and Stix-Hackl 2002 *ECLR* 85.

[143] For example, the governing statutes of FIFA are adopted at the FIFA Congress members vote on any amendments. Once adopted, members who voted against the documents are nonetheless bound. See Article 23 of the "FIFA Statutes" (2016) http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf (accessed 11 June 2016).

[144] Additionally, while an agreement cannot simultaneously constitute a concerted practice within the meaning of the Act, it can constitute a decision by an association of firms. Therefore, litigants are free to allege one in the alternative of the other.

meaning of s 4(1).[145] However, one should be mindful of possible vertical aspects in these agreements, as the seller of broadcasting rights (the sports leagues or individual clubs, as the case may be) may impose conditions on how games are to be divided into so-called "broadcasting packages".[146] In each case, it may be necessary to determine whether the agreement is horizontal or vertical in nature.[147]

The second type of cooperation envisaged under s 4(1) is concerted practice. The term is defined as "co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replace their independent action, but which does not amount to an agreement".[148] The wording here makes it clear that an act cannot simultaneously be an agreement and a concerted practice, although the distinction may be difficult to draw in practice.[149]

It appears that a meeting of wills is required in a concerted practice.[150] In order to distinguish this from consensus in an agreement, Sutherland and Kemp suggest that in some cases, an "apparent meeting of minds in the background" may suffice.[151] It is submitted that although the distinction is a sensible one, caution must be taken so as not to infer an apparent common will when the courses of conduct are, in fact, independent. Actual coordination, whether direct or indirect, must be established before reaching the conclusion that a concerted practice has occurred.[152]

In the sports context, it is arguable that the payment of transfer fees between clubs when a footballer moves to another team may be construed as a concerted practice. This is because although the payment of fees is no longer explicitly stated in the rules of FIFA, clubs have continued to do so anyway.[153] However, there is some doubt whether there is sufficient

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[145] Such agreements are not uncommon. See, for example, Premier League "Broadcasting schedules (United Kingdom)" (2016) https://www.premierleague.com/broadcast-schedules (accessed 18 June 2016).

[146] See, for example, the complex mechanism for determining how games are assigned to particular broadcasters in the U.S. National Football League at "NFL 2016 Regular Season Schedule" (2016) http://www.nfl.com/schedules (accessed 18 June 2016).

[147] Sutherland and Kemp *Competition Law* 5.10. See also *Competition Commission v South African Breweries Ltd* 129/CAC/Apr14 para 45.

[148] Section 1(1) of the Act.

[149] In particular, it may be difficult to distinguish when an act ceases to be a concerted practice, and becomes an "understanding" between the parties involved.

[150] Sutherland and Kemp *Competition Law* 5.30.

[151] *Ibid.*

[152] *Netstar (Pty) Ltd v Competition Commission* 97/CAC/May10 para 25.

[153] See FIFA "Regulations on the Status and Transfer of Players" (2016) http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransf

coordination involved, and whether it is not more appropriate to analyse the practice as an understanding between the parties. It is submitted that the latter view is preferable, as there is strong enough consensus among the clubs, who are provided with recourse should there be any disputes about the payment of fees.[154]

The last type of cooperation stated in s 4(1) is decision by an association of firms. The discussion above already considered which entities may qualify as associations within the meaning of the Act. The issue of what may constitute a "decision" remains to be examined. Although the term is not defined in the Act, it has been interpreted to include rules and regulations issued by associations of firms.[155] Similar to an agreement, the decision need not be legally binding, so long as the members regard themselves as being bound by its contents.[156] As mentioned above, conduct may constitute both an agreement and a decision by an association of firms.[157] However, it is not necessary for a decision to meet the requirements of an agreement.[158]

In the context of sports, conduct which may be regarded as decisions by an association of firms include the rules issued by sports leagues and governing bodies.[159] The constitutions and statutes of these bodies, which set out the rights and obligations of their members both towards the entities themselves and *inter partes*, will also constitute such decisions.[160] It should be noted that Schedule 1 of the Act provides exemptions for the rules of certain professional bodies. For present purposes, it suffices to say the Act does not list any sports-related occupations among the professions to which the exemption may apply.

In addition to rules, it is submitted that commercial decisions, such as sponsorship agreements and collective selling of media rights, may qualify under s 4(1) as well, depending on whether the revenue received is shared among members or retained by the association itself.[161] In the

erofplayersnov2016weben_neutral.pdf (accessed 21 September 2016). In South Africa, however, the payment of fees is specifically provided for under the Rules of the National Soccer League. See Chapter 9 below.

[154] See *ibid* Article 17.

[155] *Venter v Law Society of the Cape of Good Hope* 24/CR/Mar12 para 51.

[156] Sutherland and Kemp *Competition Law* 5.27.

[157] *Venter v Law Society of the Cape of Good Hope* 24/CR/Mar12 para 51.

[158] Sutherland and Kemp *Competition Law* 5.27.

[159] Egger and Stix-Hackl 2002 *ECLR* 85. See also *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied en Technische Unie* [2000] OJ L 39/1.

[160] *National Sulphuric Acid Association* [1980] OJ L 260/24.

[161] In the latter case, the association may be regarded as acting as a firm in its own rights, and the agreement with the sponsor or broadcaster may still be subject to s 5 of the Act.

latter case, the association may be regarded as a firm in its own rights, and its agreement with the sponsor or broadcaster may be subject to s 5 of the Act.

5.3.2 Jurisdictional elements under s 5

The jurisdictional requirements for prohibited vertical practices follow a similar structure to that of s 4, in that the section applies to a certain type of cooperation between parties in a certain type of relationship. Regarding conduct, it may be noted that the section applies to agreements, but not concerted practices or decisions by associations of firms. It has been suggested that the more inclusive approach towards horizontal practices is needed because cooperation between competitors tends to be more suspicious, while cooperation between parties in vertical relationships is necessary in business.[162]

A "vertical relationship" is defined as one between a firm and its suppliers, customers or both.[163] In other words, any supply relationship may be relevant for purposes of s 5. Examples of vertical relationships are too many to mention. However, some prominent ones are highlighted below.

Firstly, sports entities and individuals may be vertically related. For example, athletes supply their playing services to sports clubs, either as employees or independent contractors.[164] This is subject to the exception that agreements concluded in the context of collective bargaining are outside the scope of the Act.[165] A vertical relationship may also exist between clubs and league organisers. In the context of "league loyalty agreements", a number of foreign cases have viewed organisers or governing bodies as suppliers of competition organisation services.[166] Participating clubs are deemed to be suppliers of sports contests to the league. However, the nature of the league agreement should determine whether a supply relationship in fact exists in every case.

In addition to other sports entities, clubs also enter into vertical agreements with their commercial partners. These include sponsors and advertisers, and in cases where media rights are not sold on a collective basis, broadcasters as well. Similar agreements can also be entered into by individual athletes, league organisers and sports governing bodies.

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[162] Sutherland and Kemp *Competition Law* 6.11.
[163] Section 1(1) of the Act.
[164] See the discussion on the *NZRU* case in Chapter 7 below.
[165] See also 5.2 above.
[166] See the discussion on the *News Ltd* and *BCCI/Hockey India* cases in Chapters 6 and 7 below.

Lastly, clubs are also in a vertical relationship with their supporters. The latter include not only spectators that attend live sports events, but also fans who purchase official merchandise or pay "fan club" subscription fees. However, it should be remembered that the existence of vertical agreements does not necessarily indicate anti-competitive conduct. The ordinary nature of the examples listed here should illustrate this point.

5.3.3 Jurisdictional elements under ss 6-7

In addition to collusive conduct between firms, the Act also prohibits certain independent actions of dominant firms. The prohibited conduct is described under ss 8 and 9 of the Act, but the prohibitions only apply once the jurisdictional requirements under ss 6 and 7 are met. Section 6 relates to the threshold, based on a firm's assets or annual turnover, below which the provisions on abuse of dominance do not apply to that firm. Currently, the threshold amounts for both domestic annual turnover and domestic assets are set at R5 million.[167]

Whether a firm's turnover or assets are valued at or above the threshold is a question of fact.[168] It has been remarked that this is a rather low threshold, and that only a few dominant firms will be excluded due to the provision.[169] With respect to the most financially lucrative sports in South Africa, the threshold would not only be met by league organisers,[170] but most top-flight clubs as well.[171] Whether the commercial partners of sports entities meet the threshold requirement depends on the financial positions of each firm. It should be noted that MultiChoice, which is the exclusive broadcaster of a number of domestic and international sports events in South Africa, has an annual turnover of R35.7 billion, while its assets are valued at R23.6 billion, both of which exceed the Act's threshold.[172]

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[167] Determination of Threshold, GN 253, *Government Gazette* 22025, 01 February 2001.

[168] The method for calculating both amounts are published by the Minister of Trade, in consultation with the Competition Commission. See Schedule 1 *ibid.*

[169] Sutherland and Kemp *Competition Law* 7.11.

[170] See, for examples, NSL "PSL Annual Financial Statements for the year ended 31 July 2015" (2015) http://images.supersport.com/content/PSL_Financials_2014-15.pdf (accessed 16 January 2016) 82-83; and SA Rugby "Annual Report 2015" (2016) http://images.supersport.co.za/content/SA%20Rugby%20Annual%20Report%202015.pdf (accessed 31 June 2016) 42.

[171] See, for example, Transfermarkt "ABSA Premiership 16/17" (2016) http://www.transfermarkt.co.uk/jumplist/startseite/wettbewerb/SFA1 (accessed 31 June 2016). However, this does not mean that clubs will constitute dominant firms. That is determined under s 7.

[172] MultiChoice "Annual results announcement" (2016) http://www.multichoice.co.za/wp-content/uploads/2016/06/MultiChoice-South-Africa-Holdings-annual-results-announcement-31-March-2016.pdf (accessed 31 June 2016).

However, meeting the threshold is only the first step in the enquiry. Sections 8 and 9 only apply to dominant firms. According to s 7, a firm is dominant in a market if -

> "(a) it has at least 45% of that market;
>
> (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
>
> (c) it has less than 35% of that market, but has market power."

From the wording of the provision, it is clear that the dominance of a firm cannot be established until a relevant market is defined.[173] This is a question of fact, although it is not always easy to determine which market is relevant in a particular case. In general, however, this is dependent on the conduct complained of in question.[174] For example, if the alleged abuse is the charging of an excessive price by a broadcaster, then it is doubtful that the market would include the services of free-to-air broadcasters.

Because a firm may be dominant in one market, but possess no market power in another, the proper definition of the relevant market is especially crucial for purposes of ss 8-9. To use a further example, a competition organiser may be regarded as a supplier of sports entertainment services (to broadcasters, spectators) and a supplier of league organisation services (to clubs) simultaneously. While an argument can be made that the organiser competes with other sports bodies in the former market, it evidently has a monopoly in the latter if it is the only professional league for that sport.[175] The topic of relevant market(s) is discussed in 5.4 below.

Once the relevant market is identified, it is necessary to determine the firm's share in that market. In some cases, the market share may be self-evident due to the market definition. For example, if the relevant market is deemed to be the organisation of live professional football games in South Africa, and there is only one league organiser in the country, then that entity has 100% of the market.

In many cases, however, the market share can only be determined with reference to empirical evidence. In these scenarios, it may also be necessary to decide what constitutes relevant data.

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[173] *York Timbers Ltd and SA Forestry Company Ltd* 15/IR/Feb01 para 71.

[174] Sutherland and Kemp *Competition Law* 7.16.

[175] For example, PSL is the only professional football league is South Africa, but may compete with other domestic sports as well as international football competitions for viewership. Whether such competitions in fact occur depends on the substitutability of these products from the consumers' perspective.

In this regard, both the type of data and the time period from which they are obtained must be considered. The type of data appropriate in each case depends on the product or service in question.[176] Depending on how interchangeable the substitute products are, the number of units sold or revenue from sale may be the preferable indicator of market share.[177] Regarding the relevant time period, the data must cover a sufficient length of time to account for any unusual events, but also recent enough to ensure that they are relevant.[178]

Unless a firm has an at least 45% market share, it must further be determined whether that firm has market power.[179] This is defined as "the power of firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".[180] This definition shows that there are three grounds on which market power can be established.

The first of these grounds is that a firm has the power to control prices. This is discussed in 5.4 below in the context of market definition. For present purposes, it may be said that various factors have been used to establish this power, including the size of the firm relative to its competitors in the market, barriers to expansion and/or entry and the buying power (or lack thereof) of its customers.[181] The second ground is the power to exclude competition. This can be distinguished from the power to control prices, which refers to the ability of a firm to raise its own price. Exclusion of competition refers to the ability of a firm to raise the costs of its competitors, thereby reducing their ability to compete.[182]

The last ground is the power to behave independently of the firm's competitors, customers or suppliers. An example of this power may be the ability to restrict output, or reduce quality, of the product for a sustained period of time.[183] In the sports context, market power may exist where an organiser is able to restrict the organisation of a sporting event to once every four years, without having to worry about the possibility that similar events may be organised by competitors in the meantime.

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[176] Sutherland and Kemp *Competition Law* 7.24.

[177] See, for example, *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 para 78.

[178] Sutherland and Kemp *Competition Law* 7.25.

[179] In cases where the firm does have at least 45% of the market, that firm is assumed to have market power, and thus dominant. See s 7 (*a*) of the Act.

[180] Section 1(1) definition in the Act.

[181] Sutherland and Kemp *Competition Law* 7.30.

[182] *Ibid* 7.31. See also Neethling and Rutherford *LAWSA* Vol 2(2) para 244.

[183] Sutherland and Kemp *Competition Law* 7.30.

Whether market power exists must depend on the facts of each case, and in particular, the relevant market in question. Therefore, the next section discusses the topic of the relevant market.

5.4 Relevant markets in the sports context

The relevant market must be determined in each competition law matter. In some cases, it may even be necessary to conduct this enquiry before concluding whether the jurisdictional elements are present. In order to define the relevant market, both the product and the geographic markets must be identified.[184] The former includes all products which are sufficiently substitutable for the product under scrutiny so as to constrain the price of that product.[185] The latter includes all regions from where substitutable products can be sourced so as to constrain the price of the product under scrutiny.[186]

It appears that substitutability of the product and the ability of the substitutes to constrain prices are crucial. E.U. authorities have accepted that a product or service is substitutable if it possesses "characteristics [which] are particularly suited to satisfy constant needs" and it is "only to a limited extent interchangeable with other products or services".[187] As for whether substitute products are capable of constraining prices, the "SSNIP" test is frequently applied in the context of a "hypothetical monopolist" test.[188]

The "hypothetical monopolist" test can be described as a thought experiment whereby a group of suppliers (of substitutable products) are imagined to be a single entity. The test then asks whether the group, as a unified supplier, is capable of controlling the price of the product in question. The goal of the test is to find the group with the smallest number of suppliers that can achieve the price control. The range of products or services supplied by this group is deemed to be the relevant market.[189]

In order to determine whether the "hypothetical monopolist" can control the price of the product, the "SSNIP" test is used. This refers to a "small but significant and non-transitory increase in price", and a party that is capable of imposing such an increase without losing profit

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[184] Neethling and Rutherford *LAWSA* Vol 2(2) para 244.
[185] *Patensie Sitrus Bpk v The Competition Commission* 16/CAC/Apr02 paras 15–20.
[186] Sutherland and Kemp *Competition Law* 7.18.
[187] *L'Oréal v De Nieuwe AMCK* Case 31/80 [1980] ECR 3775 para 25.
[188] See, for example, *Patensie Sitrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 at 16--17.
[189] *South African Raisins (Pty) Ltd v SAD Holdings Ltd* 04/IR/Oct/1999 at 5.

is deemed to be able to control the price.[190] This, in turn, can be used to determine whether products of different suppliers are substitutable.

Substitutability is an important indicator of the relevant market in the sports context as well. There will be cases where the product or service in question is not interchangeable at all. For example, football clubs cannot substitute the services of football players with those of athletes from other sports.[191] Whether sub-markets exist for players playing in different positions (e.g. attackers and defenders) is less obvious. However, it appears that services of individual players are highly interchangeable, as clubs are content to replace departing players with others of similar skillsets.[192] An exception to this may be the truly elite players, who are regarded as among the best in their positions and cannot be easily replaced.

The difficulty of determining whether each sports league form their own distinct market was mentioned above. It is submitted that the market enquiry must take into account the actual conduct under investigation, rather than attempting to find a generalised answer. For example, a complaint about a sports team or league charging excessive ticket fees must focus on the extent to which spectators are willing to attend other live events, or alternatively watch the same event on television. It should be accepted that the relevant range of suppliers here will not necessarily correspond with the answer in an enquiry about the sports sponsorship market.

It should be emphasised that the above enquiry focuses on the extent to which consumers may switch to other products, and not whether any shift is likely to occur. In order to meet the "hypothetical monopolist" test, the number of consumers who are likely to shift to other products must be so great that an increase in the price would cause the hypothetical firm to be less profitable. In this regard, consumer preferences, and in particular, loyalty, are important considerations in the context of sport.[193]

However, consumer preferences and loyalty can only be established with empirical evidence.[194] Furthermore, the evidence in relation to preferences in one market cannot simply be transposed to another. Therefore, although most courts have preferred the view that each

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[190] *Patensie Sitrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 at 15-17. In practice, an increase of 5% in price for a period of one year is generally used as a starting point.

[191] It is submitted that this is the case in almost every sport, with the possible exception of rugby union and rugby league players, who can change from one sport to the other with relative ease, due to the similarity in the rules of the two sports.

[192] Egger and Stix-Hackl 2002 *ECLR* 87.

[193] See also Sutherland and Kemp *Competition Law* 7.21.

[194] *Ibid.*

sport constitutes its own market,[195] competition authorities should conduct their own enquiries before applying this in the South African context.

Although the relevant market cannot be determined without reference to the circumstance of each case, a general framework may be useful in illustrating how a particular market may fit within the sports industry. According to a Working Paper before the European Parliament,[196] the industry of sport can be divided into two sectors, namely the "sport activity producing sector" and the "sport supporting sector".[197]

The sport activity producing sector includes all firms that produce the actual sports events. These include not only the sports teams and athletes mentioned above, but also providers of recreational sports services, for example fitness clubs and state departments (in the context of building public parks and sports facilities).[198] The sport supporting sector includes firms that either directly support the production of sports activities, such as sports governing bodies and league organisers, or provide products or services that are related to sports activities, such as sports goods manufacturers and broadcasters.[199]

Regarding the actual sports activities, it has been suggested that they consist of three segments. The first segment is associated with amateur and youth sport. The focus here is "participation", as health benefits and social integration are the primary objectives of this segment. The second segment relates to the sporting performances of participants, which can include both amateur and professional athletes. The focus in this segment is "winning", as athletes and teams strive to attain the best possible sporting outcomes through training and preparation. The last segment involves commercialised sport. The focus in this segment is "entertainment", and it applies to any sport that draw sufficient fanbase to be able to turn their sporting performances into revenue.[200]

This model illustrates how the different social and economic functions of sport, discussed in Chapter 2 above, relate to each other. One should not be over-reliant on the distinctions between the segments, however. In particular, the competitive spirit of the second segment can

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[195] See the cases discussed in the following two chapters.

[196] European Parliament, Committee on Internal Market and Consumer Protection PE 358 378: *Working Paper on Professional Sport in the Internal Market*.

[197] *Ibid* 26.

[198] European Parliament *Working Paper on Professional Sport 26.*

[199] *Ibid.*

[200] *Ibid.*

be witnessed in both amateur and commercial sports as well. Even the participation of amateur athletes can be professionally organised, and their performances may be equally capable of commercial exploitation.[201]

Similarly, while only the commercial aspects of sport are subject to competition law, competition authorities should not be solely concerned with these elements. As the Working Paper mentioned above pointed out, amateur participation and sporting performance affect the sector's overall ability to commercially exploit their products. At the same time, the fruits of commercial exploitation are also used to sustain and promote the non-commercial segments of the sector (the so-called "solidarity principle").[202] Whether courts are permitted to take these factors into account is the focus of the remaining chapters.

[201] See the discussion on the *NCAA* case in Chapter 6.

[202] European Parliament *Working Paper on Professional Sport* 29.

CHAPTER 6

SPORTS AND *PER SE* PROHIBITIONS UNDER FOREIGN JURISDICTIONS

So far, it has been argued that competition law should apply to sports-related practices. When doing so, however, authorities must also consider whether non-economic sporting justifications are permissible. This presumes that these arguments, if accepted, could play a decisive role during the rule-of-reason enquiry. But not all conduct is tested under the rule of reason. This raises the question: what happens if the practice is prohibited *per se* under the Competition Act?

The answer to this question may appear obvious at first. If a conduct is *per se* prohibited, then it cannot be redeemed by any argument, sporting or otherwise. This reasoning was applied in the Australian case of *News Ltd v Australian Rugby League Ltd*,[1] discussed in 6.1 below. Some jurisdictions have preferred a more flexible approach. 6.2 examines two U.S. cases, in which the courts decided to apply the rule-of-reason test to otherwise *per se* prohibited practices. A sports-related *per se* exception also exists in Canadian competition law. As mentioned in Chapter 3, this exception is unique, in that it is explicitly provided in the statutes, and it is discussed in 6.3.

6.1 *News Ltd v Australian Rugby League Ltd*

Australian competition law issues are governed by the Competition and Consumer Act 2010, which replaced the Trade Practices Act 1974 ("TPA"). However, common law principles relating to restraint of trade remain relevant, and their concurrent operation is explicitly provided for under s 4M of both the new and old Acts.

The following discussion focuses on the landmark case of *News Ltd v Australian Rugby League Ltd*. The contrasting findings of the trial court and the appeal court in this case illustrate how difficult it is to account for the uniqueness of sport, particularly when *per se* prohibitions are involved.

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[1] [1996] ATPR 41-521.

In this case, the Applicant (News Ltd) sought to establish a new rugby league competition to compete with the existing Australian Rugby League ("ARL"), by offering the latter competition's clubs admission to its proposed "Superleague". The ARL responded by seeking commitment from its clubs, each of which was asked to sign a number of "Commitment and Loyalty Agreements" with the league. The agreements contained assurances from individual clubs that they would not join the Superleague or any other competing rugby league competition. In exchange, the ARL granted each club admission for a period of five years, whereas annual application for admission was required previously.

This led to News Ltd filing suit against the ARL, alleging that the agreements contravened the (then) Trade Practices Act on three grounds, namely that (1) the agreements contained exclusionary provisions, as prohibited under s 45(2) (*a*) (i) of the Act; (2) they had the purpose of substantially lessening competition, as prohibited under s 45(2) (*b*) (ii) of the Act; and (3) the ARL abused its market power through the agreements, by preventing entry into the rugby league market. In response, the league also made several cross claims based on contract and trademark laws.

In the trial court, Burchett J focused on the issue of market abuse, which required a definition of the relevant market. The court found against News Ltd's contention that rugby league is a distinct market separate from other sports in Australia,[2] and held that the relevant market included at least the sports of rugby union, football (soccer), Australian rules football and basketball.[3] It should be noted that the trial court's market findings emphasised on the existence of "peripheral fans" (i.e., those who occasionally watch the sport), as opposed to "core fans" who are dedicated to the sport.[4] This approach has been criticised for confusing product substitutability with functions of a product.[5] Therefore, although the issue of the relevant market was not considered on appeal, it is submitted that Burchett J's reasoning should not be interpreted as an endorsement of the multi-sport market definition in general.[6]

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[2] *News Ltd v Australian Rugby Football League Ltd* [1996] ATPR 41-466 ("*News Ltd II*") para 76.

[3] *Ibid* para 153.

[4] *News Ltd v Australian Rugby Football League Ltd* (1995) 58 FCR 447 ("*News Ltd I*") at 499-500.

[5] D Hazard "The Trade Practices Act, equity and professional sport: *News Limited and Ors v Australian Rugby Football League Limited and Ors*" (1997) 19 *Sydney Law Review* 95 at 110.

[6] *Ibid* 112. However, see the remarks of the High Court, albeit *obiter*, in *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45 para 5.

It appears that the sporting nature of the case also played a role in the court's market findings. Regarding News Ltd's contention that the ARL behaved independently of market forces, which would have indicated that the sport was a single market, the court remarked:

> "Like … those in charge of a church hospital, the board of the League is motivated in large part by considerations other than the pursuit of profit. It is concerned with the preservation and enhancement of the traditions of the game … the Good Samaritan delayed his business, and expended some of his funds, to serve a higher duty."[7]

As a result of the widely-defined market, the trial court found that the ARL did not have the significant market power required under s 46 to carry out market abuse.[8] The court then turned its attention to the alleged exclusionary provision within the Commitment and Loyalty Agreements.

According to s 4D of the TPA, an exclusionary provision is one that is found in an agreement, arrangement or understanding between two or more competitors, and furthermore has the purpose of preventing, restricting or limiting:

> "(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
>
> (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions."

Agreements containing exclusionary provisions are prohibited *per se* under s 45(2) of the TPA.[9] This can be contrasted with the position under the South African Competition Act, where agreements between competitors are only prohibited outright in the instances prescribed under s 4(1) (*b*) of the Act. Therefore, an act of group boycott, which was the alleged exclusionary conduct in *News Ltd*, would have been considered under the rule-of-reason

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[7] *News Ltd I* 481.

[8] *News Ltd II* para 261.

[9] *News Ltd v Australian Rugby League Ltd (No 2)* [1996] ATPR 41-521 para 580. It should be noted that agreements containing exclusionary provisions are prohibited *per se* in the sense that they cannot be justified by pro-competitive gains. However, it must still be established that a purpose to restrict supply or acquisition of products and/or services exists. See C Beaton-Wells and B Fisse *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011) 102-103.

enquiry in South Africa, or alternatively under the common law doctrines relating to unlawful competition.[10]

It is worth noting that the Applicant based its case on exclusionary acts among the clubs, as competitors, rather than vertical exclusionary conduct between the League and its clubs. It alleged that three forms of "horizontal" exclusions existed, namely the clubs' competition to supply services to competition organisers (the ARL), their competition to supply services of players, and lastly, their competition to acquire the services of competition organisers.[11]

Dealing with these separate allegations required the court to decide on a number of common issues, including whether the Commitment and Loyalty Agreements constituted an "agreement, arrangement or understanding" within the meaning of the TPA, whether the clubs were competitors in the relevant markets, whether the agreements had the purpose of substantially lessening competition in these markets, and lastly, whether the court has a discretion to refuse grant relief even if the violations are established.

The trial court decided all four issues in favour of the ARL. Its reasoning on the last three issues is particularly interesting for present purposes. Regarding the first issue, Burchett J held that because the agreements were concluded by the ARL with each club separately, they could not be regarded as agreements among the clubs themselves.[12] Each club could only hope that the other clubs would abide by the documents, and that an agreement could not be inferred.

The second issue that the court had to decide was whether the clubs were competitors in the relevant markets. It should be noted that the markets here are different to the one that the court had defined under the abuse of dominance enquiry. Here, the markets refer to those for the supply of clubs' services to competition organisers, the supply of professional players, and the acquisition of competition organisers' services.

The trial court held that the clubs were not competitors in these three markets, but were performing joint activities instead.[13] Interestingly, the court placed considerable reliance on the *NCAA v Board of Regents*[14] judgment discussed in 6.2 below, despite having earlier dismissed

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[10] P Sutherland and K Kemp *Competition Law of South Africa* Issue 20 (2000) 5.86; J Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed (2008) 287.

[11] *News Ltd (I)* para 181.

[12] *Ibid* para 257. It is submitted that this reasoning would not preclude a finding that an agreement exists under the South African Act.

[13] *Ibid* para 188.

[14] 468 U.S. 85 (1984).

the court's reasoning regarding relevant markets in that case. Burchett J quoted, with approval, the majority judgment at 101, where the U.S. Supreme Court remarked that "some activities can only be carried out jointly. Perhaps the leading example is league sports".[15] Burchett J noted that this necessity of cooperation led the Supreme Court to refuse to prohibit the conduct *per se*, and conduct a rule-of-reason enquiry instead.[16] In particular, the court approved the dissenting judgment in that case, where, at 131, Rehnquist J held that the teams constituted a joint venture in their marketing of college football.[17]

The court found that similar to the college teams in *NCAA*, clubs in the ARL were engaged in joint activities in the relevant markets. It held that this meant the clubs were neither competing to supply teams or acquire a competition organiser,[18] nor in competition to provide services of players.[19]

The third issue was whether the agreements had the purpose of substantially lessening competition. Burchett J held that this was not the case, because the true purpose of the agreements was to preserve the league's quality "through the joint participation of all the clubs".[20] The learned judge explained that the operation of the league required that its top teams be secured for the long term, and that their participation would not end abruptly at the end of a season. Although admission was previously granted on an annual basis, the new agreements to tie down the clubs for five years were nevertheless reasonable. This is because the long term maintenance of the league was in doubt for the first time, following the proposal of the Superleague. The lead times involved in preparing a new team in the event that one of the existing clubs chose to leave the ARL necessitated the longer admission period. In the end, the Commitment and Loyalty Agreements were summed up to be "commercially proper, reasonable, and [that] no proscribed purpose can be inferred".[21]

The last issue considered by the trial court was whether the relief claimed by the Applicant was a discretionary one. News Ltd had asked the agreements to be declared void *ab initio*, in order to avoid the cross-claims made by ARL based on inducement of contractual breach.[22] The court

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[15] Quoted at *News Ltd (II)* para 189.
[16] *Ibid* para 190, discussing *NCAA* 117.
[17] Para 191.
[18] Para 197.
[19] Para 216.
[20] Para 234.
[21] *Ibid.*
[22] Para 263.

held that it could only set aside an agreement with retroactive effects under s 80 of the TPA, which allowed a court to exercise a discretionary power to grant such relief.[23]

However, Burchett J held that even if News Ltd had established the existence of exclusionary provisions, he would have exercised his discretion to refuse the remedy. The learned judge attributed this to the manner in which the Applicant had behaved during the events leading up to the lawsuit. The court held that News Ltd's attempt to lure clubs and coaching staff away from the ARL amounted to "self-help in extreme form".[24] Granting the relief would be in furtherance of News Ltd's unlawful activities, and a "mockery of the rule of law".[25] Therefore, the trial court held that had it decided the previous three issues all in the applicant's favour, it still would have refused the remedy sought.

As a result, News Ltd appealed the matter before the Full Federal Court. Unlike the trial court, the issue of relevant market (and therefore the question of market power misuse) was not considered at all on appeal.[26] Instead, the court dealt primarily with the issues relating to exclusionary provisions under s 45. Its findings are discussed below, to the extent that they are relevant for the purposes of this thesis.

As mentioned above, the trial court's first major finding was that the clubs were not in competition in the relevant markets, because they were part of a joint venture. On appeal, Lockhart, Von Doussa and Sackville JJ did not explicitly dismiss the finding on the joint nature of the clubs' activities, but expressed doubts over its significance.

The court discussed the implication of the clubs' and the ARL's joint venture primarily within the context of a non-competition law issue. The ARL alleged that the clubs owed fiduciary duties towards the league (and the other clubs) as part of its cross-claims against News Ltd. The court recognised the necessity of cooperation among the clubs as part of their joint venture, but held that the they were nevertheless within their rights to conduct their business in their own interests, even if these interests conflicted with those of other clubs.[27] As a result, the court

[23] Para 264.
[24] Para 272.
[25] *Ibid.*
[26] Para 28.
[27] Para 551.

found that there was no relationship of mutual trust and confidence necessary to incur fiduciary obligations.[28]

The court repeated these remarks in the context of whether the clubs were in competition with one another. It was held that, despite the joint nature of their activities, the individual clubs and the ARL itself all had their own commercial interests.[29] This was demonstrated by the fact that the clubs vigorously competed for, *inter alia*, spectators, sponsorships and television viewers.[30] These forms of commercial competition were directly related to competition in the markets in question as well, as the clubs had to satisfy the ARL's requirements for financial viability in order to gain admission into the league.[31] As mentioned above, admission was granted on an annual basis prior to the clubs' execution of the Commitment and Loyalty Agreements. Therefore, the clubs' commercial competition had an immediate impact on their ability to meet the league's financial viability requirements.[32]

Furthermore, the court found, notwithstanding the effect of economic competition, that the clubs were directly competing for the services of the league as a competition organiser. This was indicated by the fact that each club had to apply for admission annually, and the success of their application in one year did not guarantee their entry in the future.[33] The Commitment and Loyalty Agreements changed the period of admission to five years, and the court remarked that this was seen as a major concession by the league.[34] It was also noted that the league and the clubs had considered, on several occasions, the need to reduce the number of teams in the competition.[35] This meant that at least some of the clubs were in competition to retain their places in the league, and, at the same time, competing for the services of News Ltd as an alternative competition organiser.[36]

The second issue that the court of appeal considered was whether the agreements had a substantial purpose of lessening competition in the markets in question. As discussed above, the trial court found that the purpose of the Commitment and Loyalty Agreements was the

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[28] Para 550.
[29] Para 617.
[30] *Ibid.*
[31] Para 619.
[32] *Ibid.*
[33] Para 621.
[34] Para 623.
[35] Para 624.
[36] Paras 627-628.

preservation of the rugby league competition, which was a commercially reasonable objective. The lessening of competition was not seen to be a substantial purpose.

On appeal, the court did not dismiss Burchett J's finding that the parties to the agreements had the legitimate intention to protect the quality of the league. However, it was held that the trial Judge had applied an overly-narrow definition of the word "substantial". The court found that the wording of the agreements and their context clearly showed that they were concluded in order to, firstly, prevent the clubs from supplying rugby league teams to any other competition organiser besides the ARL; and secondly, prevent clubs from acquiring the services of competition organisers other than the ARL.[37]

This underscored the more commercial characterisation that the court attached to the parties' conduct, compared to the trial court's judgment. [38] It held that whatever other objectives the clubs and the ARL may have had in entering the agreements, their purposes had to be considered "substantial" within the meaning of the TPA, even if they were not the predominant ones.[39] This, in turn, was sufficient to satisfy the anti-competitive requirement of an exclusionary provision under s 45.

The other requirement that had to be satisfied was the existence of an "agreement, arrangement or understanding" among the clubs. For present purposes, it suffices to say that the court of appeal did not agree with the trial court's finding that the agreements signed by the clubs fell short of the standard. The court highlighted the fact that the clubs executed what were essentially identical documents in quick succession of one another, at the request of ARL representatives.[40] This led to the inference of a common understanding among the clubs that they were being joined in their undertaking not to participate in the Super League.[41]

The last issue that the court had to decide was whether it had any discretionary power to refuse remedies under ss 80 and 87, as Burchett J suggested during the initial trial. The court held that the sections in question did not alter the ordinary rule, which was that if an agreement contravened s 45(2) of the TPA, it must be void.[42] Due to the section's *per se* nature, a court did not have any discretion in this regard, and that an applicant who established his claims under

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[37] Para 668.
[38] Hazard 1997 *Sydney L. Rev.* 98.
[39] Para 669.
[40] Para 654.
[41] Para 656.
[42] Para 683.

the Act was entitled to relief.[43] As a result, the court reversed the decisions of the trial Judge, and held the Commitment and Loyalty Agreements to be void *ab initio*.[44]

The outcome of the *News Ltd* case subsequently led to another legal dispute. The Super League, established in the aftermath of the Full Federal Court judgment, eventually merged with the ARL to form the National Rugby League.[45] It was agreed that the number of franchises would be reduced to fourteen over a three-year period. Following a selection process, the organisers eventually decided not to renew the admission rights of the South Sydney District Rugby League Football Club ("South Sydney").[46]

The club challenged the decision, and alleged that the agreement to reduce franchise numbers amounted to an exclusionary provision within the meaning of s 45. The argument was eventually dismissed by the Australian High Court, who held that as the league organisers had conducted a non-discriminatory suitability assessment, according to which South Sydney was ranked last, the exclusion could not be said to have been directed towards the club in particular.[47]

The *South Sydney* case is also notable for the court's pronouncement that a subjective test should be used to determine the purpose of an agreement.[48] Although the correctness of this approach has been subject to much debate, it is not necessary to set out the arguments for present purposes.[49] It should be noted that the High Court explicitly stated that the organisation of sporting competitions was a commercial activity.[50] It was clear that sports entities are not exempt from the TPA's *per se* prohibitions, even though the facts *in casu* did not establish an exclusionary provision. While the two *News Ltd* judgments were not considered here, the High Court had evidently endorsed the characterisation approach adopted by the Full Federal Court in that case.

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[43] Para 685.

[44] Para 695.

[45] C Davies "Case note: *Souths v News Ltd*" (2001) 8 *James Cook University Law Review* 121 at 121-122.

[46] *News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45 ("*South Sydney*") para 8.

[47] *Ibid* paras 26 and 217-218.

[48] *Ibid* paras 18.

[49] See, for examples, S Ross "Some outside observations on overly restrictive agreements and the Souths rugby case" (2004) 12 *Competition and Consumer Law Journal* 83; and C Davies "*News Ltd v South Sydney District Rugby League Football Club Ltd*: the High Court Decision" (2003) 10 *James Cook University Law Review* 116. See, also, *Rural Press Limited v ACCC* (2003) 216 CLR 53 regarding whether "particularity" is a requirement under the TPA.

[50] *South Sydney* para 2.

Returning to the *News Ltd* case, a few observations can be made about how the two courts approached the unique nature of sports leagues. Firstly, it is worth noting that both courts recognised that the operation and maintenance of a league competition necessitates cooperation among the clubs in various matters. The trial court, in particular, referred to the *NCAA* judgment, where the court attributed the unique dilemma of sports leagues from an antitrust law perspective to the fact that individual clubs depend on the survival (and success) of other clubs in the league. They must reach agreements with one another over a number of issues in order to enable the product (league competition) to exist at all, even if the agreements may restrict competition among the parties. Two questions arise from this dilemma: in what circumstances can such cooperation be considered legitimate, and how are courts to treat legitimate justifications?

The justification presented before the courts in *News Ltd* was that the Commitment and Loyalty Agreements were essential to the existence of the league itself. Unlike the majority of cases discussed below, where courts had to consider whether the conduct under scrutiny had enhanced the efficiency of a league or sporting body, here it was argued that without tying down the clubs through the contracts in question, the league would lose a substantial number of its teams to a potential rival competition. As a result, the league would not have sufficient participants, nor would it have adequate time to prepare new teams.

The importance of protecting this interest is obvious. Without a sufficient number of competing teams, the league cannot be conducted at all. And if the competition is frequently forced to source new teams at short notice, it is difficult to see how the league can maintain its identity and reputation with spectators. Note that stability does not denote absolute consistency here, as most sports leagues operate with a system of promotion/demotion, which allows for some movement of teams between the different hierarchies of competitions. However, even in such cases, the structure of a league would be severely undermined if teams could choose to leave the competition at will.

The trial court emphasised the importance of this in several parts of its judgment. It led Burchett J to conclude that the purpose of the agreements was commercially reasonable. On appeal, the court did not disagree with the legitimacy of the parties' interest in maintaining the operation of the league. As the facts show, a number of ARL clubs, under the impression that the Commitment and Loyalty Agreements were unenforceable, did choose to leave the competition and join the News Ltd's Super League instead. In fact, as a result of the court

declaring the agreements to be invalid, ARL soon merged with its would-be rival, and formed the new National Rugby League.[51]

However, even if the above justification is legitimate, it does not necessarily mean that its associated conduct will be deemed lawful under competition law. The necessity and importance of a purpose must be considered in its anti-competitive scope as well. *News Ltd* offers several alternatives as to how this may be done.

The trial court attempted to bypass the issue altogether, by holding that the agreements were necessary to the clubs' joint activities. As members of a joint venture, the clubs were incapable of competing against each other. However, as the Full Federal Court pointed out, this was a clearly erroneous approach, as the clubs could, and indeed did, compete against each other, even within the context of league membership. This is consistent with the Australian High Court's *dictum* that being a "joint venture" has no legal significance on its own.[52] As argued in Chapter 5, a similar position exists under South African competition law.

Therefore, it is submitted that the Full Federal Court's approach, which focused on the actual conduct between parties rather than their formal relationship, is to be preferred.[53] The trial court's conclusion could only be justified if the ARL were to be considered a single entity comprising of all the clubs. However, due to the "vigorous competition" among the clubs in a number of off-field areas, it is evident that they were not a single entity.

The trial court's approach was partly influenced by the U.S. Supreme Court's decision in *NCAA* to apply the rule-of-reason test to an otherwise *per se* prohibited conduct, due to the unique structure of sports leagues. This represents a second alternative to considering sporting justifications. Obviously, this would not affect cases that already fall under the rule of reason, nor would it be needed in cases where only economic considerations are relevant.

However, this approach is possible in the U.S. as its antitrust law is largely formulated through case law. In jurisdictions where *per se* prohibitions are prescribed by statute, such a deviation is not possible. That was the case in *News Ltd*, as the TPA prohibits agreements containing exclusionary provisions regardless of their pro-competitive, or even anti-competitive effects. This was emphasised by the Full Federal Court, who remarked that the prohibition under s 45

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[51] Davies 2001 *James Cook University Law Review* 121-122.
[52] *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10.
[53] Hazard 1997 *Sydney L. Rev.* 100.

applies "irrespective of the extent to which putative exclusionary provisions affect competition in a market".[54]

It has been argued that *per se* provisions such as s 45 of the TPA may be "inadequate" to deal with sports-related scenarios like the *News Ltd* case, due to its inability to account for pro-competitive justifications.[55] Under the proper application of the Act, there is very little scope for taking the sporting nature of the facts into consideration. Although the trial court asserted that it has a discretionary power to refuse remedies, the court of appeal found this to be a misinterpretation of the TPA, and that no such judicial power exists. This illustrates that:

> "[T]he court will apply the Act's competition law provisions strictly to any organisation falling within their purview, and will not engage in the business of manufacturing exemptions based in its own assessment of policy or justice."[56]

The South African Competition Act similarly does not allow for courts to deviate from the Act's *per se* provisions. The absence of such a discretion may well be necessary, as it would otherwise render the outcomes of disputes less predictable. Therefore, sporting justifications should either be not considered at all, or be given special consideration on clearly defined conditions.

6.2 U.S. cases on *per se* prohibitions and sport

Chapter 3 already discussed how the U.S. courts and legislature have exempted sport from the application of competition law in certain situations. This section examines how sports-related matters are dealt with by the courts once it is determined that they are subject to antitrust law. Section 1 of the Sherman Act[57] states the following:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

It is apparent from the wording of the above provision that the Act is couched in very wide terms, and that its literal interpretation may invalidate every type of business agreement.[58]

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[54] Para 580.
[55] Hazard 1997 *Sydney L. Rev.* 112.
[56] *Ibid* 109.
[57] 15 U.S.C. §§ 1-7.
[58] *Mackey v NFL* 543 F.2d 606 (1976) para 64.

However, the courts have held that the Act only renders illegal those agreements which unreasonably restrict trade.[59] This is known as the rule-of-reason test. It should be noted that this enquiry is somewhat different to how the term is understood in South African competition law. Here, reasonableness is focused on whether the restriction is justified by legitimate business purposes, and furthermore, whether it is no more restrictive than necessary to achieve the said purposes.[60]

In addition to the rule-of-reason test, the courts have also developed a list of the types of agreements which can be considered to be so consistently unreasonable that they can be categorised as being illegal *per se*, that is, illegal without the need to first determine the rule-of-reason test.[61] Two examples of such agreements relevant to cases discussed below are concerted refusals to deal and group boycotts.[62] Concerted refusal to deal refers to an agreement "not to do business with other individuals, or to do business with them only on specified terms", while group boycott may be either a refusal to deal or an inducement of others not to deal, or have business relations, with a particular tradesperson.[63]

The two cases discussed below examine what happens when a sports-related practice constitutes *per se* prohibited conduct. Although similar outcomes were witnessed in both cases, it appears that they were supported by different rationales. Whether either of these can be attributed to the uniqueness of sport is considered as well.

6.2.1 *Mackey v National Football League*

Both concerted refusal to deal and group boycott were at issue in the case of *Mackey v National Football League*.[64] Here, professional football[65] players of the National Football League ("NFL") alleged that the league's so-called "Rozelle Rule" was an illegal conspiracy in

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[59] See, for examples, *Northern Pac. R. Co. v United States* 356 U.S. 1 (1958); *Chicago Board of Trade v United States* 246 U.S. 231 (1918); *Standard Oil Co. v United States* 221 U.S. 1 (1911).

[60] See, for example, *Chicago Board of Trade v United States* 246 U.S. 231 (1918) 238. Note that this standard can be contrasted with ss 4(1)(*a*) and 5(1) of the Competition Act, 80 of 1998, which requires the anti-competitive effects to be outweighed by its pro-competitive effects, in order to remain valid.

[61] See, for example, *Northern Pac. R. Co. v United States* 356 U.S. 1 (1958).

[62] See *Klor's v Broadway-Hale Stores* 359 U.S. 207 (1959) and *Fashion Originators' Guild of America v FTC* 312 U.S. 457 (1941).

[63] *Mackey v NFL* 543 F.2d 606 (1976) para 68.

[64] 543 F.2d 606 (1976).

[65] The term "football", in this section, refers to American football rather than association footballer ("soccer"), unless stated otherwise.

restraint of trade under s 1 of the Sherman Act, because it prevented players from selling their services freely.[66]

In order to discuss the lawfulness of the Rozelle Rule, an understanding of the NFL's reserve system is required. Under the league's constitution, a football player can only play for his contracted club for the duration of his contract, and thereafter for an additional year if the club so chooses. After playing his option year, the player can then become a free agent eligible to sign with another team, subject to the Rozelle Rule.[67]

According to this rule, when a free agent wishes to sign with another team, the acquiring club and the former club must reach a mutually satisfactory arrangement that compensates the former club. Should the clubs not be able to agree on such an arrangement, the Commissioner of the NFL[68] may then select one or more players from the roster of the acquiring club to be awarded to the former club as compensation. The Commissioner has sole discretion in making his selection, which is final and conclusive, based on what he deems fair and equitable.[69]

The District Court, which first heard the matter, found the Rozelle Rule to be unlawful, as it constituted both a concerted refusal to deal and a group boycott, which are prohibited *per se* under U.S. antitrust law.[70] Alternatively, the court found that the rule would also be invalid under the rule-of-reason standard, because of its unjustifiably restrictive effects on competition.[71] In particular, it was held that there was insufficient evidence to conclude that the rule was necessary for the operation of the league.[72]

On appeal, the Circuit Court agreed with the District Court that the rule possessed the characteristics of a *per se* illegal agreement. It held that the rule significantly deterred clubs from negotiating with and signing free agents. This is because they were either required to

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[66] *Mackey v NFL* para 2.
[67] RM Terry "Tight End Mackey Blocks Commissioner Rozelle" in CE Quirk (ed) *Sports and the Law: Major Legal Cases* (1996) 188.
[68] At the time of the case, the Commissioner of the NFL was Pete Rozelle, after whom the rule in question was named.
[69] JT Whiting "Illegal procedure - The Rozelle Rule violates the Sherman Antitrust Act" (1976) 59(3) *Marquette Law Review* 632 at 633.
[70] *Mackey v NFL* para 4.
[71] *Ibid.*
[72] *Ibid.*

reach agreement for compensation or risk losing an undetermined player awarded by the Commissioner.[73]

However, the court then added a twist that is of particular interest for present purposes. It held that the case possessed unusual circumstances which rendered the application of the *per se* rules of illegality inappropriate.[74] After reviewing case law leading to the development of *per se* illegal agreements, the court remarked that they all dealt with agreements between business competitors in the traditional sense.[75] However, the court found that *in casu*, the NFL possessed unique characteristics similar to those of a joint venture, where clubs have a vested interest in the success of all other clubs in the league.[76] Furthermore, no individual club is motivated to drive any other club out of business, as this would lead to the failure of the league as a whole.[77]

However, the court was quick to point out that the league's unique characteristics did not exempt it from the scope of antitrust law. They merely rendered the rigidity of the *per se* illegality rules inappropriate in this case.[78] The court remarked that a similar approach had also been adopted in other cases concerning unique business situations.[79] An example of such a case is *White Motor Co. v United States*,[80] where the Supreme Court had to decide whether the *per se* rules were applicable to vertically imposed territorial limitations. Answering in the negative, the court held:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business and within the 'rule of reason'. We need to know more than we do about whether they have such a 'pernicious effect on

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[73] Para 69.
[74] Para 70.
[75] Para 71.
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] *Cf Klor's v Broadway-Hale Stores* 359 US 207 (1959) 212 and *Silver v New York Stock Exchange* 373 US 341 (1963), where refusal to deal were held to be unjustifiable regardless of reasonableness.
[80] 372 U.S. 253 (1963).

> competition and lack … any redeeming virtue' and therefore should be classified as *per se* violations of the Sherman Act."[81]

In another Circuit Court case, *Worthen Bank & Trust Co. v National BankAmericard Inc*[82], which dealt with a group boycott, the court held the following:

> "The term 'group boycott' … is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the 'group boycott' and '*per se*' labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed."[83]

Returning to the *Mackey* case, it is evident that the court followed a similar line of reasoning, and held that the legality of the Rozelle Rule should be tested under the rule-of-reason standard.[84] It then proceeded to outline the rule's restrictive aspects. It agreed with the District Court's analysis that the the rule in question significantly deterred NFL clubs from negotiating with and signing players who have become free agents. It also deterred players from choosing to play out their contracts and the option year (and thereby becoming free agents), due to the difficulty in finding new clubs.[85] As a result, the court held that players had significantly less bargaining power during contract negotiations with their current clubs. They were, in effect, "denied the right to sell their services in a free and open market", and were paid at a salary level that was lower than it would otherwise be if competitive bidding was permitted.[86] On the issue of its restrictive effects, the court concluded that without the rule, there would be increased movement of players from one club to another, and hence, increased interstate commerce.[87]

The court then considered the reasonableness of the restraint. It identified three ostensible purposes of the Rozelle Rule which the NFL contended necessitated its implementation and enforcement. These were the promotion of team stability, the protection of clubs' investment, and the maintenance of competitive balance in the league.[88]

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[81] *Ibid* 264.
[82] 485 F.2d 119 (1973).
[83] *Ibid* 125.
[84] *Mackey v NFL* Para 78.
[85] Paras 81-82.
[86] *Ibid.*
[87] *Ibid.*
[88] Para 83.

Regarding the issue of team stability, it was argued that football players need to play together for a long period of time before they can develop team chemistry and function effectively as a team. As both parties agreed, player movement would increase absent the Rozelle Rule. This would lead to less team stability that, in turn, would reduce the quality of play. From an economic perspective, it was contended that spectator interest would lessen, leading to financial loss for the league and its member clubs.[89]

This argument was rejected by both the District and the Circuit Courts. The District Court found that any increase in player movement would affect the team stability of all clubs equally.[90] It held that removing the rule would not lead to a reduction in the quality of play, and that even if it did, it could not justify its anti-competitive effects.[91]

The District Court's reasoning suggests that it did not consider the promotion of team stability (and its possible effect on the quality of play) to be a legitimate pro-competitive objective. On appeal, the Circuit Court did not explicitly consider this issue either, holding the effect of the rule on team stability to be irrelevant, because of the already high rate of player turnover that occurs through other factors, including player trades, retirements and drafts.[92]

The court was more emphatic on the second issue, the protection of investment. The NFL argued that the rule's compensation mechanism was necessary for clubs to recoup their costs spent on scouting and player development. Both courts rejected this as a legitimate justification. The District Court held that these expenses were the same expenses that every type of business incurs, and that football clubs had no right to claim compensation for these investments.[93] The Circuit Court agreed that these expenses constituted ordinary costs of doing business, and were not peculiar to sports.[94] It further added that, in any event, the unlimited duration of the rule made it more restrictive than necessary to achieve the objective.[95] The court did not consider, nor was it contended by the league itself, whether the removal of the rule might result in reduced spending on player development by clubs.

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[89] Para 83.
[90] Para 84.
[91] *Ibid.*
[92] Para 86.
[93] Para 84.
[94] Para 85.
[95] *Ibid.*

Finally, the court had to consider the issue of competitive balance. It was argued that absent the Rozelle Rule, star players of the league would elect to become free agents in order to play for teams that have been traditionally successful, based in large cities or have greater economic or media opportunities. This would cause an imbalance of the quality of players across the teams, thereby destroying the competitive balance of the league. Such an unbalanced league would cause spectators to lose interest, which would be financially harmful to the league and its member clubs.[96]

The District Court, however, found that the rule did not actually have a material effect on the competitive balance within the league. It held that the NFL had other, legal means available to pursue the goal, including establishing a competition committee, using multiple-year contracts and introducing special incentives.[97] On appeal, the Circuit Court did consider the legitimacy of the stated goal. The court recognised that the NFL had a legitimate interest in maintaining a competitive balance among its teams, and that the issue was whether the means used to pursue it is no more restrictive than necessary.[98]

In this regard, the court held that the rule was excessive. It identified four unreasonable aspects. Firstly, although the NFL only viewed the movement of the "star players" to be detrimental to competitive balance in the league, the Rozelle Rule applied equally to all players, including "average", or even "below average" players.[99] Secondly, the rule was unlimited in duration, which meant that a player would be restrained during contract negotiation throughout his entire career. Thirdly, there were no procedural safeguards that ensured that the Commissioner's compensation was fair. Lastly, the uncertainty of the compensation that the former team may demand during the negotiation stage was excessive.[100] Based on these factors, the court concluded that the rule in question was unreasonable, and an illegal restraint of trade within the meaning of s 1 of the Sherman Act.[101]

The league subsequently petitioned to the Supreme Court. However, before the hearing, the parties concluded a collective bargaining agreement that replaced the Rozelle Rule with a

[96] Para 83.
[97] Para 84.
[98] Para 86.
[99] Para 87.
[100] *Ibid.*
[101] Para 91.

different player restraint system.[102] Nevertheless, the impact of the *Mackey* case should not be underestimated, as it eventually paved the way for the elimination of free agency restraints.[103]

A few conclusions can be drawn from the case. Firstly, the Circuit Court's application of the rule-of-reason test, instead of the *per se* illegality rules, is compelling.[104] Although a similar approach had been adopted earlier in *Kapp v National Football League*, that case dealt with a motion for summary judgment, and concerned damages for contractual breach rather than the lawfulness of the league's rules.[105]

The *per se* exception in *Mackey* did not imply any exemption for sports leagues, as the court itself pointed out, and is rather an approach consistently followed by other courts in cases where unique organisational characteristics are present. U.S. courts are permitted to follow this approach as their antitrust law is heavily reliant on judicial interpretation of a widely framed statute, whereas in South Africa, competition authorities must follow an Act that prescribes its prohibited activities in relative detail. As the Competition Act does not provide for exemptions similar to the one applied in the *Mackey* case, South African courts are not free to apply the rule of reason test once it is determined that a practice falls under s 4(1) (*b*).

Furthermore, although the court remarked that the structure of the league is similar to that of a joint venture, it did not rule that the NFL was indeed such an organisation, much less a single entity. It appears that the features of the league that the court relied on to bypass the *per se* illegality rules were economic, rather than sport-related. The court emphasised that the individual clubs had a common interest in the survival of other clubs, and that the downfall of any one club would cause financial harm to all other clubs. As a result, the league had a legitimate, financial interest in maintaining competitive balance among its teams.

The court did not consider whether the non-economic purposes of maintaining competitive balance within a league alone are justifiable. This is not necessarily problematic for this particular issue, where the economic and sporting considerations are aligned. Difficulties may

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[102] CT Rieger and CJ Lloyd "The effect of *McNeil v. NFL* on contract negotiation in the NFL - That was then, this is now" (1992) 3(1) *Marquette Sports Law Review* 45 at 47.

[103] Football players eventually decided to forego collective bargaining in order to enjoy the protection antitrust law. This resulted in the case of *McNeil v National Football League* 790 F. Supp. 871 (1992), where a jury trial found that the system which replaced the Rozelle Rule was also an unreasonable restraint of trade.

[104] For a critique of the District Court's approach, see Whiting 1976 *Marquette Law Review* 638.

[105] 390 F. Supp. 73 (1974) 81.

arise, however, when the link between the economic and non-economic rationales are not immediately obvious.

For example, on the issue of protecting the clubs' investment in player development, both the District and the Circuit Courts held that this was merely an ordinary cost of running a business, and not peculiar to sport. The courts did not consider whether the rule had an effect on the encouragement of player development, or whether the latter could be a legitimate justification.

Whether the court considered the promotion of team stability to be a legitimate justification appears to be less certain. The District Court held in the negative, while the Circuit Court did not explicit answer this question. The District Court reasoned that the teams' quality of play would not suffer from increased player movement because all teams would be affected equally. However, it is submitted that this relates more to the issue of competitive balance – whether one team was receiving an advantage – rather than the quality of play. The league may still lose spectator interest, and therefore incomes, if all its teams are suffering from the lack of stability, or if the fans are unable to identify with team rosters that are constantly changing. The Circuit Court found it unnecessary to consider this issue, because on the facts, it held that the rule did not have a significant effect on the maintenance of team stability.

On all three issues that the court had to decide, perhaps the most acceptable reason for rejecting them is their excessive restrictiveness.[106] In other words, the means used to achieve the stated objectives are far more than what was necessary. Both courts pointed out that there were alternatives available to the league in order to promote competitive balance, youth development or team stability. The "least restrictive alternative" requirement was imposed by the court in the *NCAA* case as well. This case also saw a *per se* exception applied to a sports-related practice, but the court's reasoning was not the same as *Mackey*'s.

6.2.2 *NCAA v Board of Regents*[107]

This case dealt with a television broadcasting agreement. Sports telecasting agreements in the U.S. operate on two different levels. National broadcasting networks negotiate with the relevant sports leagues, and conclude contracts that grant them the preferential rights to broadcast a certain number of games per season. Local stations may then negotiate directly

[106] D Novick "The legality of the Rozelle Rule and related practices in the National Football League" (1975) 4(3) *Fordham Urban Law Review* 581 at 590.
[107] 468 U.S. 85 (1984).

with the individual teams to show games that are not broadcast on national television. However, the individual teams' right to conclude agreements with local stations is subject to any rules that the leagues may have adopted in this regard.[108] These rules have, on several occasions, been challenged in court under antitrust laws.[109] One of the most important cases resulting from these disputes is the Supreme Court judgment in *NCAA v Board of Regents*.

The issue here was whether the National Collegiate Athletic Association ("the NCAA") had violated s 1 of the Sherman Act, by unreasonably restraining trade through its television broadcasting rules regarding college football. The NCAA is a governing body which regulates amateur intercollegiate sports in the U.S.[110] At the time, it had imposed a set of rules which limited the number of college football games that may be broadcast on television.

The rules stated that colleges may not individually negotiate telecasting agreements with any television stations except the two national networks with which the NCAA had concluded an exclusive broadcasting agreement.[111] In addition, the two networks were only permitted to show fourteen games each during the course of the season, and at the same time were required to ensure that no team appeared more than six times on live television.[112] Furthermore, while the networks had to negotiate directly with the individual colleges for the right to televise their games, it appeared that the compensation usually amounted to a recommended fee set by the NCAA.[113] It should be noted that football was the only college sport for which such restrictions were imposed, with the stated intention of protecting live attendance during games.[114]

The matter was first heard by the District Court, which described the NCAA's rules as those of a "classic cartel". In particular, it was found that the practice resulted in almost absolute control of the supply of college football, by restricting its members' production and prescribing punishments for disobeying members, in order to set an artificially high price.[115] The court held that the arrangement restrained competition as it fixed both price and output.[116] In addition,

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[108] See JS Arico "*NCAA v. Board of Regents of the University of Oklahoma*: Has the Supreme Court abrogated the *per se* rule of antitrust analysis" (1985) 19 *Loyola of Los Angeles Law Review* 437 at 445.

[109] As far as professional sports telecasting is concerned, it should be noted that the Sports Broadcasting Act of 1961 exempts these agreements from the scope of antitrust law. See the discussion in Chapter 3 above.

[110] *NCAA v Board of Regents* ("*NCAA*") 88.

[111] Namely, the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS), at the time of the trial.

[112] *NCAA* 94.

[113] *Ibid* 93-94.

[114] *Ibid* 92.

[115] *Ibid* 96.

[116] *Ibid.*

because of its exclusive nature, the practice also amounted to a group boycott of other potential broadcasters.[117] As a result, the District Court held that the restriction was an unreasonable restraint of trade under the Sherman Act.[118]

The Court of Appeals also ruled that the rules had violated the Act. However, unlike the court *a quo*, it found that since the NCAA's conduct amounted to price-fixing, it constituted a *per se* illegal activity.[119] As a result, it was unnecessary to consider the rule-of-reason test.[120]

On further appeal, the Supreme Court also considered the issue of whether the practice was *per se* prohibited. The court held that the broadcasting arrangement did amount to horizontal output- and price-fixing, which would ordinarily be condemned as illegal *per se*.[121] In particular, horizontal price-fixing was described as the "paradigm of unreasonable restraint of trade".[122]

However, the court decided that the *per se* approach would be inappropriate in the present case, because sport is an industry in which horizontal restraints of trade are necessary in order for its product to exist at all.[123] The court explained that the product marketed by the NCAA and its member colleges was the football competition itself. Its operation required all members to agree on the rules according to which they would compete.[124] Even rules such as those regulating the size of the playing field and the number of players permitted involved some restraint on competition. However, these rules enabled the product to be available in the first place, which in turn enhanced consumer choices.[125] The court held that in order to determine whether the practice in question qualified as such a pro-competitive rule, the reasonableness enquiry had to be conducted.[126]

It should be noted that this approach had previously been applied to the NCAA in *Hennessey v NCAA*,[127] where the Circuit Court held that the public service nature of the association justified

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[117] *NCAA* 96.
[118] *Ibid* 95.
[119] *Ibid* 97.
[120] However, the court did rule that in the event that the practice was not *per se* illegal, the anti-competitive effects of the agreement had outweighed its pro-competitive justifications. *Ibid* 98.
[121] *Ibid* 100.
[122] *Ibid.*
[123] *Ibid* 100-101.
[124] *Ibid* 101.
[125] *Ibid* 102.
[126] *Ibid* 103.
[127] 564 F.2d 1136 (1977).

a rule-of-reason test for otherwise *per se* prohibited conduct.[128] However, the two cases should be distinguished on the basis that *Hennessey* dealt with non-commercial dimensions of amateur sports, while *NCAA v Board of Regents* was concerned the commercial exploitation of the sport's television rights.[129]

Having determined that the rule of reason was applicable, the Supreme Court then proceeded to consider the anti-competitive effects of the broadcasting arrangement. It agreed with the District Court's finding that the plan fixed both output and price, because absent the restraint, more games would be shown on television, and the price would not be unresponsive to consumer demand.[130] It was held that the plan had the effect of raising prices, lowering output, and eliminating competitors from the market.[131] Therefore, the NCAA had a heavy burden of establishing legitimate pro-competitive justifications.[132]

In this regard, the NCAA provided three main arguments, namely the promotion of game attendance, the maintenance of competitive balance, and the joint venture defence. Firstly, the NCAA argued that unrestricted televising of games would adversely affect the attendance at live events. In other words, if college football games were widely available on television, fewer people would pay for tickets to watch the games live. The NCAA further argued that it had a responsibility to protect gate attendance in intercollegiate sports.

The District Court held this was not necessarily an illegitimate justification. The court accepted the contention that at the time of its original implementation, a restriction on television broadcasting did protect live attendance. However, it held that the contemporary evidence no longer supported the link between the two.[133] Therefore, the argument had to be rejected.

The Court of Appeals also rejected this argument, but it applied a different line of reasoning. The court took issue with the justification itself, holding that even if the restriction did protect live attendance, it still resulted in an overall reduction in viewership, and thus a net decrease in output.[134] As a result, the justification could not be considered pro-competitive. In other words,

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[128] *Hennessey v NCAA* 1136.
[129] T Scully "*NCAA v. Board of Regents of the University of Oklahoma*: The NCAA's television plan is sacked by the Sherman Act" (1985) 34(3) *Catholic University Law Review* 857 at 868.
[130] *NCAA v Board of Regents* 105-106.
[131] *Ibid* 107-108.
[132] *Ibid* 113.
[133] *Ibid* 96.
[134] *Ibid* 97.

the protection of gate attendance could only be accepted to the extent that it increased overall viewership, and was not a legitimate justification in itself.

The issue was argued again before the Supreme Court, which adopted a mix of the reasoning of the two courts *a quo*. It agreed with the District Court that the television restriction no longer served the goal of protecting live attendance. This is because the games that the networks were permitted to broadcast were shown at the same time as all other live games, which meant that fans were prevented from watching both.[135] However, like the Court of Appeals, the Supreme Court found that there was a more fundamental reason for rejecting this argument. The court held that the restriction was implemented because the NCAA assumed that live games are not attractive enough to consumers compared to televised games, and therefore attempted to protect live games from the "full spectrum of competition" by limiting the number of games that appeared on television.[136] This was tantamount to arguing that competition itself was unreasonable, which is an untenable position in competition law.[137]

The NCAA's second argument was that the restriction preserved competitive balance. The District Court, again, accepted the legitimacy of the justification itself, but rejected the argument on factual grounds. It found that the evidence showed that the NCAA had adopted other measures, such as its recruitment policy and the preservation of amateurism, which sufficiently maintained competitive balance in college football.[138]

The Court of Appeals agreed with the District Court's finding that the NCAA had less restrictive means available to achieve the objective of competitive balance. However, it ruled that this finding was not necessary, because the argument of competitive balance amounted to the contention that "competition will destroy the market", which is unacceptable under the Sherman Act.[139] Therefore, it appears that the Court of Appeals did not consider competitive balance to be a legitimate justification.

The Supreme Court adopted the approach of the District Court. Instead of finding competitive balance not to be a legitimate justification, the court enquired whether the conduct was reasonable in achieving the objective. In this regard, it held that the evidence did not show that

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[135] *NCAA v Board of Regents* 116.
[136] *Ibid* 116-117.
[137] *Ibid* 117. See also *National Society of Professional Engineers v United States* 435 U.S. 679 (1978) 696.
[138] *NCAA v Board of Regents* 96.
[139] *Ibid* 97.

the NCAA's television plan was intended to promote equality of competition at all.[140] In any event, the court found that the plan was not very efficient at achieving competitive balance. The court pointed out that the rules did not regulate how much money any one college may spend on its football programme, nor how it may use its revenues derived from football-related activities. They merely restricted one source of income, which was no more effective at equalising competition than restrictions on other sources of income (such as donations and tuition fees).[141] The court found that the fact that competitive balance exists in other intercollegiate sports (without similar restrictions on television broadcasting) to be evidence that the plan was unnecessary and ineffective.[142]

Interestingly, the court found that there was another, more important, reason for rejecting the competitive balance argument in this case. The court held that competitive balance could only be accepted as legitimate justification if it maximised consumer demand.[143] However, on the facts, it was shown that output, being the number of games available to consumers, would actually increase without the restriction in question. The court found this to be evidence that the plan did not serve a legitimate purpose.[144]

The NCAA's third argument was that it acted as a pro-competitive joint venture, which assisted its members in marketing their broadcasting rights. In particular, it contended that the plan defined the number of televised games and the basic terms of contract, as well as establishing the price for the sport's exposure.[145] This issue was dealt by both the District Court and the Supreme Court. The latter explicitly recognised that joint selling agreements can be pro-competitive in some cases, if they lead to the availability of new products by "reaping otherwise unattainable efficiencies".[146]

In the present case, however, the court held that the argument was inapplicable, because the NCAA did not act as a selling agent for its members. It merely fixed the price and output of the product, with the negotiation and selection of each game left to the networks and the individual colleges.[147] Both the District Court and the Supreme Court agreed that the product, namely

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[140] *NCAA v Board of Regents* 118.
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid* 120.
[144] *Ibid.*
[145] *Ibid* 113.
[146] *Ibid*, quoting *Arizona v Maricopa County Medical Society* 457 U.S. 332 (1982) 365.
[147] *NCAA v Board of Regents* 113.

college football, could have been marketed just as effectively without the restrictions, and the fact that the plan resulted in lower output at a higher price proved that the arrangement was not really pro-competitive.[148]

Therefore, all three arguments raised by the NCAA were rejected, and the Supreme Court ruled that the television plan was an unreasonable restraint of trade, in violation of the Sherman Act.[149]

The following observations can be made regarding the *NCAA* case. Firstly, the applicability of *per se* illegality rules was again at issue here. Although the Court of Appeals found that the television plan was illegal *per se* because it constituted price-fixing, the Supreme Court followed an approach similar to the one adopted in *Mackey*, by applying the rule-of-reason test. The court in *Mackey* followed this approach because it found that sports leagues possessed characteristics similar to other unique business organisations to which the exception has been applied.

On the other hand, the Supreme Court in *NCAA* held that the reason for conducting the reasonableness enquiry was that a sports league requires its competitors to agree on certain anti-competitive restraints in order for the product to exist at all. As a result, courts should examine its rules on a case-by-case basis in order to determine which restraints are legitimate and justifiable. This appears to be more related to the sporting nature of the NCAA's activities, compared to rationales for previous *per se* exceptions.[150]

Earlier exemptions from *per se* analyses had also emphasised the courts' unfamiliarity with certain business structure.[151] The Supreme Court rejected this rationale as well, and held that it was sufficiently familiar with price-fixing agreements involving non-profit entities like the NCAA, and therefore capable of assessing the economic consequences of the arrangement.[152]

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[148] *NCAA v Board of Regents* 114.

[149] *Ibid* 120.

[150] Scully 1985 *Cath. U. L. Rev.* 883.

[151] See, for example, *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979).

[152] *NCAA v Board of Regents* 100. This has been described as the "analytically enhanced" *per se* approach, whereby the court uses its familiarity with a certain type of practice to make an early assessment of the conduct's net competitive effect. See L Sullivan and J Wiley "Recent antitrust developments: Defining the scope of exemptions, expanding coverage, and refining the rule of reason" (1979) 27 *UCLA Law Review* 265 at 332-333.

It is submitted that the Supreme Court's line of reasoning is less vague and more logically connected to the purpose of the approach, and should be preferred to the *dictum* in *Mackey*.[153]

A second interesting point to note is the rationale for recognising legitimate pro-competitive justifications. While the Court of Appeals rejected the arguments of protecting gate attendance and competitive balance outright, both the District Court and the Supreme Court found that they could be pro-competitive if they have the net effect of increasing output. Similar to the rationale in *Mackey*, it seems that only economic pro-competitive objectives can be considered legitimate for antitrust purposes. In other words, whether game attendance and competitive balance are intrinsically valuable is of little concern if they have no bearing on consumption. This appears to be a ringing rejection of purely-sporting justifications.

This approach was criticised by Justice White, who held, in a dissenting opinion, that live attendance was essential to the success of college football.[154] The learned judge was also critical of the overly-commercial nature in which the majority judgment had characterised NCAA's activities.[155] While the minority judgment appeared to be a ringing endorsement for non-economic considerations, it has been criticised for being inconsistent with the notions of antitrust law.[156] This illustrates the purely market-oriented focus of the U.S. approach, even though subsequent reports suggest that the judge may have been correct in his prediction of dwindling gate receipts and the NCAA's inability to prevent the commercialisation of amateur sports following the judgment.[157]

Thirdly, like *Mackey*, the Supreme Court found that the measure employed to achieve an objective, even if legitimate, must be the least restrictive means available. While it may appear that there is very little difference in outcome whether a court finds a restraint to serve no legitimate purpose or merely unreasonably excessive, at least in so far as cases such as *Mackey* and *NCAA* are concerned, it is submitted that the distinction would be significant under South African law. The Competition Act requires the pro-competitive effects of a conduct to

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[153] However, the approach is not without criticism. See, for example, Arico 1985 *Loy. L.A. L. Rev.* 457, who argues that broadcasting arrangements are not essential to the organisation of intercollegiate sports; and SM Kozik "*National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association* 104 S. Ct. 2948 (1984)" (1985) 61(3) *Chicago-Kent Law Review* 593 at 593, who argues that the court's approach had blurred the distinction between *per se* and rule-of-reason analyses.

[154] *NCAA v Board of Regents* 124 *per* White J.

[155] *Ibid* 121.

[156] See, for examples, Arico 1985 *Loy. L.A. L. Rev.* 462 and Scully 1985 *Cath. U. L. Rev.* 879-881.

[157] J Solomon "*NCAA* Supreme Court ruling felt at *O'Bannon* trial 30 years later" (2014) http://www.cbssports.com/college-football/news/ncaa-supreme-court-ruling-felt-at-obannon-trial-30-years-later/ (accessed 06 June 2016). See also Kozik 1985 *Chi.-Kent L. Rev.* 608 and Arico 1985 *Loy. L.A. L. Rev.* 465.

outweigh its anti-competitive effects in order to be valid, and does not explicitly require it to be the least restrictive means available.[158] Therefore, if sporting justifications such as player development and team stability do not fall within the meaning of "other pro-competitive gains" within the meaning of the Act, then they cannot be considered during the reasonableness enquiry at all.

The Supreme Court's judgment continues to have an impact on the regulation of sport today. Both the *per se* exception and the reasonableness requirement were applied in the recent case of *O'Bannon v NCAA*,[159] where it was argued that the association's rule prohibiting payments to student-athletes amounted to an unlawful restraint of trade. The Ninth Circuit Court held that the rule was more restrictive than necessary to preserve amateurism in intercollegiate sport.[160] The court downplayed the importance of amateurism, and held that the objective cannot, in and of itself, justify anti-competitive conduct.[161]

The NCAA's petition for a writ of *certiorari* was subsequently denied by the Supreme Court, although this does not signal the end of the legal battle.[162] Two class-action suits concerning compensation for student-athletes, *Jenkins v NCAA* and *Alston v NCAA*, are currently underway before the same District Court that initially heard the *O'Bannon* case.[163] It is also anticipated that cases similar to *O'Bannon* are likely to be filed outside the Ninth Circuit Court's jurisdiction, following the Supreme Court's denial of *certiorari*.[164] Therefore, development is expected in this area, and it remains to be seen whether non-economic considerations will play a role in U.S. antitrust jurisprudence.

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[158] Sections 4(1) (*a*) and 5(1) of the Act.
[159] 802 F. 3d 1049 (2015).
[160] *Ibid* 1079.
[161] *Ibid* 1063.
[162] *NCAA v O'Bannon* petition for writ of *certiorari* before the Supreme Court, case numbers 14-16601, 14-17068 (03 October 2016).
[163] See S Berkowitz "Judge rejects NCAA's request for dismissal of '*Kessler*', *Alston* suits" *USA Today* 05 August 2016 http://www.usatoday.com/story/sports/college/other/2016/08/05/ncaa-suit-shawne-alston-martin-jenkins-kessler-berman-nigel-hayes-claudia-wilken/88313408/ (accessed 10 October 2016).
[164] M McCann "In denying *O'Bannon* case, Supreme Court leaves future of amateurism in limbo" (2016) http://www.si.com/college-basketball/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court (accessed 04 October 2016).

6.3 Canadian Competition Act

The last section discussed in this chapter concerns the application of the Canadian Competition Act[165] to the area of sport. Although Canadian case law in this area of competition law has been limited, the Canadian Act is noteworthy for its inclusion of provisions that are only applicable to certain situations in sport.

Section 48(1) of the Act establishes that an offence is committed by anyone who "conspires, combines, agrees or arranges with another person:

(a) To limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those who so participate, or
(b) To limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league".

In order to determine whether the above section is contravened, s 48(2) further states that a court shall have regard to two factors, namely:

(a) "Whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and
(b) The desirability of maintaining a reasonable balance among the teams or clubs participating in the same league."

It should be noted that this section only applies to agreements and arrangements among clubs which are members of the same professional sport league.[166] Additionally, the agreements, arrangements, or provisions must exclusively relate to either the matters described in subsection (1) or the granting and operation of franchises in the league.[167] In such cases, s 48 applies in place of s 45, while in all other cases, the latter section is applicable as the default provision.[168]

In order to contrast the two different positions, s 45(1), which governs conspiracies between competitors in general, is quoted below:

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[165] R.S.C., 1985, c. C-34.
[166] Section 48(3) of the Act.
[167] *Ibid.*
[168] *Ibid.*

"Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) To fix, maintain, increase or control the price for the supply of the product;
(b) To allocate sales, territories, customers or markets for the production or supply of the product; or
(c) To fix, maintain, control, prevent, lessen or eliminate the production or supply of the product."

Subsection (4) qualifies the above, by providing that s 45(1) is not contravened if the agreement or arrangement is ancillary to a broader or separate agreement or arrangement between the same parties, which itself must not contravene s 45(1). In order to claim this defence, it must further be established that the conspiracy in question is directly related to the objectives of the broader agreement or arrangement, and that it is reasonably necessary to achieve them. Notwithstanding this defence, pro-competitive arguments cannot be used to justify collusive conduct listed in s 45(1).

Before discussing the implication of s 48 of the Act, it should be noted that this provision has not yet been interpreted by the courts in Canada.[169] In *Yashin v National Hockey League*,[170] the section was briefly mentioned. The case concerned an arbitration between the National Hockey League Players' Association (NHLPA) and the National Hockey League. The Applicant in this matter, a professional hockey player sought a judicial review of the arbitrator's decision to not grant him free agency while he was contracted to the Ottawa Senators Hockey Club.[171]

While the case centred on the issue of whether the arbitrator's decision was reasonable, the court did briefly deal with the Applicant's alternative contention that the decision amounted to an unlawful restraint of trade.[172] Cunningham J dismissed the issue on the ground that a collective agreement entered into by a trade union (in this case, the NHLPA) is not an illegal restraint of trade. Regarding the issue of s 48, the judge simply held that the Applicant did not produce any evidence which suggested that the section was applicable, and that in any case, s 4(1) explicitly exempts collective bargaining activities from the scope of the Act.[173]

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[169] CS Goldman and JD Dodrug *Competition Law of Canada* Vol 1 (2013) 8-87.
[170] 2000 CanLII 22620 (ON SC).
[171] Paras 1 and 7.
[172] Para 43.
[173] Para 44.

Despite the scarcity of case law interpreting s 48, the wording of the provision is still illustrative of its scope of application. Firstly it should be noted that the section only applies to professional sport. Amateur sport is completely exempted from the Competition Act by virtue of s 6, which states:

> "6 (1) This Act does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.
>
> (2) For the purposes of this section, *amateur sport* means sport in which the participants receive no remuneration for their services as participants."

It is not difficult to understand the reason behind the exemption, as participation in amateur sport is non-economic in nature, and is thus unlikely to offend competition law principles. However, it can be recalled that the U.S. *NCAA v Board of Regents* case also dealt with amateur (collegiate) sport. While it is true that the case dealt the broadcasting rights of the sport, which is arguably not covered by the exemption, it is submitted that this is not necessarily the case. This is because the sanction imposed by the NCAA was the exclusion of teams which disobeyed the broadcasting rules of the league, which resulted in a potential limitation on the participation of certain teams in the sport. Therefore, the application of s 6 to such cases is challenging to say the least.

The second issue to note regarding s 48 is that it only applies to agreements and arrangements between clubs (or their representatives) who are members of the same professional league. This, and the residual s 45, which governs conspiracies among competitors, suggest that only "horizontal" conspiracies are affected by the provision. While this is not problematic in cases involving practices that require consent from individual member clubs, difficulties may arise where alleged limitations are imposed by a governing body independent of its members. An example of the latter may be found in the *BCCI* case discussed in next chapter, where the Indian cricket governing body imposed limitations on the establishment of private professional leagues. Although the sole competitor of the T20 format in India, the IPL, did not take part in this decision (nor did its member clubs), it is clearly the beneficiary of the said restriction. However, it is unclear whether s 48 would be applicable in such an instance.

Thirdly, it can be noted that but for the vertical nature of the above scenario, the limitation in question would be subject to the section. This is because the section not only applies to the

participation of players in professional sports, but also that of the clubs' competitors.[174] Although clubs in existing leagues and those in potential rival leagues are not competitors in the sporting sense, they will be competing off the field for sponsorships, television viewers and gate receipts. Clearly, they qualify as competitors in the sense understood by competition lawyers.

Fourthly, as the section only applies to agreements and arrangements relating to matters described in s 48(1) or the granting of franchises, it is doubtful whether certain exclusive broadcasting agreements fall within the scope of the provision. As described above, the operation of such agreements may lead to restrictions on clubs' participation in sports leagues. In such instances, s 48 would naturally be applicable. However, the majority of these complaints are brought by potential broadcasters which allege that they are suffering financial harm as a result of one broadcaster's exclusive agreement with the relevant sports league. As these broadcasters are not competitors within the meaning of s 48, it is unlikely that a dominant broadcaster can rely on the section as a defence.

Regarding the defence itself, the section's most obvious difference from the residual s 45 is that whereas the latter section prescribes three forms of *per se* prohibitions, s 48 only prohibits limitations which are "unreasonable". This establishes a more flexible standard for sporting practices within the purview of the provision.[175] Three forms of "unreasonable limitations" are described in the Act, namely limitations on the players' freedom to negotiate with clubs, limitations on the participation in sport, and unreasonable terms or conditions for participation in sport. These practices are exempt from *per se* prohibitions, and their reasonableness must be determined in each case.

"Unreasonableness" is not defined in the Act. However, in order to determine whether a contravention has occurred, s 48(2) provides two considerations. It is noteworthy that the subsection does not include the phrase "any other relevant factors" in its wording, which suggests that the two factors constitute an exhaustive list. Nevertheless, the section can be compared to the Act's only other usage of the word "unreasonable". In s 55.1(1) (*c*), the Act uses to the term "commercially unreasonable" as part of its definition of pyramid selling. The absence of the word "commercial" under s 48 can be used to argue that non-economic factors

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[174] Section 48(1) (*a*) of the Act.

[175] SF Ross "Player restraints and competition law throughout the world" (2005) 15 *Marquette Sports Law Review* 49 at 59.

may be considered in order to determine an agreement's reasonableness. However, this question must remain unsolved until it is considered by the courts.

The two listed factors are the organisation of the sport on an international basis, and the desirability of competitive balance. The first factor appears to be an acknowledgement of the legitimacy of the pyramid structure in sports organisation. Here, the Act does not require the rule imposed by the international organiser itself to be reasonable, but rather that compliance with such rules may be an indicator of reasonableness itself. Regarding the maintenance of competitive balance within sports leagues, the Act refers to "reasonable balance", which indicates that a court hearing the dispute must also decide whether the level of competitive balance sought by the agreement is reasonable. The Act does not indicate that "reasonableness" should be interpreted in the same way as it is by U.S. courts under the Sherman Act. However, it is not inconceivable that an agreement which is unnecessarily restrictive in achieving the objective of competitive balance will be regarded as unreasonable.[176]

6.4 Conclusion

When a sports-related practice is subject to the provisions of *per se* prohibitions, the *News Ltd* case illustrates that a court has no alternative but to invalidate the conduct. U.S. cases have shown, however, that it may be preferable to consider these cases under the rule of reason instead. Two different rationales were offered for this approach. In *Mackey*, it was held that that the *per se* rules would be inappropriate due to the unfamiliar organisational structure of sports leagues, while in *NCAA*, it was found that the necessity of cooperation itself justifies *per se* exemptions for sports.

While the court's reasoning is convincing, it does not aid jurisdictions where *per se* prohibitions are provided in statutes, rather than by the courts. Therefore, unless a legislative exception similar to s 48 of the Canadian Competition Act is enacted, sports-related practices must be invalidated outright if they constitute *per se* prohibited conduct.

At the same time, it was shown that regardless of whether the practice is prohibited *per se* or considered under the rule of reason, courts in both the U.S. and Australia have only considered economic justifications to be relevant. Sporting objectives have been recognised, but only to the extent that they enhance competition in the market. This issue is the focus of the next

[176] Ross 2005 *Marq. Sports L. Review* 49.

chapter, which examines jurisdictions where purely sporting arguments have been used to justify otherwise anti-competitive practices.

CHAPTER 7

NON-ECONOMIC JUSTIFICATIONS UNDER FOREIGN JURISDICTIONS

The difficulty of examining whether a court has accepted purely sporting justifications in a given case is that litigants rarely draw attention to the fact that they are relying on sports-specific arguments that do not actually mitigate anti-competitive effects. Instead, these arguments are often presented as traditional pro-competitive gains that outweigh the harm to competition. This means that the court's task is often confined to determining whether the sporting objectives raised in fact enhanced competition, rather than deciding whether the non-economic nature of the justification makes it irrelevant.

Some sporting objectives are accompanied by pro-competitive gains, of course. For example, competitive balance within a sports league may be both attractive to consumers and desirable from a purely sporting perspective. Examples from Chapter 6 show instances where courts only accounted for the economic benefits of the competitive balance argument. Sometimes, however, it is clear that the non-economic aspects of sporting justifications were consciously considered by the courts. This chapter examines the varying levels of importance that courts have attached to these justifications in three different jurisdictions.

7.1 New Zealand law

The first jurisdiction to be examined is New Zealand. Competition law in New Zealand is governed by the Commerce Act,[1] and regulated by the Commerce Commission ("the Commission").[2] The Act deals with two types of anti-competitive practices, namely collective behaviours and unilateral behaviours. The former category, which is relevant in the present case, exists in three forms: agreements that substantially lessen competition,[3] agreements that exclude competitors,[4] and price-fixing agreements.[5]

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[1] Act 5 of 1986.

[2] Commerce Commission "The Commerce Act: Anti-competitive practices under Part II of the Commerce Act" (2002) https://www.comcom.govt.nz/dmsdocument/1822 (accessed 21 March 2016) 5.

[3] Section 27 of the Act.

[4] Section 29.

[5] Section 30.

Under the Act, parties to a collective anti-competitive behaviour can obtain immunity for their conduct by applying for the Commission's authorisation.[6] In order to succeed in their application, the parties must show that public benefits arising from the conduct in question outweigh its deleterious effect on competition.[7] Although "public benefit" has been widely interpreted by the Commission,[8] the regulatory body has also emphasised that only quantifiable gains can be accepted.[9]

This was illustrated in the matter of *Commerce Commission, Decision No 580*,[10] one of the rare cases where the Commerce Act was applied in the sports context.[11] The case involved an application for authorisation regarding a salary cap agreement proposed in New Zealand's domestic rugby union competition, and is an example of the more orthodox approach to evaluating non-economic objectives.

The application was made by the New Zealand Rugby Football Union ("NZRU"), which is the governing body for rugby union in the country. It is responsible for organising both domestic and international competitions for the sport.[12] The governing body sought the Commerce Commission's authorisation to enter into and give effect to its collective bargaining agreement ("the agreement") with the players' union ("the Rugby Players Collective"), which contained potentially anti-competitive provisions.

The contentious provisions of the agreement related to two proposed arrangements that would apply to the new domestic rugby union competition, the Premier Division. The first was the imposition of a salary cap on all teams that would limit total playing-staff salary payment to 2 million NZD[13] per team. The second was a revision of the existing player movement regulations that would allow players to transfer to other teams within the division more easily.

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[6] Section 58.

[7] RJ Ahdar "Antitrust policy in New Zealand: The beginning of a new era" (1992) 9(2) *Berkeley Journal of International Law* 329 at 370.

[8] See, for examples, *Re New Zealand Stock Exch., Decision No. 232* (Dated 10 May 1989) and *Re Amcor, Ltd. - N.Z. Forest Products, Ltd.* [1987] 1 NZBLC 104 at 233.

[9] *Goodman Fielder, Ltd. - Wattie Indus., Ltd.* [1987] 6 NZAR 446 at 449.

[10] *Commerce Commission, Decision No 580, Determination pursuant to the Commerce Act 1986 in the matter of an Application for the Authorisation of a restrictive trade practice. The Application is made by the New Zealand Rugby Football Union Incorporated* (Dated 2 June 2006) ("*NZRU*")

[11] AF Simpson "Promoting 'match quality' in New Zealand rugby: Authorisation of salary cap and player transfer restrictions under the Commerce Act 1986 (NZ)" (2012) 7(1) *Australian and New Zealand Sports Law Journal* 1 at 2.

[12] *NZRU* para 42.

[13] The New Zealand Dollar.

Before discussing the details of the proposed arrangements and the Commission's decision, it will be useful to provide some background on the proposal. Prior to reaching its agreement with the players' union, the NZRU conducted a review of the then National Provincial Championship, which was the elite domestic rugby union league. The domestic nature of the competition can be contrasted with the Super Rugby competition, which included, at the time, teams from New Zealand, Australia and South Africa.[14]

The purposes of the review were twofold: to ensure that the domestic competition provided a platform for sustaining the success of the national team ("the All Blacks"), and to ensure that the sport of rugby remained accessible and attractive to the people of New Zealand.[15] The review reached the conclusion that the league was not competitively balanced, as the championship winners and semi-finalists of the competition were dominated by a select few teams, while those with less resources had very small chances of becoming champions.[16] The governing body believed that the imbalance threatened to diminish interest from the fans, sponsors and broadcasters, and that it could ultimately affect the "outlook for New Zealand rugby".[17]

Having decided to take action to address the problem, the NZRU then examined interventions adopted by sports governing bodies overseas, including the imposition of player draft systems, revenue sharing regimes and player transfer restrictions.[18] Eventually, the review found that a salary cap would be the most appropriate option, and negotiated with the players' union to include the arrangement in the next collective bargaining agreement between the parties.[19] To enforce the salary cap, it was also determined that monetary penalties would be imposed on teams that exceed the salary cap.[20]

In addition, the NZRU also sought to make three changes to the existing player movement regulations.[21] The first was to expand the length of the transfer window, during which players would be allowed to join other teams. The second was to remove the requirement of transfer

[14] It should be noted that the competition now also includes teams from Argentina and Japan. See Super Rugby "Super Rugby teams" http://www.sanzarrugby.com/superrugby/teams/ (accessed 12 July 2016).
[15] *NZRU* para 91.
[16] Paras 95-96.
[17] Para 97.
[18] Para 125.
[19] Para 9.
[20] Para 18.
[21] Para 9.

fees when players move from one Premier Division team to another.[22] The third was to abolish the existing quota on the number of players each team may acquire during the season. The purpose of these changes was to make it easier for teams to acquire and/or offload players, in accordance with their obligations under the proposed salary cap.

The above aspects of the agreement prompted the NZRU to obtain the Commission's authorisation. The Commission had to decide two main issues, namely whether the proposed arrangements in question were in fact anti-competitive, and if so, whether the anti-competitive effects were outweighed by the public benefits arising from the proposals.[23] Once the magnitudes of the benefits and detriments was assessed, they must then be compared to the counterfactual in order to determine whether an authorisation should be granted.[24]

The first hint of the Commission's emphasis on quantifying any legitimate benefits could be found in its definition of the terms "public benefit" and "public detriment". It held that "… a public benefit is any gain, and a detriment is any loss, to the public of New Zealand, with an emphasis on gains and losses being measured in terms of economic efficiency."[25] This definition is consistent with the New Zealand Court of Appeal's approach in *Telecom v Commerce Commission*,[26] where the court highlighted the informative value of quantitative analyses in competition law cases, and specifically, the use of economic models.[27] The key advantages of such an approach, according to the court, were that they focus on "verifiable economic arguments", make the economic assumptions used in the analysis transparent, and can produce "quantitative estimates of the results of a given transaction".[28]

In addition to its emphasis on quantifiable benefits, the Commission also limited its consideration of gains and detriments to those that would manifest themselves within five years.[29] It reasoned that any projections of benefits beyond this period would be too uncertain to be of value.[30]

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[22] It should be noted that players moving to the Premier Division from a lower division were still subject to the agreement of transfer fees between the clubs involved. However, these transfers would now be subject to maximum possible fees.
[23] Para 28.
[24] Para 123.
[25] Para 28.
[26] (1992) 3 NZLR 429 (CA).
[27] *Ibid* 447.
[28] *Ibid.*
[29] *NZRU* para 30.
[30] *Ibid.*

Having outlined its general approach to the case, the Commission proceeded to consider whether NZRU's agreement had contravened any provisions of the Commerce Act. As stated above, the Act prohibits three types of collective anti-competitive practices. Section 27 deals with agreements that substantially lessen competition. It prohibits anyone from entering into, or giving effect to, a contract, arrangement or understanding that "has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market".[31] For the purpose of this section, price-fixing agreements are deemed to substantially lessen competition.[32]

Section 29 of the Act prohibits agreements containing exclusionary provisions. Exclusionary provisions are defined as those found in contracts, arrangements or understandings between competitors that have the purpose of "preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from" another competitor.[33]

As with the South African Competition Act, anti-competitive conduct is only prohibited under the above provisions if certain jurisdictional requirements are met. The Commission's findings on these preliminary issues are summarised below.

Firstly, it was found that a contract did exist, as evidenced by the collective bargaining agreement concluded between the NZRU and the players (which clearly also bound the individual clubs).[34] The salary cap arrangement and the new player movement regulations, as part of the main agreement, also constituted an arrangement or understanding within the meaning of the Act.[35]

Secondly, it was found that the parties were in competition with each other. The teams of the new Premier Division competed with each other to acquire services of rugby players, and the players also competed with each other to supply these services.[36] Regarding the players, however, it was disputed whether their services constituted a market within the scope of the Commerce Act. The Act's definition of "service" explicitly excludes services under

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[31] Sections 27(1) and (2).
[32] Section 30.
[33] Section 29(1).
[34] *NZRU* para 316.
[35] Paras 395 and 398.
[36] Paras 407-408.

employment contracts.[37] Therefore, the Commission's jurisdiction depended on the possibility that players could be hired as independent contractors by their clubs.[38]

NZRU submitted that although its rules did allow players to work as contractors, there was "no real prospect" that this would be the case in future.[39] In fact, at the time of the application, there was only one player in the league who could be considered a contractor, and the governing body subsequently changed its rules to ensure that all players would be hired under employment contracts.[40] Nonetheless, the Commission concluded that despite the clubs' preference for engaging players as employees, there still existed (at the time) the possibility that players could become independent contractors.[41] These players provided services within the meaning of the Act, and constituted a relevant market *in casu*.[42]

The Commission then proceeded to examine the likely effects of the proposed arrangements, in order to determine whether they resulted in the lessening of the relevant markets relative to the counterfactual scenario. Regarding the latter, however, it was recognised that this would be difficult to predict, due to the fact that the parties would have to reach a new collective bargaining agreement should the Commission refuse to authorise the one in question, with very little indication what these new terms might be.[43] Nevertheless, the Commission made the following assumptions about the counterfactual scenario: firstly, the new league format would still be implemented; secondly, there would be no salary cap in place; and thirdly, there would be slightly more transfer restrictions than what was proposed.[44]

The above was then compared to the three main aspects of the proposed arrangement, namely the salary cap, the transfer fee provision and the transfer period amendment. Regarding the salary cap, it was held that the proposal aimed to set a ceiling on the amount that each team could spend on players' salaries, and that its purpose was to restrict the abilities of the wealthier teams to compete for players' services.[45] This was because, initially, only a few teams in the

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[37] Section 2 of the Act.

[38] Para 283.

[39] Para 288.

[40] G Basnier "Sports and competition law: the case of the salary cap in New Zealand rugby union" (2014) 14 (3) *The International Sports Law Journal* 155 at 162.

[41] Para 287.

[42] Para 306. In addition to the provision and acquisition of rugby player services, the Commission found that the provision of sports entertainment services was also a relevant market, although no anti-competitive effect was found there. See para 379.

[43] Para 257.

[44] Para 263.

[45] Paras 417-418.

league were spending over the proposed limit. The Commission had no trouble in finding that this restriction satisfied the requirement of "lessening competition" under s 27.[46]

Additionally, the Commission also considered whether the salary cap was a price-fixing arrangement, i.e. an arrangement that "interferes with the competitive determination of prices, even if those prices are not specified".[47] The Commission noted that the proposed cap only fixed teams' total maximum expenditure, but not any individual salaries.[48] However, this could still affect the ability of players' to receive their free market price in two ways. Firstly, a player may be prevented from transferring to a team if the latter was constrained by the cap, and thus could not pay the player's free market price. Secondly, a player might be forced to transfer to another team because his current team could not afford his normal price due to the salary cap.[49] The Commission held that this would amount to an interference with the competitive determination of prices, and in turn, constitute a price-fixing arrangement.[50]

The Commission then considered the second proposed arrangement, namely the transfer fee provision. Here, the enquiry was focused on the maximum transfer fee applicable when players move from lower divisions to the Premier Division, rather than transfers between teams within the same league, which would attract no fee under the new agreement. The Commission recognised that the proposal was designed to ensure that teams in lower divisions are compensated when their players leave to play at a higher level, with the transfer fee serving as an incentive for these teams to develop young players.[51] It was held that since this requirement was not more restrictive than the counterfactual scenario, there was no lessening of competition for the purpose of s 27.[52]

However, the Commission then held that since the proposed rule did set maximum transfer fees, it would constitute an artificial interference with the free determination of prices, and thus, a price-fixing arrangement under s 30.[53]

Finally, the Commission considered the proposal to lengthen the previous transfer window. It was found that the old transfer period was too short, which unduly restricted the players' ability

[46] Para 429.
[47] Para 441.
[48] Para 445.
[49] Para 447.
[50] Paras 449 and 455.
[51] Para 456.
[52] Para 474.
[53] Para 487.

to move between teams.[54] In order for the salary cap to efficiently redistribute talented players, the NZRU decided to widen this period.[55] The Commission found that this proposal did not have any anti-competitive implications, nor was any price-fixing element present.[56] The restriction on player movement itself, according to the Commission, would have been the case under the counterfactual scenario, as the league was operating under a previously-approved, and shorter transfer window.[57]

In addition to the above, the Commission also briefly considered whether the agreement contained any exclusionary provisions for the purpose of s 29 of the Act. It held that the salary cap provision, which it already found to restrict the acquisition of rugby players' services, was a part of the agreement between all the Premier Division teams.[58] As the teams were in competition with each other for the acquisition of this exact service, the Commission had little difficulty in finding that the salary cap would be an exclusionary arrangement.[59]

Therefore, having found that the agreement would be in violation of the Act, the Commission then considered whether the public benefits of the proposed arrangements outweighed the detriments. The Commission recognised that the measures proposed by the NZRU were aimed at addressing the competitive imbalance concern within the league, and then proceeded to discuss whether this concern was legitimate.

The Commission pointed out that the merits of having a competitively balanced competition rely on the so-called "uncertainty of outcome" hypothesis. This is the theory that an unbalanced and predictable sports league will cause audiences to lose interest in the game, which results in revenue loss for the competition's organisers and teams.[60] Furthermore, competitive imbalance is often caused by the external factor that teams based in areas with large, wealthy populations can more easily generate incomes from their fanbase. This monetary advantage can then be used to secure the services of the most talented players, and that over time, it causes the league to become unbalanced.[61] It was finally argued that in order to redress this issue, competition

[54] Para 492.
[55] Para 491.
[56] Para 497.
[57] Para 495.
[58] Para 525.
[59] Para 528.
[60] Para 126.
[61] Para 127.

organisers should introduce interventionist measures that would maintain a reasonable equality in the playing strengths of all teams.[62]

A salary cap is one such measure available to sports governing bodies. It can prevent teams with more resources from spending more money on players than the rest of the league. However, as mentioned above, it has the side effect of preventing players from selling their services to teams that value them most highly.[63]

In order to determine whether this is justified, the Commission first examined whether there was a state of competitive imbalance within New Zealand rugby, as the NZRU had claimed. They Commission conducted its own empirical investigation on the matter, and concluded that although there has been a decline in the state of competitive balance from 1997 to 2000, the situation had remained "relatively stable" since then.[64] In fact, two of the statistics that the Commission examined, namely the relative standard deviation of winning percentage and the relative standard deviations of points, actually show that the competitiveness of the league had been improving since 2000, notwithstanding a sharp decline in 2004.[65]

Although it was unconvinced by the NZRU's claim that the domestic league was competitively imbalanced, the Commission nevertheless stated that there may be a need for talent redistribution. This is because the newly proposed format of the league also included four teams from the lower division, who may struggle to compete otherwise.[66]

In order to determine the merits of salary caps as a redistribution mechanism, the Commission constructed an economic model, which was used to highlight four main issues with the measure in general.[67] These issues are explained below.

Firstly, the salary cap would cause a loss of allocative efficiency. This occurs when teams are unable to spend more than the imposed amount in order to attract better players, as well as when players are unable to move to teams that are constrained by the cap in order to earn higher salaries.[68] Secondly, there would also be a productive efficiency loss, as the league must incur

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[62] Para 128.
[63] *Ibid.*
[64] Para 132.
[65] Para 133.
[66] Para 134.
[67] Para 147.
[68] Para 152.

significant monitoring and enforcement costs to combat teams that try and evade the cap.[69] Thirdly, players who cannot earn their free market price might be driven to ply their trade overseas, which would lead to a loss of talent. And lastly, those who are unable to move to their desired teams might become frustrated, which would have a negative impact on team morale.[70]

The Commission then considered the proposed salary cap's ability to actually achieve its objective of distributing playing talents. It identified six problems that could affect the efficiency of the proposed arrangement. Firstly, it was found that according to the agreement between the parties, some forms of payments to players would not be counted towards the salary cap.[71] The system also did not account for non-monetary benefits that teams could offer, such as better training facilities. It was held that this could undermine the strictness of the cap.[72] The Commission concluded that salary cap was not "hard enough", which might make it difficult to enforce in practice.[73]

The second limitation was that under the agreement, the initial salary cap had been set at a relatively high amount, which would only constrain a few teams from the outset.[74] Furthermore, the cap was to increase over time in order to account for inflation, which meant that the distribution process sought by the NZRU would be slow.[75] The Commission also pointed out that the fact that teams would have an incentive to "cheat the system", as only a few of them would be caught by the proposed cap initially.[76]

The third limitation was the income disparity among the teams in the league. According to the Commission's study, the difference among the team' revenues was high, which meant that even if the wealthier teams were forced by the salary cap to release some of their players, the other teams did not necessarily have the resources to capture the offloaded talents.[77] In this regard, the NZRU submitted that it had a policy to distribute special monetary grants to the smaller and the newly-promoted teams, whom have indicated that they planned to increase their spending on players in the upcoming seasons.[78] However, the Commission doubted the

[69] Para 156.
[70] Para 157.
[71] Para 166.
[72] Para 168.
[73] Para 174.
[74] Para 184.
[75] Para 176.
[76] Para 179.
[77] Para 185.
[78] Paras 188-189.

sustainability of such an approach, and held the income disparity among the teams could seriously affect the effectiveness of a salary cap.[79]

The fourth limitation was the fact that some players might be resistant to moving. According to the Commission, they might want to stay with a strong team, which could benefit their skills development and increase their chances of on-field success.[80] Since the most talented players usually have multiple income sources, a reduction in their domestic league salary might not be sufficient to motivate them to leave.[81] On the other hand, less talented players, who could not depend on earning additional incomes by playing in the Super Rugby competition or for the national team, would be more likely to leave. However, the redistribution of these players was unlikely to redress the league's competitive balance problems.[82]

The fifth limitation was that players with team-specific talents would be difficult to redistribute. The Commission noted that certain players thrive when they play alongside others whose skillsets are complementary to theirs.[83] These players would become less productive if they played for teams that were tactically unsuitable for them, which would also hinder their skills development in the long run.[84]

Lastly, the Commission also cast doubt on the assumption that a more balanced competition would be more attractive to the audience.[85] Regarding this, the NZRU claimed that the successful introductions of salary caps in Australian rugby league competitions was evidence of the system's merits, as both the National Rugby League[86] and the Australian Football League had experienced improved competitiveness and financial strength following the introduction of salary caps.[87] However, the Commission held that the success of those competitions could not be solely attributed to salary caps, as one of the leagues had also introduced other interventionist measures.[88] It was also possible that the improvements were

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[79] Para 189.
[80] Para 193.
[81] Paras 191 and 196.
[82] Para 196.
[83] Para 199.
[84] Para 201-202.
[85] Para 203.
[86] This competition was formed in the aftermath of the *News Ltd* case, discussed in the previous chapter.
[87] Para 136.
[88] Para 138.

caused by changes in cultural and sporting tastes, population growth or demographic shifts.[89] Therefore, it could not be concluded that the results could be replicated in New Zealand.[90]

As a result, the Commission decided to examine the existing literature regarding the appeal of competitive balance. After finding that the existing studies provided mixed evidence on this topic, it then decided to conduct its own empirical analysis on the effect of outcome uncertainty.[91] Regarding live spectators, the Commission found that although crowd attendances fell when seasonal outcomes were predictable, the coefficients of the two data sets were not statistically significant enough to prove a definite correlation.[92]

Regarding television audience, the Commission initially relied on the submissions of the television broadcasters that the proposed salary cap could create a more attractive rugby union competition, which would lead to increased viewership.[93] However, in its final decision, very little weight was attached to these submissions. It was held that the broadcasters' opinions were unconvincing as it was unclear on what basis they were formed, and whether they were hiding their true preference in order to appease the league organisers.[94]

Therefore, the Commission decided to construct its own econometric model on the demand of television audiences.[95] It was found that, over the four seasons studied, viewership demand in rugby was not significantly related to any single variable, although matches that involved high numbers of Super Rugby players did have a positive effect.[96] This led the Commission to suggest that match quality could be improved by a redistribution of talented players, even if it has no effect on the outcome uncertainty of the game.[97]

Having determined that the proposed arrangement had some potential to increase viewership, the Commission then examined whether the public benefits of the agreement would outweigh its detriments.[98] The Commission again stressed that emphasis should be placed on benefits or

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[89] *Ibid.*
[90] Para 142.
[91] Paras 645 and 663.
[92] Para 666.
[93] Para 670.
[94] Para 689.
[95] Para 671.
[96] Para 674.
[97] Paras 690-691.
[98] Para 541.

detriments relating to quantifiable economic efficiency.[99] It was held that only benefits realisable within five years would be considered, because although benefits beyond this period might exist, quantifying them would be too difficult.[100] Furthermore, the benefits would be periodised into the five year period, in order to account for the fact that many of the benefits claimed by the NZRU were more likely to be realised in the later years.[101] The future gains were therefore discounted at a rate of 6.8% per annum in order to determine their present value.[102]

The Commission first considered the public detriment that was likely to result from the proposed arrangement. Regarding the allocative and productive inefficiencies, it was estimated that the former had a present value of 133,000 NZD for the entire arrangement, while the latter would likely fall between 2,100,000 and 2,458,000 NZD.[103] The estimated range of the loss of playing talent due to possible emigration was between 948,000 and 1,895,000 NZD,[104] although this was heavily disputed by the NZRU and the Premier Division teams, who argued that players were likely to remain in the league even if they received lower salaries, in order to be eligible for selection in Super Rugby and by the All Blacks.[105]

The Commission held that the other efficiency losses were likely to be small, and therefore concluded that the total detriment arising from the proposed arrangements was between 3.2 million and 4.5 million NZD.[106]

This was then compared to the likely public benefits claimed by the NZRU. It was argued that a more competitively balanced league would be more attractive to fans, broadcasters and sponsors, which would in turn lead to improved financial strength of the teams.[107] The newly gained financial resources could be used to improve the game, through expenditure on player development, stadium facilities and talented overseas players.[108] The Commission, however, was unconvinced by the argument, which it saw as a change in income distribution, rather than

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[99] Para 543.
[100] Para 547.
[101] Para 561. The Commission periodised the benefits as follows: 5% in Year 1; 10% in Year 2; 15% in Year 3; 25% in Year 4; and 40% in Year 5. The remaining 5% are not considered to be relevant.
[102] Para 562.
[103] Paras 574 and 593 respectively.
[104] Para 518.
[105] Para 596.
[106] Para 633.
[107] Para 692.
[108] Para 693.

a public gain.[109] In any case, it was held that the gains would have opportunity costs, such as the diversion of sponsorships from other recipients (charities or the arts), reduced broadcasting for other programmes, or the loss of audience in other forms of sports entertainment.[110] Overall, however, the Commission recognised that there may be some public benefit, which it estimated to be valued between zero and 360,000 NZD.[111]

The NZRU also claimed that the proposed arrangements could improve the performance of New Zealand's Super Rugby teams and the national team. It was argued that the distribution mechanism of the salary cap would create a higher quality contest, in which players must train harder in order to succeed.[112] At the same, the cap would make it difficult for teams to "stockpile" talented players in reserve, which meant that more quality players could receive match experience that would aid their skills development.[113] Furthermore, since teams would be constrained on the amount of money they may spend on player salaries, resources could be diverted to training facilities.[114] However, the Commission found that the link between the claimed benefits and the proposed arrangement was weak.[115] More importantly, it was held that most of these effects would only be realisable in the long term, and were thus excluded from the five year period under consideration.[116]

The Commission then considered the benefit accruing to live and television audiences. It recognised that this benefit may be intangible, as it is not only concerned with new fans attracted to the sport, but also the extra enjoyment of existing fans as the result of an improved competition.[117] As discussed above, the Commission found that the cause of any potential increase in enjoyment was not competitive balance, but rather the increase in match quality when talented players are more evenly distributed. It was held that this figure was likely to fall between zero and 1,100,000 NZD for live spectators, while for television viewers, the figure was likely to be between zero and 10,800,000 NZD.[118]

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[109] Para 694.
[110] Para 695.
[111] Para 795.
[112] Para 702.
[113] Para 703.
[114] Para 704.
[115] Para 707.
[116] Para 706.
[117] Para 715.
[118] Paras 737 and 759.

Lastly, the Commission also dismissed the NZRU's contention that the proposed arrangements, should they lead to enhanced performance of the national team, would also have several indirect public benefits, including a general "feel-good" factor amongst New Zealanders.[119] It was held that no weight could be placed on such benefits, as they were of a "tenuous nature", and that the magnitude of these benefits was likely to be small in any case.[120]

Having considered all the public benefits and detriments, the Commission concluded that the net effect of the proposed arrangements would fall between a loss of 4.5 million NZD and a gain of 9.1 million NZD.[121] It held that the midpoint of this range, which was a gain of 2.3 million NZD, should be used as the appropriate point of indication.[122] As a result, the Commission held that despite their anti-competitive effects in the rugby player services market, the proposed arrangements nevertheless had the potential to yield public benefits.[123] Therefore, it decided to grant the authorisation, subject to the following three conditions.[124]

Firstly, it was required that the NZRU set up monitoring and enforcement mechanisms to ensure that its teams would comply with the salary cap.[125] Secondly, the governing body was requested to define the scope of the cap more clearly, in order to establish the types of payments that would contribute towards the calculation of the cap, and prevent teams from creating loopholes in the system.[126] Lastly, the NZRU was required to conduct and submit a review prior to the expiration of the authorisation period (which was limited to six years), in order to report on whether the public benefits claimed in this decision were in fact realised.[127]

However, it should be noted that this was not the final outcome regarding the matter. In 2011, a final application was made to the Commission, and granted, after the NZRU elected to eliminate the possibility of players being hired as independent contractors.[128] In other words, all players would work under employment contracts in future.[129] As a result, the Commission

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[119] Para 803.
[120] Paras 803-804.
[121] Para 811.
[122] Para 812.
[123] Para 815.
[124] *Ibid.*
[125] Para 826.
[126] Para 830.
[127] Para 842.
[128] G Basnier "Sports and competition law: the case of the salary cap in New Zealand rugby union" (2014) 14 (3) *The International Sports Law Journal* 155 at 162.
[129] Simpson 2012 *Aus. and N.Z. Sports L. J.* 12.

held that the salary cap, which now only only applied to services of employees, fell outside of the scope of the Commerce Act, and revoked its previous decision.[130]

Despite the fact that the above decision now has little practical implications, it may still serve as a guideline as to how future competition law disputes regarding sports issues may be resolved by New Zealand authorities. Broadcasting rights is an example of an issue that may arise that does not involve employment contracts or collective bargaining agreements. Therefore, some observations are made below regarding the Commission's decision.

From the outset, it can be noted that the Commission's approach in this case contrasts with the "specificities of sport" approach identified under E.U. law.[131] Whereas cases under the latter jurisprudence focused on determining whether a specific arrangement is rationally related to the achievement of a legitimate sporting objective, in *NZRU*, emphasis was placed on whether the proposal would actually achieve the goal, and achieve it in an effective manner. Here, effectiveness should also be distinguished from reasonableness discussed in the previous chapter. Whereas the U.S. courts were only concerned whether a less restrictive alternative could have been adopted, the Commerce Commission clearly also examined whether the salary cap could be improved so as to better promote its sporting objectives.

It is questionable whether this is indeed a matter for competition authorities to decide. However, it should be borne in mind that the Commission's decision was within the context of an exemption application, which explicitly required a balancing of public interests against detriments. Therefore, it may have been justified in questioning whether the methods adopted by *NZRU* was in the best interest of the sport. Nevertheless, this approach does impact on the autonomy of sports governing bodies more than the E.U. approach discussed below.

On the other hand, the Commission's attention to detail in its several studies deserves recognition. The econometric models constructed from the available data was sophisticated and transparent, which helped all the parties involved to understand the economic effects of the proposed arrangements.[132] The models are likely to be useful in future sports-related disputes

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[130] *Commerce Commission, Decision No 721, Determination of pursuant to the Commerce Act 1986 in the matter of the revocation of the authorization granted to the New Zealand Rugby Union Incorporated in Decision 580* (dated 31 March 2011).

[131] Basnier *Int. Sports Law J.* at 163.

[132] E Toomey "Anti-competitive practice in the sporting arena: Commercial watchdogs adapt their game" (2007) 26(1) *University of Queensland Law Journal* 117 at 142.

as well, with the Commission's interpretation of television viewership data being particularly insightful.[133]

In addition, it is submitted that the Commission was also correct in recognising several difficulties facing the operation of a salary cap. Here, three factors are indicative of the problems of this form of intervention, namely the difficulty of deciding whether certain forms of benefits to players should be included in the calculation of the cap, the inability of the system to redistribute talents without an effective revenue sharing scheme, and that fact that salary caps do not target "premium" and "average" levels of players equally. Regarding the last factor, the Commission astutely pointed out that a salary cap that primarily redistributes "average" players would not have the desired effect of enhancing competitive balance or match quality.

Furthermore, the conditions imposed by the Commission along with its authorisation could be an effective method of asserting some control on sports governing bodies, without completely eliminating their autonomy to govern the game. The requirement that organisers should conduct a review of the success of its proposed arrangements after their implementation can assist future competition law authorities to decide whether authorisations can continue to be granted.

However, the Commission's decision is not without criticisms. It is submitted that by only considering benefits that are realisable in the immediate five-year period, the Commission adopted a somewhat short-sighted approach. Sporting bodies, as the administrators of the games, are responsible for overseeing their long-term development, and may need to implement plans that will only bear fruit in the long run. For example, the effect of the salary cap on young players' development would only become obvious once the next generation of athletes mature, and their impact would fall well outside of the time period prescribed by the Commission. This was admitted in the decision at para 560, where the Commission recognised that the NZRU's desired effects would likely take much longer to realise. Therefore, it is submitted, respectfully, that the focus on the five-year period ignored some of the most important objectives of the arrangement in question.

Furthermore, it is submitted that the Commission was too hasty in concluding that the domestic league did not have a problem of competitive imbalance. This is because its study on the matter relied on whether the level of competitiveness improved or deteriorated, while the more

[133] Simpson 2012 *Aus. and N.Z. Sports L. J.* 20.

appropriate question was whether this level, even if stable, was desirable for the game. It is submitted that this was a judgment call that could be better made with the expertise of a sports body, rather than a competition law authority.

Similarly, in dismissing the merits of having a competitively balanced league, the Commission over emphasised the economic impact that this would have on audiences. However, it is submitted that the NZRU was correct in highlighting the sporting elements involved, such as the effect of a highly competitive league on player development and national team performance. The latter, which the Commission dismissed as a mere "feel-good" factor, was in fact underestimated in its importance. As argued in Chapter 2 above, success of the national sports teams elicits national pride among the country's citizens. While intangible, it is difficult to dismiss this as a public benefit. Furthermore, it is arguable that a case can even be made that a fair or balanced competition would be more desirable from a purely sporting perspective, and "in the spirit of the game". Therefore, it is unfortunate that the issue relating to competitive balance was heavily influenced by economic arguments, even though the Commission had elsewhere explicitly acknowledged the relevance of intangible benefits.

The Commission's reasoning that the attraction of sponsors, broadcasters and fans do not qualify as public benefits due to their opportunity costs also seems troubling. As the development of the financial side of the game is one of a sporting body's main responsibilities, which is also necessary if other aspects of the game are to be financed, it seems inexplicable that the Commission found any gains in this regard amounting to a mere redistribution of wealth. There also appears to be little evidence that such attractions would necessarily result in equivalent losses.

Finally, three interesting lessons can also be learnt from this case by other sports organisers. Firstly, due to the separation of competition and labour laws, governing bodies wishing to circumvent the former may implement rules as part of a union-negotiated collective bargaining agreement. This would effectively exclude the scrutiny of competition law.[134] As will be seen in the next chapter, this exemption is also provided under s 2 of the South African Competition Act.

Secondly, it should also be noted that New Zealand rugby is in a unique position to impose salary caps. This is because in order to qualify for national team selection, players are required

[134] Simpson 2012 *Aus. and N.Z. Sports L. J.* 2.

to play their professional games in a domestic league. This can mitigate the loss of player talent through migration. However, this requirement does not exist in South African rugby, or in sports such as football, where players may represent their national teams regardless of where they ply their trade. Therefore, the effectiveness of a salary cap would be undermined in these sports, which explains why the idea was abandoned by the Serie A in Italy after much debate.[135]

Lastly, NZRU's foresight to approach the Commission for its approval before implementing the restrictive measures proved to be practical and instructive. By doing so, the governing body was informed of the problematic aspects of its rules, thereby avoiding the possibility of prohibition at a later stage. As one author commented, this was an example of "a 'prevention better than cure' approach".[136] The task of enforcement authorities will be much easier if other sports entities were encouraged to examine their compliance with competition law as well.

7.2 Indian law

The second jurisdiction discussed in this Chapter is India. Competition law in India is governed by the Competition Act,[137] and enforced by the Competition Commission of India.[138] Chapter II of the Act prohibit certain practices, which are categorised into anti-competitive agreements and abuse of dominant positions. The latter is dealt with under s 4 of the Act, which was considered in the context of sports on two separate occasions.

Barmi v Board for Control of Cricket in India (BCCI),[139] discussed in 7.2.1, concerned a sports governing body's refusal to authorise a tournament established by a rival competition organiser. The Commission had to decide whether the sporting justifications offered by the governing body were relevant for competition law purposes. The same issue arose again in *Dhanraj Pillay v Hockey India*,[140] in which it appears that the Commission decided not to follow its earlier approach. The latter case is discussed in 7.2.2.

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[135] C Davies "The use of salary caps in professional team sports and the restraint of trade doctrine" (2006) 22 *Journal of Contract Law* 246 at 266.

[136] Toomey 2007 *Uni. of Queensland L. J.* 141.

[137] Act 12 of 2003.

[138] *Ibid* Section 18. See also CCI "CCI: About us" http://www.cci.gov.in/about-cci (accessed 12 December 2015).

[139] Case no. 61/2010, before the Competition Commission of India (08 February 2013).

[140] Case no. 73 of 2011, before the Competition Commission of India (31 May 2013).

7.2.1 *Barmi v Board for Control of Cricket in India*

In *Barmi v Board for Control of Cricket in India (BCCI)*, the Competition Commission of India had to decide whether the BCCI had abused its dominant position within the meaning of s 4(2) (*c*) of the Act. The relevant section provides that:

> "4. Abuse of dominant position -
>
> (1) No enterprise or group shall abuse its dominant position.
>
> (2) There shall be an abuse of dominant position under subsection (1), if an enterprise or group -
>
> ...
>
> (c) indulges in practice or practices resulting in denial of market access in any manner.
>
> ...
>
> For the purpose of this section, the expression ... "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to -
>
> (i) operate independently of competitive forces prevailing in the relevant market; or
>
> (ii) affect its competitors or consumers or the relevant market in its favour."

From the outset, it is clear not only does the definition of an enterprise in a "dominant position" differ from the meaning of a dominant firm under s 7 of the South African Competition Act, but that under the Indian Act, denial of market in any form is prohibited *per se*. This can be contrasted with the position under South African law, where only denial of access to an "essential facility" when economically feasible to do so constitutes an outright violation of s 8. Other forms of exclusionary acts are considered under a rule-of-reason test in accordance with s 8 (*c*) or (*d*), as the case may be. Therefore, it should be stressed that the purpose of the following discussion is not to suggest that South Africa should follow the legal principles applied in this case, but rather to note possible contexts in which non-economic arguments could be raised.

Returning to the case, BCCI is the national governing body for cricket in India. It is a full member of the International Cricket Council, and it is responsible for, *inter alia*, controlling and promoting the game of cricket in India, framing the laws of the game nationally, and

selecting teams to represent India in international matches.[141] It also has the power to organise official cricket competitions and disapprove any unauthorised tournaments. In its capacity as the organiser of a private professional competition known as the Indian Premier League ("IPL"), it was initially alleged against the governing body that there were irregularities in its granting of franchise and media coverage rights, as well as the awarding of sponsorship and other related contracts.[142] However, during the course of the hearing, it became apparent that the Commission focused on the issue of whether the BCCI's contractual agreements had prohibited the existence of a rival competition, known as the Indian Cricket League ("the ICL").

In order to answer this question, the Commission had to determine three issues, namely whether BCCI is an "enterprise" as defined in the Act, whether it has a dominant position in the relevant market, and if so, whether it has abused its dominant position within the meaning of s 4 of the Act.[143] For present purposes, only the last two issues are relevant for this chapter. Regarding the first issue, it suffices to say that the Commission found that BCCI is an enterprise despite the non-commercial nature of many of its activities.[144]

The Commission then held that the relevant market in this case was the organisation of private professional cricket.[145] As to whether the BCCI holds a dominant position in this market, the Commission first discussed the nature of sport's organisational structure. It held that cricket, like many sports including football and basketball, follows the "pyramid structure" of governance, whereby an international federation (in this case the ICC) has governing power over regional or national bodies (such as the BCCI), which in turn control the domestic leagues and clubs.[146] The Commission recognised that the pyramid structure is important for ensuring the autonomy of the sporting bodies, as they are not subject to the control of national governments. This in turn allows them to effectively perform their regulatory functions, including setting and applying the rules of the game, maintaining integrity and fairness of the sport (through anti-doping regulations), and promoting the orderly development of the game.[147]

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[141] *Barmi v BCCI (before Competition Commission of India)* para 2.1.
[142] Para 2.6.
[143] Para 3.1.
[144] Para 8.30.
[145] Para 8.39.
[146] Para 8.1.
[147] Para 8.2.

However, the Commission also pointed out that as a result of the pyramid structure, a national governing body becomes the *de facto* regulator of the sport in that country, which grants it a monopoly in the organisation for that sport.[148] It was found that this was indeed the case with BCCI, which already had monopoly over the organisation of First Class Cricket in India. This monopoly was then expanded to include private professional cricket leagues through its creation of the IPL.[149]

According to the Commission, this raises serious competition law concerns. This is because many aspects of the sporting body's regulating powers have commercial implications. In some cases, the regulator may also become the economic beneficiary of their decisions. As a result, an organiser like the BCCI can use its powers to protect its own commercial interests, and may even exceed what is appropriate for the growth of the sport.[150]

In response, the BCCI argued that any funds generated through its organisation of tournaments are re-invested back into the sport.[151] It appears that the rationale for this argument is that even though BCCI does benefit financially through its regulatory powers, its economic interests are motivated by the development of the sport. Furthermore, it was argued that its organisation of a private professional league is justified on a number of non-economic grounds, namely the finding and nurturing of talented players, promotion of the domestic game at a competitive level, international exposure for domestic players, and the attraction of of new spectators, especially women and children, to the sport through T20 format.[152] In addition, BCCI also raised the the argument that unique factors are present in the organisation of sport, including the interdependence between the competing clubs, the need to preserve the uncertainty of results, and the importance of autonomy in the internal organisation of sports associations.[153]

However, these arguments were not pursued in any detail after they were mentioned during the early stages of the hearing. In any case, the Commission did not discuss how these considerations affected its findings, other than acknowledging that they may be legitimate objectives. As a result, it was held that the BCCI did have monopoly power, due to its ability to disapprove rival cricket events, by refusing to grant authorisation to their organisers.[154]

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[148] Para 8.40
[149] Para 8.41.
[150] Para 8.40.
[151] Para 8.41.
[152] Para 8.41.
[153] Para 35 of the dissenting judgment, *per* ML Tayal, Member.
[154] Paras 8.42-43.

Furthermore, this power was not subject to restrictions and external reviews, which means that the governing body is free to exclude rival competitions in favour of its own tournaments.[155]

The Commission pointed to the failure of the ICL as an example of this. It held that BCCI's refusal to approve the league, which would be in competition with the IPL, in addition to denying it infrastructural support, was a contributory factor in the rival competition's demise.[156] The Commission found that this was an indication of the BCCI's monopoly status, which, in addition to other factors such as the governing body's regulatory role, and its control of infrastructure and players, clearly established its position of dominance in the relevant market.[157]

The issue that the Commission then had to decide was whether BCCI had abused its position of dominance. In this regard, the Commission again looked to the governing body's role in the failure of the ICL. It was found that there was a direct link between the its decision to disapprove the rival league, and its contractual agreement concerning the media rights of the officially sanctioned IPL.[158] In accordance with this agreement, concluded with a group known as MSM, the BCCI bound itself not to "organise, sanction, recognise, or support … another professional domestic Indian T20 competition".[159] The Commission found that this amounted to a denial of market access to any potential competing tournament organisers, in violation of s 4(2)(*c*) of the Act.[160]

However, the BCCI defended its role by pointing towards the ICL's unviable business model.[161] It was argued that the rival competition's collapse was caused by a number of factors, including its inability to attract sufficient live crowds and television audience, a lack of fan appeal, and general underinvestment.[162] As a result, the BCCI regarded the ICL as falling within the ambits of "disapproved cricket" in accordance with the ICC rules, which led to its refusal to endorse the competition. The governing body contended that its decision was not motivated by economic gains, and that the requirements regarding disapproved cricket were

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[155] Para 8.50.
[156] *Ibid.*
[157] Para 8.51.
[158] Para 8.55.
[159] *Ibid.*
[160] *Ibid.*
[161] Para 8.53.
[162] *Ibid.*

necessary in order to preserve the integrity of the sport, and ensure its orderly development and the consistent application of the rules of the game.[163]

The Commission disagreed with this argument. It held that while there may be merit in these considerations, the creation of a monopoly power is an overreach.[164] The Commission was unconvinced that the exclusivity of official tournaments is motivated by sporting interests, rather than economic gains. It went so far as to state that the monopoly power constitutes an attempt by sports federations to maximise revenues "under the guise of the pyramid structure".[165]

The Commission referred to s 32 of the ICC rules as evidence of such an approach. The relevant rule states:

> " … it is common for a sport's commercial partners to require certain commitments to protect their respective investments in the sport. For example, a commercial partner investing significant sums in a Member or the ICC may require assurances that Members and/or the ICC will not thereafter establish (or permit the establishment of) competing events. Members ought not to put themselves or the ICC in breach of their respective commitments to those commercial partners, as this would threaten the generation of commercial income for distribution throughout the sport."

The Commission used this to conclude that BCCI's actions were motivated by its financial interests. It held that the governing body used its dominant position to restrict economic competition in the market for sporting events.[166] In any event, the Commission reasoned, the restriction on competition is harmful in a sporting sense as well, because the game of cricket and its benefits should be spread out as much as possible, rather than being concentrated in a few hands.[167] Allowing more professional leagues to be established would provide young players more platforms on which to perform, and allow the sport to "find champions where least expected".[168]

As a result, it was ordered that the BCCI desist from similar exclusionary conduct, and the relevant clauses in its media rights agreement concerning the IPL were declared to be void.

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[163] Para 8.56.
[164] *Ibid.*
[165] Para 8.57.
[166] Para 8.59.
[167] *Ibid.*
[168] *Ibid.*

A dissenting decision was also written, by Commission Member Tayal, in which it was held that although BCCI did occupy a position of dominance within the relevant market, it did not abuse its power in the alleged manner.[169] The decision focused on the irregularities raised in the initial complaint, rather than the governing body's refusal to endorse the ICL. However, this issue did arise in the context of the media rights agreement, concerning the exclusivity clause discussed above.

The Commission Member dismissed the issue, and held that the clause in question was lawful for two reasons. Firstly, it was fair for the IPL's media partner (MSM) to demand such an exclusivity clause, because the IPL was a new format of the game at the time, with no guarantee of its success.[170] Secondly, by agreeing to the clause, the BCCI was acting in accordance with s 32 of the ICC rules quoted above.[171] Contrary to the majority decision, here it was found that the rule was not exclusionary, although the Commission Member did not elaborate on his reasons for this finding.

The BCCI subsequently took the matter on appeal before India's Competition Appellate Tribunal, where the majority decision of the Commission was overturned.[172] However, the appeal did not deal with the substance of the Commission's decision at all. Instead, the governing body argued that by relying on information that was not present in the initial complaint, the Commission did not afford the BCCI an adequate opportunity to respond to the claims.[173] As a result, the Commission did not adhere to the tenets of *audi alteram partem*, and the decision was made in violation of the principles of natural justice.[174]

The Tribunal agreed that the BCCI was not afforded the opportunity to properly challenge the Commission's findings. It held that the Commission relied on information, including the exclusivity clause in the media rights agreement, which was absent in both the informant's complaint and the Director General's investigation report.[175] As a result, the Tribunal ordered that the initial decision be set aside, and that the case be remitted to the Commission.[176] Presently, the matter remains unresolved, but its eventual outcome is keenly anticipated.

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[169] From para 120 of the dissenting judgment.
[170] Para 136 of the dissenting judgment.
[171] *Ibid.*
[172] *The Board of Control for Cricket in India v The Competition Commission of India* Appeal No. 17 of 2013 before the Competition Appellate Tribunal [23 February 2015].
[173] *Ibid* para 24.
[174] Para 23.
[175] Para 24.
[176] Para 38.

In the meantime, several observations can be made regarding this case. From the outset, however, it should be noted one must be cautious of reading too much into the Commission's decision. This is so for two reasons: Firstly, the matter on appeal revealed that questionable evidence was used by the Commission in coming to its decision, and that the BCCI was not able to respond to all the allegations. Therefore, it is very possible that the latter could have raised successful factual and/or legal arguments against the Commission's findings had it the opportunity to do so. Secondly, although the appeal did not overturn the Commission's legal reasoning, the persuasive value of a decision by the Competition Commission is still limited due to the body's quasi-judicial status.

Nevertheless, the issues that arose in the *BCCI* case illustrate why subjecting sporting bodies to competition law regulation is preferable to a *laissez-faire* approach, and why the consideration of non-economic factors may be important in resolving these cases.

As the Commission pointed out, although sports governing bodies are responsible for the development of their respective sports, they are also capable, through the pyramid structure of sporting governance, of making a large number of decisions which have substantial financial implications. In cases where event organisation and sponsorship agreements are involved, the sporting bodies also stand to benefit commercially from their decisions. Therefore, the possibility that governing bodies may pursue the most financially rewarding option at the expense of the development of the game cannot be ignored.[177] In the event that such decisions are made through the restriction of economic competition, it is appropriate that competition law authorities should intervene.

Therefore, it appears that the question of whether a governing body's decision was motivated by its economic interests or sporting considerations is also relevant. That is not to say that the two cannot coincide. However, in determining whether this is in fact the case, a competition law authority cannot merely take the sporting body's assertions at face value. For example, in the *BCCI* matter, while it was unfortunate that the Commission did not fully consider the sporting justifications raised by the governing body, it should be noted that the latter did not adequately elaborate on all such arguments, or how exactly they related to the issues at hand.[178]

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[177] R Kumar "Commercialization of sports and competition law" in R Kumar (ed) *Competition Law in New Economy* (2016) 45.

[178] R Patel "*Barmi v. the Board of Control for Cricket in India*: One to send upstairs?" (2013) http://kluwercompetitionlawblog.com/2013/02/19/barmi-v-the-board-of-control-for-cricket-in-india-one-to-send-upstairs/ (accessed 14 June 2016).

As mentioned above, regarding the BCCI's dominant status in the market, it was contended by the governing body that the unique circumstances of sports league organisation should be considered. These factors include the interdependence between competitors, the uncertainty of results and the autonomy of sports associations. However, it was not shown how these special considerations should be taken into account in the context of market monopoly. Specifically, it is unclear why these considerations render a single league structure necessary, or how they would be undermined by the establishment of a rival league.

On the other hand, it is submitted that the BCCI did establish a clearer link between its decision to not sanction the ICL and its non-economic motivations, and that its justifications on this issue should be have considered in more detail by the Commission. As the governing body contended, its power to disapprove unauthorised cricket is necessary to ensure the game's integrity, orderly development and consistent application of its rules.[179] The first two objectives could clearly be undermined by the establishment of a league which the BCCI considered to lack fan appeal and general investment. The existence of separate leagues also raises the possibility that each competition may adopt its own rules. During the hearing, these concerns were mentioned as BCCI argued that multiple leagues can lead to, *inter alia*, reduced interest in the sport, unnecessary confusion due to different rules, increased costs for sport infrastructure, and reduced economies of scale and scope.[180] These would obviously conflict with the sporting objectives behind the establishment of the IPL as a professional private league, which were the discovery and nurturing of cricket players, promotion of the domestic game, international exposure, and finally, attraction of new audience to the sport.

It is respectfully submitted that the Commission did not adequately consider these factors, by solely relying on the BCCI's commercial and organisational obligation to find that it was motivated by financial gains in its decision to disapprove the ICL. Furthermore, by ignoring the above concerns, and holding that the game would benefit from unlimited competition in a sporting sense, the decision is also open to the criticism that it is attempting to pass judgment on the proper development of the sport, which is arguably an issue that governing bodies should have the autonomy to determine.

However, it should be noted that the scope in which the sporting justifications can be considered in this case is limited, due to the fact that s 4(2) (*c*) of the Act is a *per se* violation.

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[179] Patel "*Barmi v. the Board of Control for Cricket in India*: One to send upstairs?".

[180] Para 36 of the dissenting judgment.

This raises the question whether the distinction between the governing body's economic and sporting motivations is of any significance at all, despite the fact that it was considered at great length during the hearing, as a finding of factual denial of market access would be deemed an unlawful act, even if its unreasonableness is unclear, as was the case in here.

7.2.2 *Pillay v Hockey India*

Following the *BCCI* decision, the issue of a sporting body's refusal to sanction a rival league was considered again in *Dhanraj Pillay v Hockey India*.[181] In this case, a competition known as the World Series Hockey League ("WSH") was established without the sanction of India's regulatory body for hockey, Hockey India ("HI"). It was alleged that the rules of HI and the International Hockey Federation ("FIH") regarding the prohibition of participation in unsanctioned events were anti-competitive in contravention of the Competition Act.[182]

Before discussing the alleged contravention, however, it is necessary to first explain the relationship between the parties involved. Hockey India is the country's national sports federation for hockey. It is affiliated to the Indian Olympic Association, the Asian Hockey Federation, and most importantly for present purposes, the International Hockey Federation.[183] The latter is the international governing body for the sport of hockey, as recognised by the International Olympic Committee ("IOC").[184]

Somewhat confusingly, however, there also exists an organisation known as the Indian Hockey Federation ("IHF"), which is not affiliated to the FIH, but is recognised by the Indian Olympic Association.[185] The IHF, together with the media group Nimbus Sport, announced their intention to organise a franchise-based hockey league, the WSH, which would be based on a similar model to the IPL.[186] At the time of the announcement, there were no private professional hockey leagues in India.

Subsequently, however, the FIH issued a new regulation regarding the distinction between officially sanctioned and unsanctioned events, and prescribed prospective punitive actions to all participants in unsanctioned tournaments.[187] As an affiliate member of the FIH, Hockey

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[181] Case No. 73 of 2011, before the Competition Commission of India (31 May 2013).
[182] Para 2.
[183] Para 3.2.
[184] Para 3.3.
[185] Para 3.4.
[186] Para 4.1.
[187] Para 4.2.

India adopted the rules by modifying its Code of Conduct agreement with hockey players. The new agreement included disciplinary actions, such as disqualification from the national team, for players participating in unsanctioned events.[188] Shortly after the introduction of the new regulations, HI and FIH also announced their own plan to organise a private professional hockey league in India.[189]

It should be noted that contractual negotiation between players and the WSH had already begun at this stage.[190] As a result of the amendments in rules, certain players who had agreed to take part in the unsanctioned competition brought the matter before the Competition Commission of India, alleging that the Competition Act had been violated in three ways.

Firstly, it was alleged that HI was in a dominant position due to its regulatory powers. By promoting its own proposed competition to the exclusion of WSH, it had abused its dominance, and the conduct amounted to denial of market access. As mentioned in the *BCCI* discussion above, this is prohibited under s 4(2) (*c*) of the Act.[191]

Secondly, it was alleged that the same conduct also violated s 4(2) (*e*), which prohibits the use of a "dominant position in one relevant market to enter into, or protect, other relevant market[s]". The complainants contended that HI had used its dominance in conducting international hockey events in India to enter into the market for conducting domestic hockey events.[192]

Thirdly, it was alleged that the HI's Code of Conduct agreement with players constituted an exclusive supply agreement, which is prohibited under s 3(4). The relevant section defines an "exclusive supply agreement" as including any agreement restricting the purchaser from acquiring or otherwise dealing in goods from anyone other than seller. It was argued that a vertical relationship within the meaning of the section existed between HI and the players, and that the restrictive conditions of their agreement, in effect, prohibited players from participating in any events not organised by the governing body.[193]

Before dealing with the above allegations, the Commission first had to decide on two preliminary issues, namely its jurisdiction over the two sports bodies and the relevant markets

[188] Para 4.3.
[189] *Ibid.*
[190] Para 4.2.
[191] Para 4.5.1.
[192] *Ibid.*
[193] *Ibid.*

affected in this case. For present purposes, it suffices to say that it was found that the parties were subject to the Commission's jurisdiction,[194] and that regarding the issue of the relevant markets, two markets were identified. The first was the market for the organisation of private professional hockey leagues in India, in the context of alleged foreclosure of a rival league.[195] The second was the market for the services of hockey players, in the context of alleged restrictions on players' movement.[196]

The next issue was whether Hockey India and the FIH were dominant in the two identified markets, for the purpose of s 4. In this regard, the complainants submitted that Hockey India occupied a monopoly position as the sport's sole regulatory body in the country.[197] It was endorsed by the FIH as India's national association, which enabled it to select the national representative team and conclude Code of Conduct agreements with players. These powers allowed it to impose restrictive conditions on players' movement, and enforce them through disciplinary sanctions.[198] At the same time, the hockey players did not have any bargaining power against the governing body, and were thus subject to its rules.[199]

The complainants' arguments were supported by the Director General's investigative report, which also found that the pyramid organisational structure was the source of the parties' monopoly power.[200] The report found that this created an entry barrier to other competition organisers, while Hockey India's power to select the national team also placed it in a dominant bargaining position over the players.[201]

In response, Hockey India and the FIH did not contend that they were not in a dominant position. Instead, it was argued that the issue of pyramid structure is unique and cannot be "assessed against the yardstick of market forces".[202] The governing bodies contended that the organisational structure is important and well established in the context of sports governance. Application of ordinary competition law principles would be inappropriate as the pyramid

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[194] Paras 10.8.5-6.
[195] Para 10.9.15.
[196] Para 10.9.19.
[197] Para 4.8.
[198] *Ibid.*
[199] *Ibid.*
[200] Para 7.3.1.
[201] Para 7.3.2.
[202] Para 8.4.1.

structure had the public objective of organising and developing sports through the values of the Olympic Charter.[203]

In particular, it was argued that the system provided three benefits, namely the protection of the integrity of each sport, the coherent organisation of the sporting calendar, and the prioritisation of international events over domestic competitions.[204] Furthermore, it was contended that the pyramid structure was also necessary from a practical perspective, because during international tournaments, every country could only be represented by one team, which had to be selected by a single national association.[205] Furthermore, national associations can only recognise one international federation, if the victorious nation at an international event is to be recognised as the "world champion" of that sport.[206]

Lastly, Hockey India stressed that its compliance with the Olympic Charter was a requirement for the national team's participation in the Olympic Games. In order to meet the latter's eligibility standards, national governing bodies must furthermore comply with the conditions established by the international federations of the respective sports.[207] In this case, HI was bound to amend its rules in accordance with the FIH's instructions, failure of which could result in the Indian team's expulsion from the Olympics, the Asian Games and the Commonwealth Games.[208]

However, as Hockey India did not deny that the pyramid structure resulted in the dominance of the governing bodies, the Commission had no difficulty in finding that HI and FIH were dominant in both relevant markets.

Regarding the market for the organisation of professional private leagues, the Commission agreed with the complainants and the Director General that Hockey India was in a dominant position, and that the source of its dominance was its regulatory powers vested by its affiliation with the FIH.[209] Among these powers was the right to sanction private hockey events in India. This created entry barriers in two ways: firstly, rival leagues had to obtain permissions from the

[203] Para 8.4.1.
[204] Para 8.5.1.
[205] Para 8.5.1.1.
[206] *Ibid.*
[207] Para 9.2.1.
[208] *Ibid.*
[209] Para 10.10.2.

governing bodies; and secondly, players had to obtain Non-objection Certificates which ensured that they did not participate in unsanctioned events.[210]

Additionally, the Commission found that HI's dominance also stemmed from its control over the top hockey players. This control was maintained through its Code of Conduct agreements, which players had to sign in order to participate in international hockey events organised by the governing body. Because hockey players are a vital input in the organisation of any domestic league, Hockey India's control in this regard also established its dominance in the market for the organisation of private professional leagues.[211]

Regarding the market for the services of hockey players, the Commission found that the governing bodies were dominant for two reasons. Firstly, it was held that due to the Code of Conduct requirement, Hockey India was, in fact, the monopsony buyer of the players' services.[212] As a result, it can impose conditions that restrict the freedom of the players' movement. Secondly, the players have little bargaining power in return, partly due to the absence of a hockey players association.[213] This meant that whilst HI can choose from a large number of players, the players do not have the same luxury of choice. The combination of these factors indicates HI's dominant position in the market.[214]

However, the Commission was quick to point out that the existence of dominance does not necessarily indicate any unlawful conduct. At the same time, it also echoed the concerns raised in *BCCI* regarding the strong possibility of abuse of dominance in sports. As the Commission had remarked in its earlier decision, the possibility of competition law violation arises when the power to sanction sports events and the right to organise them are both vested in a single entity.[215] Although sports federations are established as non-profit organisations, the ever-increasing commercial implications of the industry may lead to a change in these governing bodies' underlying objectives.[216] Therefore, scrutiny under competition law is necessary.

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[210] Para 10.10.2.
[211] Para 10.10.3.
[212] Para 10.10.7.
[213] Para 10.10.8.
[214] Para 10.10.9.
[215] Para 10.1.
[216] Paras 10.2-3.

However, the Commission also recognised the need to account for the specificities in sport, and particularly in this case, the pyramid structure of sports governance. It identified a number of merits in the system, including:

(a) Its ability to account for the special requirements in sport, such as uniform application of rules and a coherent timetable;
(b) It is necessary for the selection of national representative teams and the organisation of domestic championships;
(c) It allows the prioritisation of international competitions, which is the "lifeblood of any sport"; and
(d) It helps to protect the integrity of the sport, and maintain the public confidence in its ability to do so.[217]

The Commission remarked that balancing these objectives with the potential competition law concerns above highlighted the difficulty in accounting for the specificities of sport. Interestingly, it then provided a useful description of the issue. According to the Commission, There are two types of special characteristics that distinguishes sport from other commercial enterprises. The first relates to sporting activities, such as the separation of competitions for men and women, the need to ensure uncertainty of outcomes, and the desirability of competitive balance between teams in the same competition.[218] The second relates to the organisational structure in sport, including the autonomy of sports organisations, the progressive structure of competitions from the grassroots to elite level, solidarity mechanisms between the different levels, and the principle of a single federation per sport.[219]

The Commission then discussed how these factors should be considered when analysing restrictive practices under competition law, particularly in the context of the pyramid structure. In this regard, it was held that sports governing bodies' right of self-regulation in matters relating to their particular sports should be recognised.[220] However, the Commission stressed that the manner in which these bodies regulate their sports should not violate the objectives of competition law, and that outright immunity would not be possible.[221]

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[217] Para 10.5.2.
[218] Para 10.6.1.
[219] Para 10.6.1.
[220] Para 10.6.3.
[221] *Ibid.*

In order to account for sporting bodies' right of self-regulation, the Commission held that arguments raised in relation to the efficiency of an alleged restrictive practice must be evaluated before the conduct in question can be ruled as anti-competitive.[222] Regarding the evaluation of such arguments, the Commission approved the approach adopted by the European Court of Justice in the *Meca-Medina* case discussed in 7.3 below. According to the Commission, the approach, which it called the "inherence-proportionality principle", can be described as follows: A restrictive rule or practice in sports does not violate competition law if its subject matter and manner of application are inherent to the legitimate objectives of that sports federation, and that its effect on economic competition is proportionate to these sporting interests.[223]

Having decided on the general approach, the Commission then proceeded to examine the individual allegations. It first considered the parties' arguments relating to abuse of dominance. In this regard, the complainants argued that HI and the FIH's non-sanction of the WSH itself, coupled with its prohibition on players' participation, amount to an abuse of dominant position. It was alleged that the purpose behind its exclusion of the rival competition was to promote its own proposed league, which is not inherent in and proportionate to the legitimate objectives of the sport.[224]

Furthermore, it was argued that this constituted a denial of market access by Hockey India and the FIH, which only sanctioned events in which they have a commercial interest.[225] It was therefore impossible for competing organisers to stage events which might divert revenues away from the two governing bodies. At the same time, hockey players are prevented from participating in events which allow them to compete against other players, develop their skills and earn additional incomes. As a result, both organisers and players are denied market access, in contravention of s 4(2) (*c*) of the Act.

The Director General agreed with the complainants that the purpose of the new rules was not inherent to the proper sporting objectives of the governing bodies. It was found that the fact that the rules were introduced after the WSH announced its intention to organise a domestic league shows that it was an "afterthought" on the part of the FIH in order to maintain its monopoly in

[222] Para 10.6.4.
[223] Para 10.6.5.
[224] Para 4.9.
[225] Para 4.9.1.

the organisation of hockey events.[226] Its immediate intention was to prevent players from participating in its would-be competitor league.[227] According to the DG, this had the effect of restraining players from participating in hockey events, while foreclosing the market on the organisers of these events.[228] It was found that this did not benefit the sport of hockey, its players or the spectators, and was in contravention of s 4(2)(*c*).[229]

In response, the governing bodies contended that the rules served two legitimate sporting objectives. Firstly, by requiring potential organisers to obtain sanctions, the integrity of the sport could be protected, and that the public would have confidence that the integrity would be protected.[230] Secondly, the requirement was necessary to ensure that due priority was given to international matches in the sporting calendar. It was contended that international matches, i.e. games between national representative teams, are essential to any sport as they are the "driver of popular interest" in the game. By not sanctioning events that overlap with international matches, the FIH could ensure that the latter would always take precedence, which helps to promote the game's long-term health.[231]

In addition to protecting the value of international games, three other reasons were identified for the prohibition of unsanctioned events. Firstly, it was argued that unsanctioned events may damage the reputation of the sport.[232] This is because organisers of unofficial tournaments do not need to comply with uniform rules of the sport as established by the governing bodies. The viewing public may be unable to distinguish these events from the authorised games, and the reputation of the latter may be tarnished this way.[233]

Secondly, it was argued that governing bodies spend enormous amounts of money and effort in developing the reach and infrastructure of their respective sports. Private organisers who establish competitions without governing bodies' approval are essentially free-riding on the latter's investments.[234] And lastly, in a similar argument, it was contended that hockey players are also beneficiaries of sports federations' investments, and that by participating in

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[226] Para 7.4.2.1.
[227] Para 7.4.2.2.
[228] Para 7.4.2.5.
[229] *Ibid.*
[230] Para 8.2.4.
[231] *Ibid.*
[232] Para 8.5.3.1.
[233] *Ibid.*
[234] *Ibid.*

unsanctioned events, they would be breach their "duty of solidarity" with the sport.[235] It is unclear exactly what this duty involves, as neither the FIH nor the Commission elaborated on this issue.

After examining the above arguments, the Commission found that the objectives behind the introduction of the rules relating to unsanctioned events to be those claimed by Hockey India and the FIH. In particular, four objectives were identified, namely the prioritisation of international events, prevention of free-riding on governing bodies' investments, the maintenance of a cohesive sporting calendar, and the preservation of the integrity of the sport.[236] The Commission recognised these as legitimate objectives, because they are inherent to the orderly development of the game, which is a primary objective of any governing body.[237]

Having found that the rules served legitimate sporting objectives, the Commission then examined whether they were applied in a proportionate manner by the governing bodies. It was pointed out that the organisers of the WSH did not, at any time, seek the formal sanction for the competition from the FIH.[238] Although there were ongoing discussions among the parties, no actual application for approval was ever made, even though the organisers had the opportunity to do so prior to the competition's commencement. Therefore, the Commission remarked that it was impossible to know whether the governing bodies had acted unreasonably in not sanctioning the WSH.

The Commission also dismissed the DG's finding that the rules were introduced as an "afterthought" to prevent the establishment of rival leagues.[239] It was held that although the regulations were issued after the announcement of the WSH, there was still a considerable period before the tournament actually commenced. The disciplinary actions prescribed for players participating in unsanctioned events were prospective, therefore the intention of the governing bodies was not to retrospectively punish players for agreeing to take part in the league.[240]

Regarding the fact that players who participated in WSH were left out of India's national team for subsequent games, the Commission found that this, too, did not amount to punitive actions

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[235] Para 8.5.3.1.
[236] Para 10.12.1.
[237] *Ibid.*
[238] Para 10.12.5.
[239] Para 10.12.6.
[240] *Ibid.*

against the players. It was held that the players did not participate in the training camp where the national team representatives were to be selected.[241] The dates on which the camp was to take place was approved more than a year in advance, while the list of probable players for the national team was announced prior to the commencement of WSH.[242]

As a result, the Commission found no evidence that the rules were applied disproportionately. Therefore, it concluded that there was no unlawful denial of market access to the rival league or its participants, within the meaning of s 4(2)(*c*) of the Act.[243]

The Commission further held that as it had already defined the "organisation of private professional hockey league" as the relevant market, the question of s 4(2) (*e*), which dealt with the use of dominance in one market to protect another relevant market, did not arise.[244] As a result, the complainants' contentions under this section were dismissed as well.

The next issue that the Commission had to decide was whether the Code of Conduct ("CoC") agreement between Hockey India and professional hockey players constituted an exclusive supply agreement within the meaning of s 3(4) (*b*) of the Act. It was argued by the complainants that a vertical relationship existed between the players and the national association through the CoC agreement.[245] Regarding the agreement's exclusionary nature, it was contended that hockey players were effectively "tied down" to Hockey India, and risked facing disciplinary action if they participate in any event organised by other parties.[246] This created a barrier to entry for other competition organisers, which resulted in reduced opportunities for players to be remunerated and trained.[247]

The Commission agreed that a vertical relationship exists between the national association and the players, as the latter are sellers of their services, with Hockey India as the buyer.[248] However, it was again stressed that the specificities of sport must be taken into account.[249] In the context of the CoC agreement, the Commission remarked that players were only prohibited

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[241] Para 10.12.7.
[242] *Ibid.*
[243] Para 10.12.8.
[244] Para 10.12.9.
[245] Para 4.10.
[246] Para 4.11.
[247] Para 4.12.
[248] Para 10.13.2.
[249] Para 10.13.5.

from unsanctioned events, rather than any event not organised by Hockey India or the FIH.[250] It was held that the power to sanction sports events is a regulatory function of governing bodies, which does not violate competition law *per se*.[251]

The Commission, aware of its earlier decision in *BCCI*, distinguished it from the present case, by highlighting the fact that in that matter, the governing body had demonstrated that the purpose of its rules prohibiting unsanctioned events was to protect the financial interests of its commercial partners.[252] Here, it was held that there was no evidence that HI and the FIH had applied the rules in an unfair or discriminatory manner.[253] Furthermore, regarding the fact that players had to obtain Non-objection Certificates prior to participating in hockey events, the Commission pointed out that this requirement was not only directed towards unsanctioned events, but also served to ensure that players complied with other clauses in the CoC agreement, such as good behaviour on the field, adherence to the dress code, etc.[254] The Commission found, therefore, that the restrictions were both inherent and proportionate to the governing bodies' legitimate objectives, and that there was no contravention of s 3(4) of the Act.

Despite finding that HI and the FIH had not violated the Competition Act, the Commission nevertheless expressed its concern for potential contravention in this area. It recognised that both competing events organisers and hockey players are completely dependent on the sanctioning power of the governing bodies. In its final order, the Commission quoted, with approval, its prior remarks from *BCCI* that the benefits from sports should be spread out to as many people as possible through competition in the market. Therefore, the manner in which governing bodies approve or disapprove events is of great concern to competition law.

As a result, it was recommended that Hockey India implement an internal control system, in order to ensure, firstly, that the governing body's regulatory powers are not used for the benefit of its own commercial activities; and secondly, that Non-objection Certificates are issued in a fair and transparent manner, without discriminating against players that participate in events organised by HI's competitors, provided that such events are properly sanctioned by the appropriate authorities.

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[250] Para 10.13.5.
[251] *Ibid.*
[252] *Ibid.*
[253] Para 10.13.6.
[254] Para 10.13.5.

For present purposes, a number of observations can be made. Firstly, it is interesting to note that the Commission had again highlighted the competition law concern when the sporting and financial objectives of governing bodies overlap. It maintained its opinion in *BCCI* that even in sports, unrestricted competition is beneficial for the game's development. The Commission's recommendations, contained in its final order, demonstrate its concerns over two potential problems when restrictions on competition are permitted on the grounds of sporting justifications, namely the governing bodies' abuse of regulatory power in order to promote their own financial interest, and the lack of transparency in their decision-making process.

However, it is worth noting that the Commission recommended an internal control system in order to address these two issues, rather than imposing an order directing HI and the FIH on the exact measures to be taken. This suggests an unwillingness on the Commission's part to undermine the governing bodies' autonomy, or to dictate the appropriate approach in the sport's orderly development.[255]

On the other hand, it is clear that the Commission did not adopt a completely deferential approach. Although the Commission accepted the need to consider the specificities of sport, it emphasised the fact that sports governing bodies cannot have outright immunity.

At the same time, the fact that the specificities of sports were recognised and discussed in the decision is interesting in itself. It is submitted that the Commission's acceptance of the argument can be attributed to the fact that the governing bodies were able to show how the the features under scrutiny are linked to sporting objectives.[256] For example, Hockey India demonstrated that the pyramid structure of sports governance allows a coherent sporting calendar that prioritises international events, which is important to the long-term development of sports. In other words, specific benefits of *prima facie* restrictive practices were demonstrated in this case. This can be contrasted with the *BCCI* decision, where the governing body in that case only referred to the specificities of sports as a general defence. As a result, the Commission had more difficulty accepting the arguments in that case.

Regarding the consideration of the specificities of sport, the Commission in *Pillay* found that the *Meca-Medina* approach should be adopted. Although the Commission called this the "inherence-proportionality test", it will be seen below that the similarity in terminologies does not mean the enquiry is identical to the principles under European law.

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[255] V Dixit "Competition law" (2013) 49 *Annual Survey of Indian Law* 171 at 177.
[256] *Ibid.*

Regarding the first enquiry, i.e. whether the rule or practice under scrutiny is inherent to a legitimate sporting objective, the Commission explicitly stated that it recognised sports associations' right to self-regulation within the confines of competition law. As a result, it had little difficulty in accepting the arguments raised by the FIH as merits of the pyramid structure, and in particular, the power of the governing body to prohibit unsanctioned events.

As discussed above, the Commission held that legitimate purposes behind the pyramid structure include the uniform application of the rules of the game, prioritisation of international events, proper selection of national team representatives, and the protection of the sport's integrity. Later, it was also found that these objectives also serve to justify the FIH's rules relating to unsanctioned events, with the addition that the rules can also prevent free-riding by unauthorised organisers on governing bodies' investments.

It is submitted that although the "protection of the integrity of the sport" appears to be a general argument that is potentially too vague, here, it is shown how the objective can in fact relate to all other legitimate goals of a sports association.

Regarding the uniformity of rules and timetables, Hockey India explicitly argued that allowing unsanctioned events to take place may tarnish the reputation of the sport, as these events may diverge from the uniform rules of the game and/or interrupt the sporting calendar. The possible confusion among supporters, caused by the different competitions, is capable of undermining the integrity of the sport.

The argument relating to the need to prioritise international events in the sporting calendar also affects the integrity of the game. The Commission accepted that international events are vital to any sport, and that they are the "driver of popular interest" in the game. This can be contrasted with private domestic competitions, which have been treated as commercial endeavours. Subsequently, governing bodies' decisions to prioritise international events are seen as an effort to protect the long-term interests of the sport.

Regarding the selection of national teams and the organisation of national championships, the Commission agreed with the governing body's argument that it is the responsibility of an international sports federation to organise competitions where the "world champion" is determined. In order for the title to be respectable, there can only be one representative team from each nation, the selection of which is within the purview of national governing bodies.

Therefore, in order to ensure that a world championship is fair and worthy of its title, the monopoly organisational structure is necessary.

However, one must ask why this logic is not applicable to the organisation of domestic championships. It is clear that the Commission did not conclude that in order to determine a national champion, which may subsequently represent its nation at continental or international club competitions, it is feasible to have only one system of domestic competitions (which may be linked through mechanisms of "promotion" and "relegation") per country. Had the Commission come to such a conclusion, there would have been no need to decide whether the FIH's power to sanction events is justified on other grounds.[257]

As it was, the Commission found the other arguments to be more persuasive. Nevertheless, it is interesting that the objectives approved by the Commission contribute towards to the protection of the integrity of sports. The exception to this is the free-riding argument, which appears to be an economic one. However, the integrity of the sport is an interesting objective, as it requires the consideration of the best interests of the game more than the somewhat more bureaucratic tasks such as the scheduling of the sporting calendar and the organisation of international tournaments. It is perhaps the objective that most require the existence of a pyramid organisational structure that exercises governing monopoly over a particular sport.

However, the Commission also highlighted another aspect of the inherence enquiry, namely, whether an objective is financially motivated. Lengthy arguments were heard on the issue of whether the FIH's new rules were introduced in order to prevent the establishment of potential rival leagues. It was argued that if this question is answered in the affirmative, then the true intention of the governing body is the promotion of its own financial interests. The Commission seemingly concurred with this assumption, even though it ultimately found, on the facts, that the rules were not targeted at the WSH. It is instructive that the Commission differentiated the present case from *BCCI* on the ground that in the latter case, the governing body was financially motivated in its decisions.[258] Specifically, it had directed its national associations to prevent the creation of rival leagues in order to safeguard the interests of their commercial partners.

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[257] It has been argued that this should have been a relevant issue in the *BCCI* case as well. See Patel "*Barmi v. the Board of Control for Cricket in India*: One to send upstairs?".

[258] N Zachariah "Hockey or Hookey? Case Review: Dhanraj Pillai & Ors v. M/S Hockey India (Case No. 73/2011)" (2013) https://lawnk.wordpress.com/2013/07/22/hockey-or-hookey-case-review-dhanraj-pillai-ors-v-ms-hockey-india-case-no-732011/ (accessed 15 June 2016).

The implication of this is that, according to the Commission, economic interests do not qualify as legitimate sporting objectives. Even in *Pillay*, it is clear that the power to sanction events would not have been permitted if it was used to maintain a monopoly. Hence, the Commission's finding that rival leagues could be sanctioned by the FIH in the right circumstances is a crucial one. However, the suggestion that the governing bodies in this case were not motivated, at least in part, by their own commercial interests is difficult to accept, as Hockey India and the FIH announced their own domestic league soon after warning players against participating in the WSH.[259]

Supposing that the rules were in fact introduced for the purpose of maintaining a monopoly in the market for the organisation of private hockey leagues, the scenario poses two intriguing questions. Firstly, can a governing body's attempt to maintain its monopoly through its sanctioning power be considered a legitimate objective? As described above, it can reasonably be argued that monopoly in the organisation of sports events is required in the context of world and national champions. The second question is whether a sports federation's financial motivations can invalidate arguments relating to legitimate sporting objectives. It is not inconceivable that the two interests may coincide. However, there is also the inherent danger that, given the governing body's autonomy, sporting objectives could be manipulated into legal arguments that suit their commercial interests. This is the concern that the Commission had highlighted on numerous occasions.

To a certain degree, however, this danger can be addressed by the proportionality enquiry. In the present matter, the Commission relied on the fact that the WSH had never applied for sanctioning from the relevant governing bodies, even though the rules regarding unsanctioned events were introduced before the competition's commencement. Therefore, it could not be said that the FIH had acted unreasonably in this context.

With respect, it is submitted that the WSH's failure to apply for formal sanction does not indicate its true prospects of obtaining the governing bodies' approval. As the parties acknowledged, discussions were ongoing between the WSH and the FIH regarding the latter's sanctioning of the competition. This took place prior to the league's commencement. The fact that no application for approval was subsequently made suggests the lack of prospects for the success of such an application. This indicates either that the WSH was unwilling to meet the FIH's requirements (reasonable or otherwise), or that the federation was unwilling to sanction

[259] Dixit 2013 *Annual Survey of Indian Law* 177.

the league on any condition. Either of these possibilities may bring the reasonableness of the governing bodies into question, given that the Commission holds the opinion that refusal to sanction for the sole purpose of maintaining a monopoly does not serve any legitimate objective.

Furthermore, it should be noted that the proportionality enquiry conducted by the Commission is not equivalent to the test under European law. As the ECJ explained in the *Meca-Medina* case, in order to meet the proportionality requirement, a rule adopted by a sports association should be the least restrictive measure necessary to achieve its objectives. This requirement was not adopted by the Commission in the *Pillay* case, although its application may result in a different outcome. For example, if the Commission saw the uniformity of rules and the coherence of the sporting calendar as the primary objectives behind the power to sanction events, it is arguable that the new rule can be less restrictive if it only prohibits hockey events that do not conform to these objectives. A general power to refuse sanction is arguably unnecessarily broad, and allows governing bodies to use it to promote other, possibly financial, interests.[260] If, however, the monopoly of national championships is seen as a legitimate justification, then it is submitted that the right to selectively approve events would not be overly restrictive.

Lastly, it is worth noting that the Commission had no problem in taking into account the specificities of sport in both the s 4(2) (*c*) and s 3 enquiries. The latter section is not a *per se* prohibition under the Indian Competition Act.[261] Therefore, consideration of efficiency arguments is permitted. Section 19(3) of the Act provides a closed list of factors to be considered when determining whether an agreement has an "appreciable adverse effect on competition", including:

> "(d) accrual of benefits to consumers;
>
> (e) improvements in production or distribution of goods or provision of services; [*and*]
>
> (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services."

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[260] See, for example, the European Commission's ongoing investigation into the International Skating Union's eligibility rules. European Commission Press Release, IP/15/5771 (05 October 2015). In particular, the Commission stated its concern regarding the possibly excessive nature of the governing body's ban on athletes who participate in unsanctioned events.

[261] See s 19(3) of the Act.

While it is unclear which of the factors the Commission had relied upon when adopting the inherence-proportionality approach, it could conceivably be argued that "specificities of sport" are related to any of the above three factors. This can be contrasted with the position under s 4, which does not permit considerations of efficiency arguments. Sections 19(4) to 19(7) provide factors that may be taken into account when determining the relevant markets and whether an enterprise enjoys a dominant position, but are not applicable to the enquiry as to whether a dominant position was abused. Therefore, denial of market access by a dominant firm is a *per se* violation of the Act.

This raises the question of whether the Commission was correct, from a statutory perspective, to consider the specificities of sport. The Commission explicitly labelled these as efficiency arguments, despite the fact that such arguments are not relevant in enquiries into *per se* violations. It is submitted that although the consideration of unique factors in sports produces a more desirable outcome, the wording of India's Competition Act does not permit such an approach. This may have troubling implications for South African law, as our Competition Act similarly prescribes *per se* prohibitions of certain practices. The next chapter examines whether this dilemma can be addressed with a more flexible legislative approach.

7.3 E.U. law

The last part of this chapter discusses the law of the European Union. Unlike the other jurisdictions considered so far, E.U. law explicitly recognises the "specificity of sport". Although the concept is yet to play a decisive role in cases under the Union's competition law, the European Court of Justice has already demonstrated how this may occur in principle.

7.3.1 Overview of E.U. competition law

The primary sources of the E.U. legal system are its founding treaties.[262] These are currently known as the Treaty on European Union ("TEU")[263] and the Treaty on the Functioning of the European Union ("TFEU"),[264] following the entry into force of the Treaty of Lisbon.[265]

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[262] In addition to the primary sources, it should be noted that other sources of law are also relevant in the E.U. legal system, including general principles, external and secondary sources. Even recommendations and opinion (the so-called "soft laws"), which are not legally binding, may be considered by the courts. See A Kaczorowska *European Union Law* 3 ed (2013) 109.

[263] European Union, Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01.

[264] European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.

[265] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007/C 306/01.

Although not explicitly stated in the treaties, the laws and decisions of the E.U. have primacy over any conflicting national legislation of Member States.[266]

The responsibility of supervising and enforcing the E.U. treaties lies with the European Commission.[267] The Commission has both preventative measures and enforcement powers at its disposal to ensure compliance by Member States as well as any person under the jurisdiction of a Member State.[268] Infringement proceedings initiated by the Commission are brought before the Court of Justice of the European Union, which comprises the European Court of Justice ("ECJ"), the General Court (formerly known as the Court of First Instance, or "CFI") and specialised courts known as "judicial panels".[269] It should be noted that although there is no doctrine of precedent under E.U. law, the courts rarely depart from principles laid down in earlier cases.[270] Therefore, judgments of the ECJ provide valuable guidance and are frequently referred to in subsequent cases.[271]

The protection of free competition is closely related to the goal of creating a single internal market,[272] and is thus an important objective of the Union.[273] Title VII, Chapter 1 TFEU contains the primary provisions relating to competition law. Section 1 of the Chapter (Articles 101-106 TFEU), which deals with competition rules applicable to "undertakings",[274] is relevant for present purposes.[275]

Under the Treaties, anti-competitive agreements between undertakings are governed by Article 101 TFEU.[276] These agreements[277] are prohibited under Paragraph (1) if they have the object or

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[266] *Costa v ENEL* [1964] ECR 585 at 599. See also Declaration 17 of the Treaty of Lisbon.

[267] Article 17 TEU and Article 17 TFEU.

[268] Kaczorowska *EU Law* 70. See also European Commission "About the European Commission" http://ec.europa.eu/about/index_en.htm (accessed 15 April 2015).

[269] Article 19(3) TEU.

[270] Kaczorowska *EU Law* 109.

[271] See, for example, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, where the ECJ held that national courts are not obliged to refer questions relating to interpretation of E.U. law if their answers are obvious in light of earlier case law.

[272] *Metro v Commission (No. 1)* [1977] ECR 1875 para 20. See also Article 3(3) TEU.

[273] See European Union, Protocol No. 27 on the Internal Market and Competition, 2008 O.J. 115, and *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055 para 36.

[274] As discussed in Chapter 5 above, an analogy can be drawn between an "undertaking" and a "firm" within the meaning of the South African Competition Act.

[275] Section 2 of the Chapter (Articles 107-109 TFEU) deals with anti-competitive state aid, and is not examined here. It should be noted that the European Commission has investigated sports-related state aids, and acknowledged the potential of these measures to interfere with competition. See Commission Decision of 18 December 2013 (*SA.29769 Spain – State Aid to certain Spanish professional football clubs*), 2014 O.J. C 69/115.

[276] It should be noted that the Article only applies to conduct that affect trade between E.U. Member States, and that national competition laws are applicable instead when this requirement is not met. See Article 101(1) TFEU.

effect of preventing, restricting or distorting competition.[278] Despite the provision in Paragraph (2) that anti-competitive agreements are automatically void, the Article does not actually prescribe a *per se* prohibition, as courts must additionally consider the pro-competitive benefits of the conduct in question.[279]

Abuse of a dominant position is dealt with under Article 102 TFEU.[280] The Article provides a list of examples that are regarded as abusive conduct, although the ECJ has held that this is not a closed list.[281] It should also be noted that while the Article does not prescribe any defences to abusive conduct, the Commission and the courts have accepted a number of justifications relating to practices that are *prima facie* abusive.[282] Therefore, anti-competitive practices are not "*per se* prohibited" under E.U. law, in the sense that the term is understood in South Africa competition law.

In addition to the primary sources in the Treaties, different types of secondary legislation are also relevant to the enforcement of competition rules in the Union. These include binding regulations[283] as well as non-binding recommendations and opinions.[284] These sources of law are also discussed below where necessary.

7.3.2 Recognition of uniqueness of sport through "soft law"

As stated earlier, the uniqueness of sport is explicitly recognised in European Union law. Article 165(1) TFEU states, *inter alia*:

> "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."

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[277] Similar to Competition Act, the provision also applies to decisions by associations of undertakings and concerted practices.

[278] The Article provides a non-exhaustive list of examples of these agreements, including price-fixing, market-sharing and production-limitation.

[279] According to Article 101(3), a benefit must meet the following requirements: (1) contribution to improving the production or distribution of goods or to promoting technical or economic progress; (2) consumers are allowed a fair share of the resulting benefit; (3) restrictions are indispensable to the attainment of the objectives; and (4) undertakings are not afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

[280] Similar to Article 101, only abuse of dominance affecting trade between Member States are prohibited under the Article.

[281] *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 215 para 26.

[282] M Lorenz *An Introduction to EU Competition Law* (2013) 216.

[283] See, for example, Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ No. L 24.

[284] Lorenz *EU Competition Law* 32.

Article 165(2) TFEU further states that Union action shall be aimed at:

> "... developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."

Before the amendment by the Treaty of Lisbon, however, the E.U. Treaties did not contain any provision relating to sport.[285] At the time, the Union's position regarding sport was stated in a number of policy documents which were not legally binding on the Member States. The first of these was the Amsterdam Treaty[286] adopted in 1997, which included the Declaration on Sport.[287] The Declaration called upon the various institutions in the Union to listen to sport associations on important issues affecting sport.[288] As a declaratory statement, the document had little binding effect on the Member States. However, it provided the much needed impetus for further Union actions in the following three years.[289]

In 1998, a European Commission staff working paper was published. It was entitled "The development and prospect for Community action in the field of sport".[290] The paper recognised the important sociological and economic roles of sport.[291] Crucially, however, it also stated that the social significance of sport does not warrant a general exemption from European law.[292]

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[285] R Siekmann "The specificity of sport: Sporting exceptions in EU law" (2012) 49 (4) *Collected Papers of the Law Faculty of the University of Split* 697 at 699.

[286] European Union, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.

[287] European Union, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts - Declarations adopted by the Conference - Declaration on Sport 11997D/AFI/DCL/29 1997 O.J. C 340/1.

[288] The Declaration also emphasised "the social significance of sport, in particular its role in forging identity and bringing people together", and called on the Union to give special consideration to the "particular characteristics of amateur sport". See *ibid.*

[289] Siekmann 2012 *Collected Papers of the Law Faculty of the University of Split* 699.

[290] "Development and Prospects for Community Activity in the Field of Sport" Commission Staff Working Paper, Directorate General X, 29/09/98.

[291] The document identified functions similar to those discussed in Chapter 2 above, including benefits relating to public health, socio-cultural development and recreation. *Ibid* 5-6.

[292] *Ibid* 15. See also R Parrish *Sports Law and Policy in the European Union* (2003) 180.

In 1999, the comprehensive Helsinki Report on Sport was released.[293] It repeated the earlier stance that sport should be subject to regulation, including the European competition rules.[294] However, it proposed that the application of law in the sporting context must take the "specific characteristics" of the sector into consideration.[295] The report argued that such an approach was necessary to allow sport to conform to the economic and legal realities, as the interdependence between sport and its generated economic activities could no longer be ignored. At the same time, it was also necessary to preserve the traditional values in sport, such as the principle of equal opportunity and the uncertainty of results.[296]

The Helsinki Report formed the basis of the Nice Declaration on Sport in 2000.[297] It again echoed the earlier sentiments that application of European law in the sporting context must consider the special functions of sport.[298] The emphasis on the "functions of sport", rather than the general "specific characteristics of sport", was somewhat more precise, and gave an indication for the basis for the sector's special consideration.

Neither the Amsterdam nor the Nice declarations were legally binding, as they were merely policy statements by the various heads of states. Therefore, they constituted so-called "soft-law".[299] It was not until the 2003/2004 Intergovernmental Conference that the insertion of a provision in the European Treaties was agreed upon, and the amendment was eventually reflected in the Lisbon Treaty as Article 165 TFEU.[300] The ratification of the treaty in 2009 has now granted the European Parliament the power to pass binding policies on sport in future.[301]

In 2007, the same year that the Treaty of Lisbon was signed, the European Commission adopted the White Paper on Sport, a sport-specific comprehensive strategy document.[302] Its

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[293] European Commission "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: The Helsinki report on sport" Com (1999) 644 1/12/99.

[294] *Ibid* para 4.2.1.

[295] European Commission "Helsinki Report" para 4.2.1.

[296] *Ibid.*

[297] European Council "Nice European Council Conclusions, Annex IV: Declaration on the specific characteristics of sport and its social function in Europe" (2000) http://www.europarl.europa.eu/summits/nice2_en.htm#an4 (accessed 09 February 2015).

[298] *Ibid* clause 1.

[299] Siekmann 2012 *Collected Papers of the Law Faculty of the University of Split* 702.

[300] European Commission "SCADPlus: The Intergovernmental Conference 2003/2004 - Negotiations under the Irish Presidency" http://europa.eu/scadplus/cig2004/negociations2_en.htm#RESULT (accessed 10 February 2015).

[301] Siekmann 2012 *Collected Papers of the Law Faculty of the University of Split* 706.

[302] European Commission "White Paper on Sport" COM/2007/0391 final.

adoption was described as being driven by various stakeholders who demanded the promotion of the industry as well as legal certainty in the sector.[303]

The White Paper supported the previous documents' emphasis on the special characteristics of sport, as it focused on sport's social and educational values, economic significance and the organisation of sport.[304] On the last aspect, it regarded the principles of subsidiarity and autonomy of sport organisation as compatible with the current E.U. legal framework.[305] According to the document, these principles are justified due to the "specificity of sport"[306] – a concept that had not been introduced before.[307]

It elaborated that there are two aspects to the specificity of sport. Firstly, sport is specific in its actual activities and rules.[308] These include competitions separated by gender, the need to ensure uncertainty of outcomes and competitive balance between clubs.[309] Unfortunately, what it means to ensure uncertainty of outcomes and competitive balance is not explained in the document. Secondly, sport is also specific in its governance structures. The autonomy of sport organisations, the pyramid structures of competitions, solidarity mechanisms and the principle of a single federation per sport were cited as examples of the specificity of sport.[310]

Although the White Paper does not canvass the specificity of sport concept in detail, it signals an indication of what Article 165(1) means by "taking account of the specific nature of sport". However, the report was mainly concerned with which aspects of sport should be taken into account, and did not provide a practical guidance on how this is to be accomplished. The latter issue is left to the courts. As will be seen below, however, E.U. courts have considered the uniqueness of sport long before the White Paper was published. The document, as well as the ratification of Article 165 TFEU, simply meant that authorities need not solely rely on "soft law" to justify their decisions.

7.3.3 Recognition of uniqueness of sport by the courts

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[303] Siekmann 2012 *Collected Papers of the Law Faculty of the University of Split* 706.
[304] European Commission "White Paper on Sport" 3.
[305] *Ibid* 13.
[306] *Ibid.*
[307] Siekmann 2012 *Collected Papers of the Law Faculty of the University of Split* 706.
[308] European Commission "White Paper on Sport" 13.
[309] *Ibid.*
[310] *Ibid.*

The provisions of the E.U. Treaties have been applied to sports-related practices on a number of occasions. Even before the insertion of Article 165 in the Treaty of Lisbon, the ECJ had accepted that the unique characteristics of sport may justify certain conduct when they appear to be in conflict with E.U. law. The majority of these cases were considered in the context of freedom of movement for workers,[311] and it was not until the *Meca-Medina* case[312] when it became clear that the principles laid down in those cases were applicable to competition law cases as well.

The best known of these cases is almost certainly *Union Royale Belge des Sociétés de Football Association ASBL v Bosman*,[313] commonly referred to as "the *Bosman* ruling".[314] This case dealt with two separate rules that existed in European football at the time. The first rule allowed clubs to demand compensation when their players left after the expiry of their contracts.[315] The second rule involved player nationality quotas, which were imposed by a number of domestic leagues across the continent.[316] The ECJ found that both rules violated the freedom of movement of workers under the then Article 48 EEC (now Article 45 TFEU).

Football authorities[317] argued that the rules were necessary to maintain financial and competitive balance between clubs.[318] The court recognised this objective, as well as the need to promote uncertainty of results and encourage the training of young athletes, as legitimate aims of sports bodies. At para 106 it held that:

> "In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate."

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[311] Article 45 TFEU (ex 39 and 48).

[312] *Meca-Medina and Majcen v Commission* Case C-519/04 [2006] ECR I-6991.

[313] Case C-415/93 [1995] ECR I-4921.

[314] M Slater "Bosman ruling: 20 years on since ex-RFC Liege player's victory" *BBC* 15 December 2015 http://www.bbc.com/sport/football/35097223 (accessed 15 December 2015).

[315] See Chapter 9 below for a discussion on the historical development on this rule, as well as the facts and the contextual background of this case.

[316] Although not identical, the essence of the quota rules was that each club may only field and/or register a certain number of foreign players.

[317] In addition to the Belgian Football Association (Union Royale Belge des Sociétés de Football Association), the case also involved the Union of European Football Association ("UEFA") and the player's former club, RFC de Liège). Submissions were also made by the French and Italian governments.

[318] *URBSFA v Bosman* para 105.

However, the court also reaffirmed that any sporting justification must remain limited to its proper objective, and cannot be used to preclude the whole of the sporting activity from the scope of the Treaty.[319] It found that, in this case, neither rule actually achieved the stated purpose of competitive balance.

Regarding compensation for out-of-contract transfers, the court held that the rule did not promote competitive balance, as it still allowed wealthy clubs to attract the most talented players through financial power.[320] In other words, clubs that offered higher compensation amounts (the so-called "transfer fees") were more likely to acquire the services of sought-after footballers, and could therefore obtain a competitive advantage in this manner. In any case, it was found that the compensation amounts, which had to be negotiated by the clubs themselves, were contingent, and bore no relation to the actual cost that clubs had spent on training players.[321] This indicated the excessively restrictive nature of the rule, and led the ECJ to conclude that the aim of competitive balance was attainable through more reasonable alternatives.[322]

Regarding the nationality quotas, the court held that this rule did not contribute towards the maintenance of competitive balance either.[323] This was because wealthy clubs could still use financial incentives to attract the most talented domestic players, in order to preserve their dominance in the league.[324] The court's reasoning with respect to competitive balance illustrates two points: firstly, it must be shown that a sports rule is actually capable of achieving its designated objective; and secondly, it must not go beyond what is necessary to do so. Conversely, a rule which attains its stated goal through proportionate means will be in conformity with E.U. law, even if it has a restrictive effect on freedom of movement.[325]

The ECJ also considered two other sporting justifications in relation to nationality quotas. Firstly, sports authorities argued that the requirement was necessary to maintain national talent pools, in order to keep international teams competitive.[326] The court rejected this argument on the basis that a player's eligibility to represent his country was unaffected by his place of

[319] Para 76.
[320] Para 107.
[321] Para 109.
[322] Para 110.
[323] Para 135.
[324] *Ibid.*
[325] S Van den Bogaert "From *Bosman* to *Bernard* C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177" in J Anderson (ed) *Leading Cases in Sports Law* (2013) 96.
[326] Para 124.

employment.[327] Therefore, permitting players to ply their trade overseas did not adversely impact national team selections. Secondly, it was also argued that nationality quotas preserved the traditional link between football clubs and their base countries.[328] The ECJ held that this link was no more relevant than a club's connection with its local town or region, yet no measures have been taken to preserve these links.[329] Similarly, clubs representing their countries at continental tournaments[330] were not restricted in the number of foreign players they could field.[331] Therefore, the court concluded that the preservation of national links was not inherent to the sporting activity of football clubs.[332]

This shows that not all sporting objectives will be regarded as legitimate. In order to justify conduct that are otherwise incompatible with E.U. law, the designated aims must at least be inherent to the sporting activities in question.[333] It should be noted that the ECJ did not consider whether nationality quotas affected competitive balance across different leagues,[334] as this issue was not raised. Therefore, it is unclear whether this would have been regarded as a legitimate objective.

As both rules were found to have contravened Article 48 EEC, the court held that it was not necessary to consider the competition law implications of the rules.[335] However, as former Advocate General Christine Stix-Hackl later opined, the reasoning in *Bosman*, particularly the manner in which the court considered the issue of competitive balance, would have been equally applicable if the facts were analysed under E.U. competition rules.[336]

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[327] Para 133. It should be noted that this is not the case in all sports. In rugby union, for example, national governing bodies may decide that only domestically based players would be eligible for national teams. See, for example, the *NZRU* discussion above.

[328] Para 123.

[329] Para 131.

[330] These include the UEFA Champions League (formerly known as the European Cup) and the UEFA Europa League (formerly known as the UEFA Cup).

[331] Para 132. It should be noted that this is no longer the case, as UEFA has since introduced a "Homegrown player rule", which requires participating teams to have a minimum number of locally trained players in their registered squads. See UEFA "Protection of young players" (2014) http://www.uefa.com/news/newsid=943393.html (accessed 28 April 2016).

[332] Para 131.

[333] Van den Bogaert *Leading Cases in Sports Law* 97.

[334] In other words, the issue would be whether quotas prevent a concentration of talented players in a few financially resourceful leagues, at the expense of other countries. This can be contrasted with competitive balance among clubs in the same league.

[335] Para 138.

[336] A Egger and C Stix-Hackl "Sports and competition law: A never-ending story?" (2002) 23(2) *ECLR* 81 at 88.

Competitive balance was considered again in *Lehtonen v Fédération Royale Belge des Sociétés de Basketball ASBL*.[337] This case dealt with a rule in the Belgian basketball league that prohibited teams from fielding foreign players who were not registered during the prescribed transfer period. The Court of First Instance (as it was then known) had to decide whether this rule was incompatible with E.U. competition law as well as the freedom of movement of workers.[338] Similar to the ECJ in *Bosman*, the court did not address the question relating to competition law, this time because the referral on the issue did not contain sufficient information.[339]

The CFI had little difficulty in finding that the rule in question was an obstacle to the freedom of movement for workers.[340] It held that although the rule did not directly prevent clubs from employing or registering foreign players, this was achieved indirectly by restricting the playing eligibility of these players, whose economic activity was essentially participating in basketball games.[341]

However, the court held that this was not the end of the matter, because the social significance of sport also had to be taken into account.[342] The court referred to both the *Bosman* judgment and the abovementioned Amsterdam Declaration on Sport to support its view that obstacles to contractual mobility may be justified by purely sporting objectives.[343] *In casu*, it was found that the transfer period rule operated to prevent teams from signing new players in the latter stages of a championship, and served to ensure regularity and equity within a competition.[344]

This was a legitimate objective, according to the CFI. Late transfers could substantially alter the playing strength of a team involved in a title or relegation play-off, which would cast doubt on the legitimacy of outcome as well as the proper functioning of the competition itself.[345] The court then repeated the ECJ's *dicta* in *Bosman* that measures taken to achieve a sporting

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[337] Case C-176/96 [2000] ECR I-2681 ("the *Lehtonen* case").
[338] *Ibid* Para 18.
[339] Para 29.
[340] Para 50. It should be noted that at the time of the judgment, freedom of movement for workers was governed governed by Article 39 EC. This is the successor of Article 45 EEC and predecessor of Article 48 TFEU.
[341] *Ibid.*
[342] Para 32.
[343] Para 33. In order to distinguish these from economic justifications, the CFI used the phrase "reasons concerning only sport as such". See, for example, para 60.
[344] Para 53.
[345] Paras 54-55. See also Chapter 9 below, which considers the reasonableness of transfer periods in football.

objective may not be more restrictive than necessary.[346] In this regard, the court referred to the fact that two different transfer deadlines existed, depending on the player's country of origin, and remarked that this appeared to be excessive at first sight.[347]

However, the court declined to find the rule incompatible with E.U. law, and held that this was a matter for the national courts to decide.[348] It was possible, the CFI reasoned, that the different transfer periods were justifiable due to sporting reasons particular to each domestic league.[349] This outcome highlights the need to determine the reasonableness of conduct on a case-by-case basis, and it is submitted that the court was correct to not make a generalised conclusion.

In addition to the promotion of competitive balance, the ECJ in *Bosman* also recognised that the encouragement of youth training was a legitimate sporting objective. The court confirmed this again in *Olympique Lyonnais v Bernard*,[350] another case that dealt with the transfer system in football. Contrary to *Bosman* and *Lehtonen*, competition law issues were not alleged in this case, and the ECJ only had to deal with the restriction on freedom of movement.

The rule in question required youth players to sign professional contracts with the club that provided their training on expiry of their youth contracts. The training club would have a right to damages if a player decided to sign with another club instead.[351] The court firstly affirmed that sports-related rules were subject to E.U. law insofar as they constitute economic activities.[352] It held that the rule in question did restrict footballer's freedom of movement, because it discouraged young players from seeking employment with clubs that did not provide their training.[353]

The ECJ then considered whether the rule could be justified by its sporting objectives. Regarding the need to account for the uniqueness of sport, the court referred to the Treaty of Lisbon,[354] and held:

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[346] Paras 34 and 56.
[347] Para 58.
[348] Para 59.
[349] *Ibid.*
[350] Case C-325/08 [2010] ECR I-2177.
[351] *Ibid* paras 4-6.
[352] Para 27.
[353] Paras 35 and 37.
[354] Article 165, in its current form, did not exist when the CJEU decided *Bosman* and *Lehtonen*. As discussed in 7.3.2 above, the provision was only inserted after the Treaty of Lisbon.

> "In considering whether a system ... is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken ... of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those is also corroborated by their being mentioned in the second subparagraph of Article 165 (1) TFEU."[355]

The court acknowledged that the objective of encouraging youth development was relevant in this case. It found that football clubs might be deterred from investing in the training of young players if the latter were able to join other clubs without compensation.[356] This would particularly affect smaller clubs that recruit and train young players at the local level.[357] It was recognised that the development of players at this level performed an important social and education function in sport.[358]

Furthermore, the ECJ pointed that returns (whether economic or sporting) on training investments are inherently uncertain. The court explained that:

> " ... Clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club.
>
> Moreover, the costs generated by training young players are, in general, only partly compensated for by the benefits which the club providing the training can derive from those players during their training period."[359]

Therefore, a compensation scheme for the development of footballers is justifiable in principle.[360] However, the court also referred to *Bosman*, and held that the scheme had to be proportionate to its objective of youth development, taking into account the uncertainty of the costs that are borne by the clubs.[361] It was found that the rule in question was not in fact a training compensation scheme, but rather a damages remedy for contractual breach.[362] The

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[355] Para 40.
[356] Para 44.
[357] *Ibid.*
[358] *Ibid.*
[359] Paras 42-43.
[360] Para 45.
[361] *Ibid.*
[362] Para 46.

damages were unrelated to the actual training costs incurred by clubs, even when the costs of training players who did not go on to play professionally are taken into account.[363] The damages were calculated according to the loss suffered by training clubs, which also meant that they could not be determined in advance.[364] As a result, the ECJ held that the rule's restrictive effect was disproportionate to the aim of youth development, and thus unjustified.[365]

The court's application of the "proportionality" principle can be contrasted with the Competition Commission of India's interpretation in the *Pillay* case. The ECJ held that a rule is disproportionate if it goes beyond what is necessary to achieve the stated aim.[366] While the Indian Commission did consider whether the conduct of Hockey India and FIH were reasonable, it clearly did not require the governing bodies to employ the least restrictive means to attain their objectives. As argued above, such alternatives were available in that case.

The ECJ's approach can also be contrasted with the U.S. court's reasoning in *Mackey*.[367] It may be recalled that the Circuit Court in that case was willing to consider the merits of competitive balance in that case, but rejected the clubs' need to recoup training costs as a justification outright.[368] The court regarded the expense as an ordinary part of business, and not unique to sports. On the other hand, the ECJ recognised the positive effect of training compensation on youth development, which it acknowledged as a legitimate sporting objective, in both *Bosman* and *Bernard*. In the latter case, the court explicitly held that compensation may include the costs of training players that do not eventually pursue a professional career in football. The divergent approaches on this issue illustrate how the recognition of non-economic justifications can play a decisive role in sports-related cases.

The E.U. cases discussed above all dealt with freedom of movement for workers, rather than Union's competition rules. However, the *Meca-Medina* case[369] confirmed that the reasoning in those cases relating to sporting justifications are applicable to competition law matters as well. This case dealt with the anti-doping rules of the International Swimming Federation

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[363] Para 50.
[364] Para 47.
[365] Para 50.
[366] Paras 45 and 48.
[367] *Mackey v NFL* 543 F.2d 606 (1976).
[368] It should be noted that the Circuit Court only considered a more balanced competition to be beneficial if it enhanced output. In other words, only the economic benefits of competitive balance were recognised in principle.
[369] *Meca-Medina & Majcen v Commission* Case C-519/04 [2006] ECR I-6991.

("FINA")[370] and the International Olympic Committee ("the IOC"). Two swimmers who were banned after testing positive for Nandrolone (a performance-enhancing steroid) alleged that the governing bodies' rules regarding the acceptable level of the drug within athletes were excessive and in violation of Articles 81 and 82 EC.[371]

Chapters 3 and 5 above already discussed the ECJ's reasoning for finding competition law to be applicable in this case. The court held that the anti-doping rules had the potential to produce anti-competitive effects if they prescribed sanctions that led to the unwarranted exclusion of athletes from sporting events.[372] However, the court affirmed that, similar to restrictions on freedom of movement for workers, adverse effects on competition could be justified if they were inherent to the pursuit of legitimate sporting objectives and not disproportionate to the aims.[373]

The court found that the rules in question were designed to combat doping. This general objective was related to other goals, including the proper conduct of competitive sport, protection of athletes' health, objectivity of sporting outcomes and preservation of ethical values.[374] These objectives were held to be legitimate and inherent in the organisation of competitive sport.[375] As for the ban on Nandrolone, it was common cause that the drug was a performance enhancer that compromised the fairness of sporting events. Therefore, the classification of the drug as a banned substance also achieved a legitimate purpose.[376] Lastly, the court held that penalties were also justifiable in principle, because they were imposed to ensure compliance with the rules.[377]

The ECJ proceeded to consider whether the rules were limited to what was necessary to achieve their objectives. This requirement would not be met if the legal limit on the substance was set at an excessively low level or the penalties imposed were unreasonably severe.[378] Regarding the legal limit, the court acknowledged that Nandrolone can be naturally produced in the human body, which meant that doping only occurs when the substance is present in an

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[370] "Fédération internationale de natation".

[371] The two Articles are the predecessors of Articles 101 and 102 TFEU, which deal with anti-competitive agreements and abuse of dominance respectively. See the explanation in 7.3.1 above.

[372] *Meca-Medina v Commission* para 47.

[373] Para 42.

[374] Para 43.

[375] Para 45.

[376] Para 51.

[377] Para 44.

[378] Para 48.

amount that exceeds the prescribed threshold. Therefore, the threshold would be unreasonable unless it was objectively determined, taking into account the available scientific knowledge at the time.[379]

The court held that it had no reason to conclude that the limit in this case was excessive, as the Appellants, who simply alleged that the threshold had no scientific basis, did not propose a more reasonable alternative legal limit.[380] Furthermore, it was not argued that the sanctions, imposed in the event that the limit was exceeded, were unduly severe.[381] As a result, the court held that the rules in question did not go beyond what was necessary to achieve their objectives.[382]

The ECJ's approach in *Meca-Medina* highlighted two issues: firstly, only objectives inherent to the proper conduct of sport will be regarded as legitimate; and secondly, only proportionate means used to achieve the objectives will be regarded as justifiable. The court established that proportionality required the practice in question to be no more restrictive than necessary.[383] The implication of this is that no general rule in sport can be automatically accepted as legitimate, as the compatibility of every case must be determined on its own merits.[384]

Moreover, proportionality of the conduct cannot be determined without reference to the inherence of the objective in question. Objectives accepted as legitimate by the ECJ in cases such as *Bosman* and *Bernard* suggest that a broad interpretation may be attached to the term "inherent".[385] Even then, not all objectives will be regarded as inherent to the proper conduct of sport,[386] and as the CJEU warned in *Piau v Commission*,[387] vague allusions to the existence of "specificity of sport" in a particular case will not suffice.[388] For this reason, it was perhaps unsurprising that the Competition Commission of India was unconvinced by the general

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[379] Para 52.

[380] Para 54.

[381] Para 55.

[382] Para 54.

[383] This principle was followed in *Bernard*. Although the term "proportionality" does not appear in *Bosman* or *Lehtonen*, the courts in both cases had in fact required the same.

[384] Siekmann 2012 *Collected Papers of the Law Faculty of the University of Split* 708.

[385] Although objectives such as the promotion of competitive balance and encouragement of youth development are desirable from a sporting perspective, it is doubtful that they are essential or inseparable from the organisation of sport. Therefore, these objectives would not be regarded as legitimate on a narrow interpretation of "inherence".

[386] See, for example, the ECJ's findings with respect to nationality links in *Bosman*.

[387] Case T-193/02 [2005] ECR II-209.

[388] Para 105. Confirmed on appeal in *Piau v Commission* Case C-171/05P [2006] ECR I-37.

arguments relating to the uniqueness of sport in *BCCI*, but far more receptive to the sports-related objectives submitted in *Pillay*.[389]

Therefore, competition authorities and sports organisers should not strain to find sporting justifications where none exist. The European Commission has acknowledged that "specificity of sport" will not be applicable in every case, and that it may be more appropriate to focus on the relevant economic issues instead in some instances. In broadcasting agreements, for example, the Commission has found arguments relating to efficiency gains[390] arising from joint selling of media rights to be more persuasive than sporting justifications, although the latter were not dismissed outright.[391]

7.4 Conclusion

This chapter examined sports-related cases from New Zealand, Indian and the E.U., with an emphasis on how purely sporting arguments were dealt with by competition authorities. Although non-economic justifications were accepted to various degrees in all three legal systems, each jurisdiction's approach to these issues have exhibited some unique features. These are reflected in the type of sporting objectives which are acceptable in principle, the requirements that they must meet in order to be accepted in a particular case, and how they are to be evaluated against adverse effects on competition once they are accepted.

The next chapter analyses the courts' divergent approaches to these issues, along with the legal positions examined in Chapter 6 above, in order to identify a suitable approach for South African competition law.

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[389] See the discussion in 7.2 above.

[390] As explained in 7.3.1 above, anti-competitive agreements may be justified if they meet the conditions under Article 101(3) TFEU.

[391] See, for examples, European Commission Decision No. 2003/778/EC (*COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League*), 2003 O.J. L 291/25 para 197 and European Commission Decision Summary of 22 March 2006 (*COMP/38.173 - Joint selling of the media rights to the FA Premier League*), 2006 O.J. C 7/18.

CHAPTER 8

APPLYING COMPETITION LAW TO SPORTS IN SOUTH AFRICA

The previous two chapters examined how courts in foreign jurisdictions have considered arguments relating to uniqueness of sport in competition law matters. It is now necessary to discuss the issue from a South African perspective. This chapter explores the appropriate approach for South Africa in general. It is divided as follows: Part 1 outlines the three key issues that must be addressed when considering sporting justifications; Part 2 discusses the present South African legal position on these issues. The suitability of the current position is examined in Part 3, which also proposes an alternative approach for applying competition law to sports. The proposed approach is then applied to the issue of football transfer system in the next chapter.

8.1 The three key issues regarding sporting justifications

Chapters 6 and 7 showed that a wide-ranging number of sports-related issues have been identified in foreign competition law. Although some jurisdictions have recognised that the uniqueness of sport warrants special consideration, their approaches in this regard have not been uniform. In particular, three questions have consistently challenged the courts. The first is whether sporting justifications are relevant when a *per se* prohibited conduct is alleged. The second question is whether justifications are only acceptable to the extent of their economic benefits. The last question is how sporting benefits (economic or otherwise) should be evaluated against their adverse effects on competition.

In order to explain the contentious aspects of the three issues, this chapter begins with a brief review of the contrasting approaches adopted in foreign jurisdictions with respect to each of these issues. Regarding the issue of *per se* prohibitions, the laws of the U.S., Canada, India and Australia have provided particularly useful insight. In the U.S. cases of *Mackey*[1] and *NCAA*,[2] both courts held that although the practices in question are usually classified as *per se*

[1] *Mackey v NFL* 543 F.2d 606 (1976).
[2] *NCAA v Board of Regents* 468 U.S. 85 (1984).

violations under the Sherman Act,[3] it was more appropriate to apply the rule-of-reason test instead. In *Mackey*, the court attributed this to the fact that a sports league is similar to other unique businesses structures to which the exception has applied in the past. In *NCAA*, however, the U.S. Supreme Court held that the rule of reason was warranted because horizontal restraint on competition between sports teams was essential to the existence of the league as a product.

However, as noted earlier, U.S. courts are permitted to adopt such an approach as its antitrust legislation is couched in general terms, and its enforcement is heavily reliant on case law. This can be contrasted with the Canadian Competition Act,[4] which explicitly provides a reasonableness enquiry for certain sports-related scenarios that would otherwise fall under the Act's *per se* prohibition category.

The South African position, however, is closer to that of the Indian Competition Act[5] and Australia's former Trade Practices Act[6] (now the Competition and Consumer Act[7]). Neither statute deals with the issue of sports specifically, and both prescribe certain *per se* prohibitions. It can be recalled that the two jurisdictions adopted contrasting approaches to the issue, with the Australian court in *News Ltd*[8] explicitly rejecting the relevance of sporting justifications on the basis that the conduct in question was *per se* prohibited. On the other hand, sporting justifications played a decisive role in the Indian Competition Commission's finding, in *Pillay*,[9] that Hockey India's conduct was lawful, despite its categorisation as a *per se* prohibition. It should be noted, however, that the Commission did not elaborate on the legal basis of its exception.

The second issue concerns sporting benefits with both economic and non-economic dimensions. In this regard, the New Zealand *NZRU* case[10] exemplifies an approach that favours economic arguments. In order to determine whether the public benefits of the proposed rules in question outweigh their detriments, the Commerce Commission balanced the alleged gains and harms in terms of their verifiable economic efficiency. In particular, emphasis was placed on

[3] 15 U.S.C. §§ 1-7.

[4] R.S.C., 1985, c. C-34.

[5] Act 12 of 2003.

[6] Trade Practices Act 1974.

[7] Competition and Consumer Act 2010.

[8] *News Ltd v Australian Rugby League Ltd* [1996] ATPR 41-521.

[9] *Dhanraj Pillay v Hockey India* Case No. 73 of 2011, before the Competition Commission of India (31 May 2013).

[10] *Commerce Commission, Decision No 580, Determination pursuant to the Commerce Act 1986 in the matter of an Application for the Authorisation of a restrictive trade practice. The Application is made by the New Zealand Rugby Football Union Incorporated* (Dated 2 June 2006).

gains that could be realised and translated into economic terms within five years, as effects further than this were deemed to be too difficult to quantify. Although the Commission did recognise that some benefits may have only intrinsic value, it was clear that very little weight was attached to this form of benefits.

As a result, arguments such as talent development and the performance boost of the national team failed to impress the Commission in that case, due to the lack of direct economic benefits. The improvement in match quality was found to be a persuasive factor to the extent that it increased television viewership, which can be translated into monetary figures. The Commission held that enhanced competitive balance would also have been a legitimate public gain had there been substantial proof that it boosted live attendance and viewership.

There was a similar emphasis on justifications grounded in economic gains in the two U.S. judgments. Both *Mackey* and *NCAA* recognised that the maintenance of competitive balance within a sports league is a legitimate objective. However, in the latter case, the Supreme Court stressed that this would only be the case if output or consumer demand was increased as a result. For this reason, any attempt to boost live game attendance, whatever its sporting motivation might be, would be anti-competitive if it harmed television viewership to the extent that the overall consumption decreased. Likewise, in *Mackey*, the court rejected the maintenance of team stability and protection of player investments as justifications on the ground that they were not economically legitimate arguments.

The Competition Commission of India also affirmed that sporting rules must maximise output if they are to be permitted under competition law. However, its decisions in *BCCI*[11] and *Pillay* suggest that it did not necessarily follow the New Zealand and U.S. approach. Both cases confirmed the legitimacy and benefits of the pyramid structure in sports governance. In *BCCI*, the conduct in question was held to be purely financially motivated, and thus illegal. The reason for this was later clarified in *Pillay*, where it was held that sporting bodies' objectives are legitimate if they promote the integrity of the game and the public confidence in it.

In that case, it was found these objectives included the prioritisation of international competitions, the administration of coherent sporting calendar and rules, the selection of national representative teams and the organisation of domestic championships. The

[11] *Barmi v Board for Control of Cricket in India (BCCI)* Case no. 61/2010, before the Competition Commission of India (08 February 2013).

Commission particularly acknowledged the importance of self-regulation in sports, and closely followed the approach outlined in the E.U. White Paper on Sports.[12]

This document described two types of sports specificities. The first relates to actual sporting activities, including rules of the game, uncertainty of outcomes and competitive balance. The second relates to sports governance structures, including the autonomy of sports organisations, the pyramid structure, solidarity mechanisms and the principle of a single federation per sport.

A number of these factors have been recognised as legitimate justifications by E.U. courts, including competitive balance (in *Bosman*[13] and *Lehtonen*[14]), development of young athletes (*Bernard*[15] and *Bosman*), health of sportspersons and the integrity of the game (*Meca-Medina*[17]). These explicitly recognised that sporting restrictions can be justified on non-economic grounds in principles, although it should be noted that the majority of these cases dealt with restrictions on free movement of labour rather than restrictions on competition.[18]

Lastly, it appears that the Canadian Competition Act may also permit consideration of non-economic justifications in circumstances where s 48 applies. The Act lists the organisation of the game on an international basis and the maintenance of reasonable competitive balance as two factors that may indicate legitimate limitations on competition in sports. The reasonableness of competitive balance within sports leagues is not required to be of a commercial nature, as is the case elsewhere in the Act. Therefore, despite the sparse application of the section in practice, a case can be made that it does not require sporting justifications to be economically beneficial.[19]

The third issue is the manner in which courts should evaluate sporting justifications. This question is necessary, because once it is decided that the justification relates to a legitimate objective, the next enquiry is whether the means used to achieve that objective are reasonable and effective. Here, the court may choose to either exercise some deference to governing

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[12] European Commission "White Paper on Sport" (2007) COM/2007/0391 final.

[13] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) Case C-415/93 [1995] ECR I-4921.

[14] *Jyri Lehtonen v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* (2000) Case C-176/96 [2000] ECR I-2681 .

[15] *Olympique Lyonnais v Olivier Bernard and Newcastle United F.C.* (2010) Case C-325/08 [2010] ECR I-2177.

[17] *Meca-Medina and Majcen v Commission* Case C-519/04 [2006] ECR I-6991.

[18] However, cases including *Meca-Medina* and *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Dimosio* Case C-49/07 [2008] ECR I-04863 confirm that the principle applies to the Union's competition rules as well.

[19] However, this point cannot be confirmed until the section is applied by a court in practice.

bodies' decisions, or adopt a more skeptical approach and closely examine the rule or agreement in question, as well as any available alternatives.

In this regard, it is arguable that the New Zealand Commerce Commission in *NZRU* paid the most attention to the effectiveness of the governing body's proposal in achieving its stated aims. The previous chapter discussed how the various aspects of the proposed salary cap were closely examined, through which the Commission was able to identify a number of flaws in the system. The issue of excessiveness was not dealt with, as the case rested on the existence of net public gains. Despite finding numerous efficiency problems with the proposal, it was nevertheless authorised. However, the authorisation was subject to a number of conditions that the Commission imposed on the governing body in order to ensure that the new system was effective.

The issue of effectiveness was also considered in the U.S. case of *NCAA*, where it was held that although the maintenance of competitive balance is a legitimate objective, the measure adopted in question (broadcasting restrictions) could not have achieved that objective, and was thus unreasonable. In addition to effectiveness, excessiveness is also a factor to consider according to U.S. jurisprudence. Both *NCAA* and *Mackey* required the means used to be the least restrictive alternative. In *Mackey*, it was held that although the reserve system might achieve the legitimate goal of competitive balance, it was excessive in nature, and therefore struck down as unreasonable.

The E.U. cases similarly focus on the issue of excessiveness. Here, the test is one of proportionality, and in both *Bosman* and *Bernard*, the measures adopted by the governing bodies were held to be disproportionate to the stated objectives. In both cases, it was found that there were less restrictive alternatives to achieve the goals in question. Therefore, it appears that "least restrictive means" is also a requirement under E.U. law. This was confirmed by the ECJ in *Meca-Medina*, although in that case, the issue of disproportionality was dismissed as the complainant failed to produce evidence that a less restrictive alternative was available.

The inherence-proportionality test pronounced in *Meca-Medina* was also followed by the Competition Commission of India in *Pillay*. However, as discussed in the previous chapter, in this case, "proportionality" did not require the means used to be the least restrictive alternative. Furthermore, although the Commission had reservations about the Hockey India's potential to abuse its administrative powers through commercial exploitation, it did not impose conditions upon the governing body as part of its decision. Instead, it recommended that the governing

body establish its own internal control system. This echoed the Commission earlier endorsement of self-regulation in sports.

Having outlined the key questions when considering sporting justifications, and their divergent approaches, it is now appropriate to examine the current South African legal position with respect to these issues.

8.2 The current legal positions in South Africa

The following section considers the approach that South African competition authorities are likely to adopt in sports-related cases. It should be noted that the Competition Commission is yet to encounter such a case, and that the Act[20] itself does not contain any special provisions on the subject. Determining the likely outcome in hypothetical cases is thus somewhat challenging. Nevertheless, the wording of the Act and decisions from analogous competition law cases are illustrative of the Commission's expected approach in these matters.

8.2.1 The applicability of *per se* prohibitions in sports

Regarding the first issue outlined above, namely whether sports-related arguments are permitted during a *per se* prohibited conduct case, the answer is reasonably clear, insofar as they relate to pro-competitive justifications. However, there is still some uncertainty in our law with respect to the types of arguments that are permissible during the enquiry, as the discussion below shows.

The Competition Act provides for a number of *per se* prohibitions, despite the fact that they are not explicitly labelled as such. Regarding restrictive horizontal practices, s 4(1) (*a*) of the Act provides a rule-of-reason enquiry for anti-competitive conduct among competitors in general, while s 4(1) (*b*) states that horizontal practices are prohibited outright if they involve any of the following practices:

> (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
>
> (iii) collusive tendering.

[20] Competition Act 89 of 1998.

Section 5 of the Act, which governs restrictive vertical practices, similarly provides for a general, rule-of-reason enquiry under subs (1). The practice of minimum resale price maintenance is *per se* prohibited, subject to s 5(3). Finally, two forms of abuse of dominance are also *per se* prohibited, namely (*a*) charging an excessive price to the detriment of consumers; and (*b*) refusing to give a competitor access to an essential facility when it is economically feasible to do so.[21]

The inclusion of *per se* prohibited acts under the Competition Act is partly due to the U.S. jurisprudential experience.[22] Antitrust law cases under the Sherman Act have shown that certain types of conduct are invariably anti-competitive in nature, and are highly unlikely to have pro-competitive benefits.[23] Therefore, prohibiting these forms of conduct *per se*, rather than subjecting them to a rule-of-reason test, would promote legal certainty and litigation efficiency.[24] In *American Natural Soda Ash Corporation v Competition Commission* ("*Ansac (SCA)*"),[25] the Supreme Court of Appeal also attributed the "inimical" nature of these practices towards economic competition as a rationale for their *per se* prohibition.[26]

The practical effect of a *per se* prohibition is obvious. In order to establish that a *per se* prohibited practice has occurred, it is not necessary to prove any anti-competitive effect arising from the conduct in question.[27] At the same time, once it is shown that the conduct falls within one of the categories of *per se* prohibited practices, the conduct cannot then be justified through efficiency or other pro-competitive arguments.[28] Therefore, it is clear that only evidence relating to the issue of whether the conduct constitutes a *per se* prohibited practice is permissible.

In the *Ansac (SCA)* case, the issue was referred to as the characterisation of the conduct in question.[29] Here, the SCA had to decide whether the judgments of the courts *a quo* merely held that evidence relating to an "efficiency defence" was inadmissible in *per se* prohibition cases,

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[21] Section 8 of the Act. Subsections (*c*) and (*d*) provide for two forms of rule-of-reason tests, with differing burden of proof depending on the nature of the conduct involved.
[22] P Sutherland and K Kemp *Competition Law of South Africa* 20 SI (2000) 5.45.
[23] See, for example, *United States v Topco Associates Inc* 405 US 596 (1972) 607-608.
[24] *Arizona v Maricopa County Medical Society* 457 US 332 (1982) 343-344.
[25] 2005 (6) SA 158 (SCA).
[26] Para 37.
[27] Sutherland and Kemp *Competition Law* 5.46.
[28] M Neuhoff *et al A Practical Guide to the South African Competition Act* (2006) 63.
[29] Para 47.

or that the exclusion also applied to evidence regarding the characterisation of the conduct.[30] The court held that the decision *a quo* was at least open to the latter interpretation, which would be incorrect, as characterisation is a factual question that must be answered by adducing relevant evidence.[31]

In addition to the factual enquiry regarding the nature of the conduct in question, it was held that characterisation also involves a determination of the scope of the *per se* prohibition, which is a matter of statutory construction.[32] Here, the SCA recognised that the law in this respect is not yet settled. Regarding the prohibition of price-fixing in particular, the court remarked that indirect price-fixing, which is not exempted from the *per se* prohibition under s 4(1) (*b*), may result from, and be incidental to, a *bona fide* joint venture among competitors.[33] It was recognised that it is not yet clear whether this type of price-fixing would fall within the terms of the *per se* prohibition, and the court was open to the interpretation that it does not.[34] Unfortunately, this was a matter that had to be decided by the competition courts rather than the SCA, due to the latter's jurisdictional limitation,[35] and the case was settled between the parties before the Competition Tribunal could decide the issue.[36]

The *Ansac* case reveals that there remains some uncertainty in the characterisation enquiry of *per se* prohibited conduct. Sutherland and Kemp submit that the practical implication of the SCA's judgment is that some efficiency-related evidence is indeed admissible, so long as it is kept in strict bounds.[37] The subsequent Competition Tribunal decision in *Competition Commission v South African Breweries Ltd* suggests that the characterisation enquiry may be assisted by referring to the rationales behind *per se* prohibitions mentioned above.[38] The Tribunal also appeared to rely on the relationship between the parties involved as an indicator of the nature of the conduct.[39]

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[30] Para 38.
[31] Paras 41 and 45.
[32] Para 47.
[33] Para 54.
[34] Para 55.
[35] Para 56. Section 62(1) (*a*) of the Act provides that the Competition Tribunal and the CAC share exclusive jurisdiction in respect of interpretation and application of, *inter alia*, Chapter 2 of the Act.
[36] *Commission v American Natural Soda Ash Corporation* 49/CR/Apr00 4/11/2008 (consent order).
[37] *Competition Law* 5-55.
[38] 134/CR/Dec07 24/03/2014 paras 68-72.
[39] See Sutherland and Kemp *Competition Law* 5.56 for a criticism of this approach.

In this case, there was an alleged territorial division of markets, which is prohibited *per se* under s 4(1) (*b*) (ii). The Tribunal held that on a literalist approach of the arrangement in question (SAB had agreements with local distributors over exclusive supply rights), it would constitute a market division.[40] However, it held that the SCA judgment in *Ansac* effectively renounced such an approach, by stressing that the characterisation enquiry is dependent on the relationship between the would-be competitors.[41] It should noted the court in *Ansac* merely held that the provisions in the Act was open to a less literalist interpretation of the *per se* prohibitions, but that this was a matter to be decided by the competition courts. Nevertheless, the Tribunal in *SA Breweries* found that although the parties in question were not a single economic entity, they were not sufficiently independent of each other for s 4(5) (*b*) to be applicable.[42] As a result, the Tribunal conducted a rule of reason enquiry under s 4(1) (*a*).[43]

The Commission appealed the matter before the CAC,[44] where it was argued that the Tribunal's emphasis on the relationship between the parties produced an excessively vague characterisation test, which effectively allowed firms to circumvent the *per se* provisions by introducing unnecessary evidence.[45] The CAC agreed that the Tribunal had erred in its over-reliance on the inter-dependence among the parties involved, and held that although this was a relevant issue, it should not have been the sole decisive factor.[46]

Regarding the correct approach to characterise whether the conduct is *per se* prohibited, the court acknowledged that South African law has had limited experience dealing with this issue. Therefore, despite the statutory nature of the Act's *per se* provisions, their characterisation enquiry must necessarily draw from the legal and economic expertise of jurisprudences where the prohibitions are judicially constructed.[47]

However, although the court agreed with the SCA in *Ansac* regarding the need to define the ambit of *per se* prohibitions and the importance of a consistent characterisation approach, neither of these were formulated in the judgment. On the issue of the scope of *per se* provisions, it was held the relevant sections must be construed so that only "economic activities in regard

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[40] Para 78.
[41] Para 66.
[42] Para 87.
[43] Para 97.
[44] *Competition Commission v South African Breweries Ltd* 129/CAC/Apr14 02/02/2015 ("*SA Breweries (CAC)*").
[45] Para 23.
[46] Para 38.
[47] Para 37.

to which no defence should be tolerated are held within the scope of the prohibitions".[48] As to which activities would qualify under this definition, the court merely held that this is a matter to be informed by "common sense and competition economics".[49]

On the facts, the CAC found that the agreements in question displayed a relationship, between SA Breweries and its local distributors, that was primarily vertical, rather than horizontal, within the meaning of the Act.[50] This meant that it was not necessary to consider the matter under s 4. Therefore, it appears that on appeal, the relationship among the parties still played the decisive role, with the distinction that in the Tribunal decision, the relationship was used to determine whether the conduct could be exempt in a similar manner to s 4(5), while in the CAC judgment, the focus was on whether a real horizontal relationship existed at all. However, it seems that the CAC was alluding to the fact that the agreements were incidental, rather than a naked restraint of trade,[51] which is a distinction often drawn under U.S. case law,[52] although further clarification from the competition authorities is required before one draws such a conclusion for certain.

Nevertheless, the CAC's interpretation of the ambit of s 4(1) (*b*) affirms that once an act is characterised as *per se* prohibited conduct, no defences are available. It should be noted that this approach is somewhat less flexible than the U.S. one, which occasionally permits a truncated (or "quick-look") rule-of-reason enquiry despite the conduct's categorisation.[53] As discussed previously, this is especially applicable to practices involving business forms with which the courts are not entirely familiar.[54] However, this degree of flexibility is absent under the South African Act.[55] In *American Natural Soda Ash Corporation v Competition Commission*,[56] the Competition Tribunal recognised this distinction, but remarked that this is not necessarily problematic, as many of the U.S. cases where the *per se* rules were relaxed dealt with the rules of professional bodies, for which exemptions may already apply under the

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[48] Para 44.
[49] *Ibid.*
[50] Para 45.
[51] *Ibid.*
[52] See, for example, H Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* 2 ed (1999) 256-257.
[53] See *NCAA v Board of Regents of the University of Oklahoma* 468 US 85 (1984), discussed in Chapter 8 above.
[54] *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979).
[55] Sutherland and Kemp *Competition Law* 5.48. See also J Campbell "Restrictive Horizontal Practices" in M Brassey (ed) *Competition Law* (2002) 140.
[56] 49/CR/Apr00.

Competition Act.[57] However, it is not difficult to see that this does not cover all cases that may warrant relaxation of the *per se* rule under U.S. law.

Sport is such an example. Schedule 1, Part B of the Act does not include any organisation of professional sportspersons or other sporting bodies among its list of professional associations. Therefore, the exemption provided under Part A of the Schedule does not currently apply to sports. The grounds of exemption listed under s 10(3) of the Act are not relevant here either. This means that if a sport-related practice is alleged to be *per se* prohibited, then the enquiry outlined above must be followed.[58]

Regarding the characterisation process, there is still some uncertainty with respect to the scope of the legislative prohibition, despite the Tribunal's comments in *SA Breweries*. Therefore, it appears that the law remains open for sporting bodies to argue that their rules do not fall within the terms of conduct that the legislature envisaged to be *per se* prohibited. However, this does not mean that sports will necessarily escape the implications of *per se* prohibitions.

This is because the characterisation enquiry should focus on the nature of the conduct, rather than the relationship between the parties.[59] Therefore, it is insufficient for sports leagues and governing bodies to purely rely on the unique relationship among sports clubs as an argument. It is necessary to show that the type of practice in question is not the type that typically reduces competition.

This presents a challenge for sporting bodies, as the previous chapters have demonstrated that although many of the practices under scrutiny have anti-competitive effects, they were justifiable due to their sporting merits. However, this "saving grace" would not be admissible during the characterisation enquiry if evidence is limited to the *per se* nature of the conduct. Therefore, a rule-of-reason analysis would not be available in these cases.

Chapter 9 looks at the implication of the *per se* provisions through a practical example, but for present purposes, it suffices to say that a number of the foreign cases examined in the previous chapters may be considered prohibited *per se* under South African competition law. To recap, those cases involved issues such as player transfer restrictions (*Bosman*, *Bernard* and *Mackey*), salary caps (*NZRU*), doping regulations (*Meca-Medina*), television broadcasting restraints

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[57] At 19.

[58] See the discussion in 8.3 below.

[59] Sutherland and Kemp *Competition Law* 5.56.

(*NCAA*), and exclusion of rival leagues (*News Ltd*, *BCCI*, *Hockey India* and *MOTOE*[60]). On a literalist interpretation of the Competition Act, it could be argued that transfer restrictions and salary caps both constitute indirect fixing of the buying price for players' services;[61] doping regulations constitute direct fixing of a trading condition;[62] broadcasting restraints may constitute both fixing of the selling price and market division,[63] depending on the terms of the restraint in question, while exclusion of a rival league in the form of an agreement seen in *News Ltd* may constitute a division of market. However, the exclusion of rival competitions by a governing body (as seen in *BCCI* and *Hockey India*) is unlikely to constitute a refusal of access to an essential facility,[64] as it was remarked, albeit *obiter*, by the Competition Appeal Court that the meaning of "essential facility" does not include services.[65] Therefore, a sporting body's refusal to authorise rival competitions, which were interpreted as services in both *BCCI* and *Hockey India*, is unlikely to constitute an abuse of dominance.[66]

On the other hand, it is also possible that the competition authorities may follow the approach adopted in *South African Breweries*, and regard any unique relationship between the parties involved as key during the characterisation enquiry. Under this approach, the practices mentioned above are more likely to escape the scope of *per se* provisions. However, it is submitted that each case must still be decided on its own facts. The characterisation enquiry should examine the actual relationship within the sports leagues or organisations in question, as they will not all possess the type of joint venture-like characteristics considered in *South African Breweries*. For example, transfer restrictions may be characterised as not prohibited *per se* insofar as they are rules imposed on teams within the same league (or leagues that are interlinked through promotions and relegations), due to the cooperative and interdependent relationship among the teams. However, they may be considered *per se* violations if they apply to inter-league transfers, since competitions in different countries do not constitute the type of genuine joint venture envisaged by the SCA in the *Ansac* case.

Therefore, the Act's *per se* provisions may be applicable to sporting bodies even under a more exclusionary interpretation. This means that pro-competitive arguments, including sporting

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[60] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Dimosio* Case C-49/07 [2008] ECR I-04863.

[61] Prohibited under s 4(1)(*b*)(i) of the Act.

[62] *Ibid.*

[63] The latter is prohibited under s 4(1)(*b*)(ii) of the Act.

[64] Prohibited, subject to economic feasibility, under s 8(*b*) of the Act.

[65] *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 para 53.

[66] However, the conduct can still be scrutinised under the rule of reason as an exclusionary act under s 8(*c*) of the Act.

justifications, will not be admissible in these circumstances under the present legal position. Sections 8.3 and 8.4 below argue that this approach is inappropriate for the development of sports, and suggest a more suitable alternative.

8.2.2 The relevance of non-economic justifications

The second issue to be dealt with under the current section is the permissibility of non-economic, sporting justifications during the rule-of-reason enquiry. Unlike the *per se* discussion above, this issue is only relevant once a rule-of-reason enquiry is conducted. The Competition Act provides four instances where the enquiry will be necessary. Each of these is briefly explained below.

Regarding restrictive horizontal practices, s 4(1) (*a*) of the Act provides that agreements (or concerted practices and decisions by an association of firms) between competitors are prohibited if -

> "it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect".

As mentioned above, s 4(1) (*b*) provides three types of *per se* prohibited practices. Therefore, subsection (*a*) only applies if the conduct in question falls outside the scope of the *per se* provisions.[67] A rule-of-reason enquiry is conducted after it is established that the object of the conduct (the agreement, concerted practice or decision) takes place among competitors, and that there is substantial anti-competitive effect in the market. This anti-competitive effect is then weighed against any pro-competitive gains in order to determine whether the conduct should be permitted.

Section 5(1) of the Act contains a similar provision, with the exception that it applies to agreements between parties in a vertical relationship instead.[68] Exclusionary acts by dominant firms are also considered under the rule of reason. They are dealt with under either s 8 (*c*) or s 8

[67] Campbell *Competition Law* 141.

[68] The relationship is defined under s 1(1) of the Act as one between a firms and its suppliers, customers or both.

(*d*), depending on whether the conduct in question constitutes an act listed under the latter provision.[69]

The wording of the sections indicates that there are three types of pro-competitive effects, namely technological, efficiency and other pro-competitive gains. While the first two refer to economic gains, the meaning of "other pro-competitive gain" is yet to be decided by the competition authorities.[70] In *Trident Steel (Pty) Ltd/Dorbyl Ltd*,[71] the term was used by the Competition Tribunal in order to interpret the meaning of technological and efficiency gains within the context of a large merger. Applying the rule of *eiusdem generis*, it was held that both gains must be pro-competitive in order to be relevant under the enquiry. Therefore, technological gains should refer to the dynamic efficiencies that arise during technological innovation, while efficiency should refer to real gains in economies of production, rather than merely pecuniary benefits (such as savings in accounting costs).[72] However, the Tribunal did not elaborate on the nature or meaning of "other pro-competitive gains".

Nevertheless, it is apparent that whatever "other" gains may be, they need to be "pro-competitive". In other words, any alleged benefits arising from the conduct must be those that enhance the state of competition within a market(s). For example, benefits from the grant and usage of exclusive intellectual property rights have been cited as a pro-competitive gain that do not necessarily fall within the technological or efficiency categories.[73] It has the potential to increase competition in the market by encouraging capital investment, while the existence of patent rights can also lead to growth in scientific knowledge.[74]

Nevertheless, it is submitted that benefits associated with intellectual property rights can only qualify as pro-competitive gains to the extent that they do enhance the state of competition, as determined by the facts of the particular case. The emphasis on pro-competitiveness in *Trident Steel* suggests that effects which are competition-neutral will not be relevant in the rule of

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[69] The categorisation affects the burden of proving the exclusionary nature of the conduct in question. See *Competition Commission v South African Airways (Pty) Ltd (SAA)* Case 18/CR/Mar01.
[70] Sutherland and Kemp *Competition Law* 5.81.
[71] 89/LM/Oct00 ("*Trident Steel*").
[72] Para 78.
[73] B Lister "Competition - It is not just about the Act" (2005) 13 (3) *Juta's Business Law* 115 at 120.
[74] *Ibid.*

reason enquiry, although this does not mean that the conduct in question cannot be justified on other grounds.[75]

If this interpretation is correct, it could be particularly problematic for sports cases. A number of the case studies in the previous chapters saw sports organisers and governing bodies raise sporting justifications for their conduct. For example, in the *Pillay* case above, although the Indian Competition Commission reaffirmed its earlier decision in *BCCI* that sports rules and practices must maximise consumer output, it in fact relied heavily on the governing body's sporting justifications in permitting the conduct in that case. Indeed, it is difficult to argue that objectives such as the prioritisation of international tournaments over domestic ones and the selection of national representative teams can enhance economic competition through technological, efficiency, or other gains.

Similarly, purely sporting justifications have played decisive roles in a number of the E.U. cases discussed above. In *Lehtonen* and *Meca-Medina*, it was found that the rules in these two cases had restricted the freedom of movement and competition, respectively. However, in both cases, the conduct in question were justified on non-economic grounds. Furthermore, in the cases of *Bernard* and *Bosman*, it was explicitly stated that restrictive conduct may be justified by sporting arguments. The development of young footballers was accepted as a legitimate objective in both matters, although it was ultimately held that the rule in each case was disproportionately excessive in achieving that goal.

However, these justifications would not be accepted as pro-competitive effects under our competition law, where the current legal position is closer to that of the U.S. For example, in *NCAA*, the Supreme Court held that although competitive balance may be a legitimate consideration under the rule of reason, it is only relevant to the extent that it increases output and consumer demand. In fact, the court viewed the organiser's attempt to boost live attendance to be anti-competitive because it had a negative effect on the overall consumption of the product. Similarly, arguments relating to the maintenance of team stability and youth development were regarded as irrelevant by the court in *Mackey*, in stark contrast to the E.U. position outlined above.

Therefore, it is clear that governing bodies and organisers would be precluded from raising many purely sporting justifications as pro-competitive effects under South African law. The

[75] For example, s 10(4) of the Act allows firms to apply for an exemption based on the fact that a conduct is related to the exercise of intellectual rights.

next issue to consider is whether these arguments may, alternatively, be raised as social welfare benefits.

Chapter 2 above outlined a number of social benefits in sports. Therefore, it may appear that social welfare is a much more suitable category for sporting objectives than pro-competitive effects. However, the difficulty with this approach is that our competition law only permits very limited social welfare considerations. The Competition Act is "narrowly formulated" in this regard, with the term "other *pro-competitive* gain" [own emphasis] effectively excluding social welfare considerations that do not enhance economic competition.[76]

The scope for considering social welfare outside of the pro-competitive terms are limited. In this regard, the objectives listed under s 2 of the Act may be instructive. While the first two purposes, namely (*a*) the promotion of "the efficiency, adaptability and development of the economy" and (*b*) the provision of "competitive prices and product choices" to consumers, are traditional competition law objectives, the other listed purposes are closer to social welfare concerns. Many of these are grounds on which exemption may be obtained under s 10(2) of the Act.[77] However, Sutherland and Kemp have argued that the fact that the Act requires firms to obtain an exemption from the Competition Commission when relying on these objectives as a defence is an indication that they will not readily be accepted as pro-competitive justifications during the rule of reason analysis.[78]

The learned authors' arguments are convincing, especially when taking into account the manner in which public interest is considered under Chapter 3 of the Act. During a merger application, s 12A(1) provides that the Commission must determine whether the proposed merger is anti-competitive. If it is, then subsection (*a*) is applicable, in which case it must be determined, firstly, whether the anti-competitive effects are offset by any merger-specific pro-competitive gains, and secondly, whether the merger is justifiable due to public interest considerations. Subsection (*b*) applies if no anti-competitive effect is found, in which case the Commission must still consider public interest grounds that may affect the granting of the merger. According to the Commission's guidelines on public interest, the effect of the section

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[76] Sutherland and Kemp *Competition Law* 5.81.

[77] The objectives which are relevant for the granting of such exemptions are listed under s10(3)(*b*). They include (i) maintenance or promotion of exports; (ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (iii) change in productive capacity necessary to stop decline in an industry. It is submitted that these correspond with the purposes listed under ss 2(*d*)-(*f*) of the Act.

[78] *Competition Law* 5-81.

is that mergers with net anti-competitive effects may be approved on public interest grounds, while mergers with no overall anti-competitive effects may still be prohibited, or approved subject to conditions, due to negative public interest considerations.[79]

The consideration of public interest grounds is clearly absent in the rule-of-reason provisions dealing with prohibited practices under Chapter 2 of the Act. From the wording of s 12A(3), it is clear that the relevant public interest grounds are those that coincide with the social welfare objectives listed above. The section provides:

> "When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on -
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> *(a)* a particular industrial sector or region;
> *(b)* employment;
> *(c)* the ability of small businesses, or firms controlled or owned by historically disadvantaged person, to become competitive; and
> *(d)* the ability of national industries to compete in international markets."

The integration of public interest consideration and rule-of-reason test within merger enquiries can be contrasted with the requirement to apply for exemptions on socio-economic objectives grounds in non-merger cases. It is submitted that the omission of public interest considerations in ss 4-8 must be interpreted as deliberate, and that the Legislature did not wish social welfare arguments to be a readily available defence to otherwise anti-competitive conduct. Therefore, under the current legal position, purely sporting justifications are not available to governing bodies and organisers as either arguments relating to pro-competitive gains or social benefits. Section 8.4 below examines whether our competition law should accept these justifications as legitimate, and if so, how they may be evaluated.

8.2.3 The weighting of anti-competitive effects against pro-competitive gains

Regardless of whether purely sporting arguments should be accepted under competition law, there is no doubt at least some sports-related justifications will be deemed "pro-competitive". This will be the case when a rule or practice promotes an objective, such as the maintenance of

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[79] Items 5.5 and 5.6 of the Guidelines on the Assessment of Public Interest Provisions in Merger Regulation, GN 309, *Government Gazette* 40039, 2 June 2016. It should be noted that although public interest has led to imposition of conditions as part of merger approvals, they have not yet caused an otherwise unproblematic merger to be refused, or an otherwise problematic merger to be approved. See *Wal-Mart and Massmart* 73/LM/Nov10 para 34.

competitive balance, which can be shown to benefit consumers and increase output. Therefore, the last issue to be discussed under the present section is the manner in which pro-competitive gains should be weighed against anti-competitive effects in sports-related matters, irrespective of whether non-economic justifications can be considered "pro-competitive".

Here, the discussion will focus on five issues, namely (1) the verification of pro-competitive gains; (2) the indispensability requirement; (3) the degree to which gains must benefit consumers; (4) the role of the courts' discretion; and (5) the imposition of conditions as part of an order. As will be seen below, many of these issues are in fact interrelated, and although they are discussed seriatim they should not be considered each in isolation.

The first issue directly affects how effects and gains will weigh up against each other. The verification of pro-competitive effects is by no means a simple task, even outside of the sports context. This is because the benefits claimed by parties attempting to justify their conduct will often be conceptual in nature, and the economic impact of such conduct cannot be easily calculated.[80] The Competition Tribunal has remarked, in the context of a merger consideration, that efficiency claims can be "easy to assert and sometimes difficult to disprove".[81] Therefore, competition authorities tend to reject arguments that are based on "broad speculative assertions" which are incapable of measurement.[82]

In *Pioneer Hi-Bred International v Competition Commission*,[83] it was held that efficiency claims must be quantitatively verifiable in order to be accepted.[84] On appeal, the CAC applied a somewhat less stringent standard, holding that verification should emphasise the existence of such efficiencies, rather than their precise quantification.[85] It should be noted that this matter took place in a market that the court described as being "dominated by innovation competition", which made the quantifications particularly difficult to verify.[86]

Furthermore, it should be noted that merger pro-competitive gains and Chapter 2 pro-competitive gains are qualified differently under the Competition Act. Section 12A(1) (*a*) (i) requires competition authorities to take into account any gains that are "likely to result"

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[80] Sutherland and Kemp *Competition Law* 7.79.
[81] *Trident Steel (Pty) Ltd/Dorbyl Ltd* 89/LM/Oct00 para 55.
[82] *Ibid* para 63.
[83] 81/AM/Dec10 09/12/2011 ("*Pioneer Hi-Bred (CT)*").
[84] Para 315.
[85] *Pioneer Hi-Bred International v Competition Commission* 113/CAC/Nov11 28/05/2012 para 37 ("*Pioneer Hi-Bred (CAC)*").
[86] *Ibid.*

from the merger. This can be contrasted with the wording under ss 4(1) (*a*) and 5(1) of the Act, which merely refers to pro-competitive gains "resulting" from the alleged prohibited practice. While it is possible that this distinction merely refers to the prospective nature of merger enquiries, it is submitted that the better view here is to treat speculative pro-competitive claims with even more skepticism in non-merger cases. This should especially be the case where anti-competitive effects have already taken place, in order to minimise "straw-clutching" arguments by would-be contravening firms.

However, this conclusion would present a particularly challenging scenario for sports cases, where the anti-competitive effects are much easier to establish than the asserted gains. The exception here would be productive efficiency gains achieved, for example, through joint-selling of broadcasting rights. However, as the case studies from previous chapters have shown, although the existence of these gains are relatively easy to prove, they also tend to have the least persuasive force with competition authorities. Therefore, in order to outweigh the negative effects, it is usually necessary to rely on consumer benefits in the form of increased consumption or lower prices. But as the *NZRU* case indicates, while economic theory can be used to explain how a particular sports rule is able to promote consumer welfare, it does not verify whether the benefits actually exist in a particular case, much less the magnitude of such benefits. For example, despite its best efforts, the New Zealand Commission found that the increase in television viewership resulting from a salary cap introduction could range anywhere between zero and 10,800,000 NZD. Uncertainty would only be compounded further if purely sporting benefits are justifiable, as these would be even more difficult to translate into monetary figures.

An additional requirement for verification of pro-competitive gains is the timeliness of claimed benefits. In the *Pioneer Hi-Bred (CT)* case, the Tribunal held that any asserted efficiencies "must be achieved within a relatively short period of time to prevent a proposed merger from causing harm to consumers".[87] It then proceeded to consider efficiencies that were achievable within five years of the proposed merger, similar to the position adopted by the New Zealand Commission in the *NZRU* case.[88] However, the CAC rejected this approach on appeal, holding that imposing a time period ceiling would discourage long-term innovation.[89]

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[87] Para 325.
[88] Para 334.
[89] *Pioneer Hi-Bred (CAC)* para 50.

It is submitted that the CAC's more inclusive approach is also appropriate in non-merger cases where the markets involved are heavily reliant on dynamic efficiencies.[90] Furthermore, because a time limit is not explicitly prescribed within the Act, competition authorities should also be encouraged to adopt the flexible approach in cases where the agreements or conduct are designed to achieve long term benefits. Sports organisers and governing bodies may well have to rely on such an interpretation, as the most commonly asserted sporting objectives (such as the development of youth players and promotion of competitive balance) from the previous chapters will not only have to meet the "pro-competitive gain" qualification, but also pass the timeliness requirement.

The second issue that must be considered when weighing effects on competition is whether conduct that lessens or prevents competition must be indispensable in order to achieve the desired benefits. In other words, once it is determined that the pro-competitive gain asserted is legitimate and verifiable, is it also necessary to establish that the same gain cannot be achieved through means that do not harm competition?

Chapter 3 of the Competition Act provides a relatively clear position on this issue for merger considerations. According to s 12(1)(*a*)(i), only gains that "would not likely be obtained if the merger is prevented" are relevant during the rule of reason enquiry. In *Trident Steel*, this was interpreted to mean that the efficiency claimed must be both merger-specific and unobtainable through less restrictive alternatives.[91] The first requirement is a factual matter of causation, and should undoubtedly apply to non-merger enquiries as well. After all, there is little reason to consider a pro-competitive gain if it is not, if fact, caused by the conduct under scrutiny at all.

However, as the Tribunal's interpretation of the phrase also includes the "least restrictive means" requirement, it must further be asked whether the difference in wording between the Act's merger and non-merger tests has any significance. If ss 4 and 5, which do not contain the phrase in question, do not require a competition-reducing practice to be the least restrictive alternative, the natural implication is that a conduct may be deemed lawful as long as its pro-competitive gains outweigh its anti-competitive effects, even if less excessive means are available to the firms in question.

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[90] Sutherland and Kemp *Competition Law* 10.106.

[91] *Trident Steel* paras 76-77.

In *Patensie Sitrus Beherend Beperk v Competition Commission*,[92] the issue was considered in the context of an abuse of dominance matter. At para 266, the CAC held:

> "The efficiency defence requires appellant to show that the efficiencies relied upon are directly related to and dependant upon its 'act' that has been found to be the practice which is prohibited. In other words, that the anti-competitive behaviour is a *sine qua non* of the efficiencies and that the gains could not be otherwise achieved."

Regarding the conduct in question, which consisted of a number of exclusivity provisions, the CAC found that the Appellant has failed to show that the articles were necessary to achieve the alleged efficiencies.[93] The existence of alternatives that do not violate competition law led to the court to conclude that the conduct in question was unjustifiable.[94] It should be noted that the CAC did not explain why the conduct must be a "*sine qua non*" of the claimed benefits, which cannot be obtained otherwise. Furthermore, the Appellant's contention would, in any case, have failed as it was not shown that the alleged efficiencies had outweighed the anti-competitive effects of its conduct.[95]

Nevertheless, there are good reasons why the requirement should exist beyond merger cases. Similar standards have been adopted in both U.S. and E.U. jurisprudence. The Sherman Act has been interpreted to only permit restraints that are reasonably necessary to achieve its pro-competitive gains, where the term "reasonably necessary" has been interpreted to mean the absence of a practical, significantly less restrictive alternative that can achieve an equivalent or comparable efficiency.[96] Similarly, indispensability of conduct is one of the requirements under the proportionality analysis in E.U. competition law cases.[97] Sutherland and Kemp conclude that although the South African Act does contain the indispensability requirement for non-merger cases, it will be difficult to justify conduct where there are less restrictive alternatives available.[98]

It is submitted that this approach should be welcomed, especially in sports cases. As mentioned above, pro-competitive gains (economic or otherwise) in sports are often difficult to quantify.

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[92] [2003] 2 CPLR 247 (CAC) ("*Patensie Sitrus*").
[93] Para 266.
[94] Para 267.
[95] Para 266.
[96] Federal Trade Commission and Department of Justice *Antitrust Guidelines for Collaboration Among Competitors* (April 2000) 9. See also the discussions on the *NCAA* case above.
[97] See, for example, the discussions on the *Meca-Medina* case above.
[98] *Competition Law* 5-81.

Yet, in many cases, they are capable of achieving legitimate objectives. While underestimating these benefits may undermine the proper organisation of sports, overestimating their effects may be equally harmful, as it will permit sports bodies to adopt excessively restrictive rules in the knowledge that they will likely be sanctioned by the courts. The indispensability requirement can ensure that the governing bodies do not have carte blanche when organising their respective sports.

Consumer pass-through is another requirement which might restrict abuses of power. In other words, In other words, sports organisers must not only show that the pro-competitive gains of their conduct outweigh the anti-competitive effects, but that these gains are passed on to consumers. However, the degree to which this requirement is a part of South African law is debatable.

At the outset, it should be noted that "consumers" do not necessarily refer to parties that deal directly with the firms in question. The CAC has held that pro-competitive gains must benefit competition, rather than immediate customers.[99] It has been argued that benefits to customers may be relevant, but they must be considered in light of harm to other participants in market, including ordinary consumers.[100] In the context of sport, organisers' customers may include broadcasters and buyers of other media licenses, while consumers would range from spectators (through live attendance or broadcasts) to supporters who purchase sports-related merchandise.

The U.S. and New Zealand case law examined in the previous chapters have shown that courts in these jurisdictions have required consumer benefits when considering the efficiency claims in sports. Specifically, emphasis were placed on the potential of restrictive agreements to increase total viewership. European authorities, on the other hand, have adopted a more flexible approach. Objectives such as development of youth players and redistribution of resources to amateur sports have been recognised as legitimate despite limited evidence of their effect on consumer preference.

In *Trident Steel*, the Tribunal acknowledged the fact that the degree to which consumer benefits must be present when verifying efficiency claims is far from certain under the Competition Act. Nevertheless, it proposed the following test regarding the issue of consumer pass-through:

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[99] *Patensie Sitrus* 266-267.

[100] Kemp and Sutherland *Competition Law* 7.80.

> "[Where] efficiencies constitute 'real' efficiencies and there is evidence to verify them of a quantitative or qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling. On the other hand, where efficiencies demonstrate less compelling economies, evidence of a pass through to consumers should be demonstrated and although no threshold for this is suggested, they need to be more than trivial, but neither is it necessary that they are wholly passed on. The test is thus one where real economies and benefit to consumers exist in an inverse relationship."[101]

As explained above, the Tribunal saw "real" efficiencies as those that arise from dynamic or technological gains, as opposed to mere pecuniary efficiencies. Essentially, it can be observed that the requirement here is not one where all benefits must be gained by the consumers. In cases where dynamic efficiencies can be established with relative certainty, consumer pass-through will not be a decisive factor. However, in cases where the proof for the claimed benefits is less than satisfactory, there must also be consumer pass-through of a non-trivial nature. This test has been described as a "sensible" method of balancing consumer and firm interests.[102]

If the above approach is applied to the sports context, it is submitted that many cases will need to demonstrate significant consumer benefits in order to be justifiable. This is because the economic benefits that organisers have claimed tend to be of a productive efficiency nature, e.g. utilising the joint negotiation power of clubs to obtain lucrative sponsorship or broadcasting deals. The purely sporting objectives cannot qualify as the type of "real efficiencies" described by the Tribunal either, should they be considered legitimate. As per the "inverse" nature of the *Trident Steel* test, the difficulty of quantifying the pro-competitive gains in sports suggest that a significant proportion of the contended pro-competitive benefits should be consumer-oriented in order to outweigh the anti-competitive effects.

The fourth issue to be considered here is the actual manner in which effects on competition should be weighed against each other. Specifically, it must be determined how much discretion a competition authority may exercise during the balancing act. The question is important as the types of anti-competitive effects alleged and pro-competitive gains claimed may often be so

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[101] Para 81.

[102] Kemp and Sutherland *Competition Law* 10.110.

different as to be incapable of comparison.[103] As a result, it has been observed that competition authorities have often try to "side-step" the comparison process altogether.[104]

Nevertheless, this enquiry is unavoidable at times. The Tribunal has held that there are two ways to determine the outcome, namely the formulaic approach and the flexible approach:

> "The formulaic leads one to approach the problem as an economist would do in a classroom demonstrating Williamson's trade off. Efficiencies claimed and deadweight losses are calculated in terms of a formula and then compared. If the efficiency as calculated exceeds the deadweight loss the trade off requirement has been satisfied … When adopting the flexible approach the competition adjudicator relies on its discretion rather than an equation. But the adjudicator can't begin exercising its discretion unless it has formulated a policy approach to guide it in its evaluation."[105]

The Tribunal recognised both approaches have their merits and problems. Regarding the formulaic approach, it remarked:

> "One can see immediately why some find this approach attractive. Once the numbers have been verified the outcome is definitive. The problem with the formulaic approach is that the losses and gains are not always susceptible to measurement by the same units and on the same scale. The one may be quantitative and measurable in units such as rands, the other may be qualitative and defy easy calibration. How does one balance a loss associated with a possible 15% price increase with the gains associated with an innovation in product performance?"[106]

It appears that our competition authorities favour the more flexible alternative. Quoting, with approval, the Canadian approach on this topic, the Tribunal remarked that the comparison of trade-offs should not be an exact science, even in cases where the effects can be quantitatively estimated.[107] Instead, the aim is to "compare two orders of magnitude", which is achievable even with a discretionary approach.[108] Regarding the possible criticism that the flexibility is at the expense of business certainty, the Tribunal remarked that without the flexibility, the

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[103] Sutherland and Kemp *Competition Law* 5.81. In *Trident Steel* at para 63, the process was described as "conceptually difficult".
[104] *Ibid* 10-109.
[105] *Trident Steel* paras 65-66.
[106] *Ibid* para 65.
[107] *Ibid* para 67.
[108] *Ibid.*

analysis would be "so clinical and rigid that it would reduce the proper exercise of a discretion to a matter of calculus."[109]

With regard to sport, it may be recalled that the New Zealand Commission in the *NZRU* case was able to produce monetary estimates of the various alleged public benefits and losses, inclusive of minimum and maximum possible values for each. It then relied on the midpoint of these estimates to determine the overall impact of the conduct in question. It appears that South African courts are unlikely apply the same model of analysis, in light of the *Trident Steel* decision. Nevertheless, this does not mean that sports bodies can neglect to produce evidence that indicates the magnitude of their asserted benefits, as competition authorities can only exercise their discretions based on the best available estimates. However, organisers will not be inhibited by these valuations, as they will not be determinative of the outcome on their own. Therefore, a flexible assessment of trade-offs offers wider latitude for abstract reasoning, which may be favourable to parties wishing to maintain a sporting rule or practice.

Having discussed the approach in which effects on competition should be evaluated, the final issue is whether competition authorities may permit conduct that restricts competition subject to conditions. The Competition Act expressly states that conditions may be imposed as part of an order approving a merger application.[110] However, with respect to Chapter 2 practices, the Act only provides for the imposition of conditions when an exemption is applied for under s 10(1), which deals with exemptions on public interest grounds.[111] Exemptions based on intellectual property rights[112] and rules of professional associations[113] may not be granted conditionally.

Once a matter is brought before a competition authority for consideration under ss 4, 5 or 8, however, it is not open to litigating parties to argue that the conduct in question should be permitted subject to conditions. The Tribunal may decide that the act either constitutes a prohibited practice, or that it is not. If the conduct does not qualify as a prohibited practice, then there is no ground for the court to restrain it with conditions. Similarly, if the conduct is held to be a prohibited practice, the Act does not permit authorities to conditionally absolve the parties either.

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[109] *Trident Steel* para 82.
[110] See ss 13(5) (*b*) (ii), 14(1) (*b*) (ii), 16(2) (*b*) and 17(2) (*b*) of the Act.
[111] See s 10(2) (*a*) of the Act.
[112] Section 10(4) of the Act.
[113] Schedule 1 Part A of the Act.

In the sports context, it was discussed above that the flexible approach will most likely be followed by competition authorities when assessing the effects of sports rules and practices on competition. Even in cases where the gains claimed by sporting bodies are difficult to quantify, courts may nevertheless exercise discretion and find the conduct in question to be lawful. However, this does not mean these decisions will always be made without reservations. The implication of the above legal position is that these reservations may not be alleviated by imposing conditions that would limit the anti-competitive aspects of the conduct under scrutiny. In these scenarios, competition authorities face a difficult choice: it must either be content with giving sports organisers the benefit of the doubt, or err on the side of "caution" – with caution being the elimination of market restraints.

The inability to impose conditions does not prevent competition authorities from making recommendations upon finding the practice in question to be lawful, as the Competition Commission of India did in the *Hockey India* case. These recommendations may urge the parties in question to implement self-regulatory mechanisms, in order to minimise the anti-competitive effects of the conduct.

However, compared to the imposition of conditions, recommendations have a couple of obvious shortcomings. Firstly, as these recommendations are more akin to suggestions than part of the order, they are not binding. Sports bodies on the receiving end of these judgments may choose to ignore them without consequences.[114] Secondly, recommendations cannot be supervised, as opposed to conditions,[115] which means that even if firms elect to carry out the internal measures, competition authorities have no means of ensuring that they do so with the necessary endeavour.[116]

On the other hand, the non-binding nature of recommendations is perhaps more respectful of sports governing bodies' autonomy. As argued in Chapter 7 above, the imposition of strict conditions may be construed as an attempt to replace governing bodies' experience with the courts' own wisdom in sports-related matters. The outcome in *Hockey India* may therefore represent a balance between deference to the objectives and responsibilities of sporting bodies on the one hand, and market competitiveness oversight on the other.

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[114] On the other hand, s 10(5)(*b*) of the Competition Act allows the Commission to revoke exemptions granted in terms of subs (2)(*a*) if their conditions are not fulfilled.

[115] Sutherland and Kemp *Competition Law* 10.141.

[116] This can be contrasted with the requirement that conditions must be capable of preserving competition with certainty. See *Wesbank, a Division of FirstRand Bank Ltd/The Industrial Machinery Finance Book, owned by Barloworld Equipment Finance, a division of Barloworld Capital (Pty) Ltd* 37/LM/Apr04 1-2.

In any case, arguments that organisers should be subject to the more rigorous standard of conditional approval will only be relevant in the context of exemptions on public interest grounds. As discussed above, however, sports practices do not qualify for such exemptions presently. Therefore, conditions similar to those imposed by the New Zealand Commerce Commission in *NZRU* are unlikely to be seen in South Africa.

The above discussion outlines the approach that South African competition authorities in are likely to adopt in sports-related matter, when determining the lawfulness of conduct under a rule-of-reason enquiry. To summarise, the position is as follows: sports organisers will be required to produce concrete evidence of the benefits that they have alleged, with an emphasis on the existence of these gains, rather than their exact quantity. In this regard, courts are unlikely to be overly demanding in the timeframe in which the benefits must be realised. However, for less verifiable gains, sporting bodies must show that a large portion of the benefits will be passed on to consumers. The pass-through of benefits must also be more significant in cases where the gains are of a pecuniary nature. Additionally, in order to show that the restrictive aspects of their rules are necessary, governing bodies must also show that there are no reasonable alternatives which can achieve the same objectives. Once the arguments relating to the pro-competitive gains and anti-competitive effects are presented, competition authorities may exercise a discretion in order to determine the order of magnitude of the two, before deciding whether the conduct in question should be permitted. Lastly, although courts may not impose conditions when finding that the practice in question lawful, there is no reason why recommendations may not be issued so that governing bodies may internally address any market concerns.

It is submitted that the above approach is suitable, even when taking into account the specificities of sports. Therefore, the only two questions that remain relate to the applicability of the *per se* provisions and the admissibility of non-economic arguments. The next two sections address these issues.

8.3 The application of *per se* prohibitions to sports

Having discussed the implication of applying the current competition law position to sports, the focus may now be shifted to whether any legislative changes are necessary. Regarding the first issue, namely the likelihood of sports-related practices being prohibited *per se*, the conclusion reached above was that this largely depends on whether competition authorities characterise *per se* prohibitions based on a literalist interpretation of the Act. It appears likely,

however, that the Commission will not investigate claims on *per se* basis if the parties involved exhibit relationships akin to a joint-venture, due to the Tribunal's, and subsequently the CAC's, decisions in *SA Breweries*. Regardless of whether the reasoning in that matter reflects an accurate interpretation of the *Ansac (SCA)* judgment, it is reasonable to presume that a large number of sports practices will avoid being charged with *per se* violations on this basis alone.

As a result, two questions become pertinent: Firstly, is this practical outcome desirable from both a competition law and sporting perspectives? Secondly, if it is preferable to exclude sports from the scope of *per se* prohibitions, should the exception be explicit and clarified?

In order to address the first question, both the advantages and disadvantages of exempting sports from the applications of *per se* provisions must be considered. The most obvious criticism here is the legal uncertainty that will arise from adopting the exemption. As mentioned above, the *per se* prohibition of certain conduct exist in order to promote litigation expediency and certainty.[117] Admitting efficiency-related arguments for practices that are known to be almost always anti-competitive wastes both money and time.[118] Therefore, it may be argued that the gains from conducting a full rule-of-reason analysis in sports cases do not justify the undermining of legal certainty.[119]

This argument may be problematic for two reasons. Firstly, it assumes that the *per se* prohibitions provided by the Act establish a high degree of legal certainty, perhaps more so than jurisdictions where the same rules are developed by the courts.[120] However, the SCA's comments in *Ansac (SCA)* regarding the characterisation enquiry of *per se* prohibited conduct has already cast some doubt over the exact scope of these prohibitions.[121] As a result, firms defending against a *per se* complaint can reasonably argue that the ambit of prohibition in question should be construed through a purposive interpretation of the Act. This will naturally afford them a much wider scope of admissible evidence during the characterisation enquiry.[122] Furthermore, following the two *SA Breweries* decisions, it is unlikely that cases involving

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[117] Sutherland and Kemp *Competition Law* 5.45.

[118] *United States v Topco Associates Inc* 405 US 596 (1972) 607.

[119] See *Arizona v Maricopa County Medical Society* 457 US 332 (1982), where the US Supreme Court remarked, at 334, "For the sake of business certainty and litigation efficiency we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable."

[120] See, for example, the Competition Tribunal's comments in *Venter v Law Society of the Cape of Good Hope* 24/CR/Mar12 14/10/2013 para 73.

[121] K Moodaliyar and K Weeks "Characterising price fixing: A journey through the looking glass with *ANSAC*" (2008) 11 (3) *SAJEMS* 337 at 343.

[122] *American Natural Soda Ash Corporation v Competition Commission* 2005 (6) SA 158 (SCA) para 65.3.

ancillary agreements will be decided without evidence relating to the nature of the parties' relationship being introduced, even if they involve efficiency or other pro-competitive claims. Therefore, it is submitted that while legal certainty is undoubtedly a desirable attribute in competition law, the persuasiveness of this argument is weakened by the current lack of clarity on the correct interpretation of the relevant provisions.

Secondly, the legal certainty argument also assumes that the justifications for *per se* provisions are valid in sports cases. As the CAC readily acknowledged in *SA Breweries (CAC)*, South African competition authorities are still relatively inexperienced with regard to *per se* prohibitions, and much useful thinking can be gathered from other, particularly U.S., legal developments. While the distinction between *per se* rules that are judicially-construed and those that are statutorily decreed must not be blurred as a result,[123] one should still be mindful of the rationales behind these prohibitions' existence in foreign jurisdictions.

Although legal certainty is one of these rationales, it is important to remember that this certainty is rooted in the assumption that *per se* prohibitions only apply to conduct with serious harm on competition and has no redeeming value.[124] This was emphasised in *Northern Pacific R. Co. v United States*,[125] one of the earlier judgments dealing with *per se* prohibited conduct, where the U.S. Supreme Court described such conduct as "agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal".[126]

However, conclusions that certain types of conduct possess "pernicious effect" with no "redeeming virtue" are not drawn easily. In *United States v Topco Associates Inc*,[127] the court stressed that it is "only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act".[128] This explains why U.S. courts have sometimes been reluctant to rule certain agreements as *per se* prohibited.

As mentioned above, the *Mackey* case is an example where this approach was adopted in the sports context. In finding that the *per se* rules should not be applicable to the agreements in

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[123] For example, it should not be permissible to apply a full rule of reason analysis under our Competition Act, once a conduct is characterised as *per se* prohibited, contrary to the approach in U.S. cases such as *NCAA*.
[124] See 8.2.1 above.
[125] 356 US 1 (1958).
[126] *Ibid* 5.
[127] 405 US 596 (1972).
[128] *Ibid* 607-608.

question, the court held that the organisation of a sports league is analogous to other cases involving unique business situations.[129] The court highlighted the absence of individual clubs' motivation to drive each other out of business as a key reason for its conclusion. It held that in this aspect, a sports league is akin to the functioning of a joint venture.[130]

On the other hand, the U.S. Supreme Court found, in the *NCAA* case, that although the *per se* rules should not apply to sports competitions, its reasoning was different. Specifically, the court remarked:

> "This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"[131]

As argued in Chapter 6 above, the reasoning in *NCAA* is to be preferred, as it is specific, and not reliant on judicial experience relating to analogous business structures. It is submitted that while the court in *Mackey* was correct to hold that "pernicious effect" of sports league agreements cannot be concluded with certainty on a categorical basis, the finding in *NCAA* takes the matter one step forward, in concluding that these agreements are likely to have "redeeming values", by enabling the product to exist at all.

Naturally, the implication of relying on the basis of an "unusual business structure" is that it leaves the door open for a future finding (once courts have dealt with more cases in a similar context) that such agreements should be either *per se* prohibited, or subject to a rule-of-reason enquiry. It appears that the *NCAA* ruling is a conclusive finding in favour of the latter. This is because the court's reasoning (in the quote above) was based on the nature of the industry in question, rather than the specific circumstances of the parties involved. This, in turn, shows that the court envisioned the exclusion from *per se* rules to be categorical, rather than an *ad hoc* finding. In other words, horizontal restraints on competition are necessary in the organisation of sports in general, and not only intercollegiate football. According to the Supreme Court, the

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[129] *Mackey v NFL* Para 71. See also the discussions in Chapter 6 above.

[130] *Ibid.* However, as noted by the CAC in *SA Breweries*, this is not the sole determinative factor in whether the *per se* provisions are applicable in a case.

[131] *NCAA v Board of Regents* 100-101.

necessity of restraints to the product's' existence is sufficient reason not to apply the *per se* rules.

It is submitted that this reasoning may be extended further. While the court referred to uniformity in the rules of participation as the type of agreements that enable the existence of sports leagues, it is not difficult to imagine other arrangements that enhance, rather than facilitate, the appeal of a sports tournament as a product. The cases from previous chapters reveal that the maintenance of competitive balance is often cited as an objective that justifies the restriction of competition in sports. For example, a rule that prevents the concentration of talented athletes within a handful of teams is not, strictly speaking, necessary for the existence of a league.[132] Nevertheless, sporting bodies in cases from *Mackey*, *Bosman* to *NZRU* have all argued that the attractiveness of their respective competitions is enhanced when the teams are evenly matched. Whether these contentions were always well-founded is another matter, as the facts of some cases indicate that the rules in question had predominantly anti-competitive effects. However, the argument cannot be dismissed out of hand, and courts only reach their conclusion after closely scrutinising the benefits of, and harm caused by, the particular conduct with respect to competition.

As a result, the "redeeming values" of sports-related restraints should also extend to considerations that are not essential to the product's existence, but enhance its consumer appeal. Therefore, if it is to be accepted that the rationale of *per se* prohibitions is to provide legal certainty in cases involving conduct with "pernicious effect and no redeeming value", it would be sensible to exclude organised sport from such conduct. However, the legal merit of extending the exception is not the end of the enquiry, as it must also been shown that it would be practically feasible to do so. The argument of legal uncertainty was addressed, and dismissed, above. The following discussion examines whether a *per se* exception for sports has the potential to "open the floodgates".

Here, the argument is that sports-related rules and agreements are not the only type of conduct that have pro-competitive gains despite being *prima facie per se*-prohibited practices. Extending an exemption to sports will allow other industries to argue that they, too, deserve the same treatment. This will be especially problematic if the argument is raised in cases where

[132] Although organisers have sometimes argued that the lack of competitive balance may lead to the demise of the competition in the long run, this argument should not be taken literally. While a predictable league may be unappealing to spectators, it does not prevent the actual functioning of the competition itself.

there are no legitimate benefits. It is not difficult to imagine opportunistic litigants using this argument merely as a delay tactic.

The issue here is similar to the legal uncertainty problem discussed above, except whereas the uncertainty was caused by the sports-related conduct itself in the earlier scenario, here, it would be caused by non-sports industries attempting to obtain the same exemption. Nonetheless, it has the same potential to undermine litigation expediency, and should be given serious consideration.

However, many of the industries to which *per se* prohibitions should not be applicable already enjoy more favourable exemptions under the current Competition Act. Rules and agreements that meet the requirements under s 10 or Schedule 1 may be exempt from any or all of Chapter 2, as the case may be. This allows practices that are otherwise anti-competitive (if subject to a rule-of-reason enquiry) to be upheld. Therefore, industries and professions that qualify for the exemptions are unlikely to pursue the type of exception that should apply to sports.[133]

There still remains the dilemma of sectors which do not qualify under one of the existing exemptions, as well as rules of professional associations that do not relate to the standards and ordinary functions of the respective professions.[134] Here, a distinction should be made between cases that actually have pro-competitive gains which are only discoverable through the rule of reason, and those that are founded on unsubstantiated grounds.

While it is conceivable that other genuine cases where *per se* rules would be inappropriate may exist, it would be impossible to determine whether a categorical exception should be granted without careful consideration. Unfortunately, that is beyond the scope of this thesis. However, there is no reason, in principle, why other deserving sectors should not receive the same exemption, if their redeeming, pro-competitive values are features of those industries in general, rather than that of specific and isolated cases. In any case, it is presently open to the litigants to argue that their conduct should not be characterised as *per se* prohibited, in accordance with the *SA Breweries* interpretation of the term. Legal uncertainty arising from

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[133] For example, in the U.S. case of *Broadcast Music, Inc v Columbia Broadcasting System, Inc* 441 US 1 (1979), it was held, at 24, that the *per se* rules should not apply to blanket licensing agreements in the music industry. Under the South African Competition Act, it is not necessary to resort to such an argument, as s 10(4) permits the Commission to exempt agreements relating to the exercise of intellectual property rights from Chapter 2 entirely.

[134] Item 2 of Schedule 1, Part A of the Act requires a restrictive agreement to be reasonably necessary for the maintenance of professional standards or the ordinary function of the profession in order to qualify for the exemption under Item 1. However, it is difficult to see how professional rules that do not achieve these objectives can be exempt from the *per se* rules in any case.

whether entire industries should be exempt may, for the moment, be mitigated if the sports-specific exemption were to be introduced through legislative changes, as opposed to a "reading in" by the competition authorities.

At the same time, an explicit exemption within the Act is also likely to deter the more frivolous attempts to circumvent the *per se* provisions. Courts will not entertain arguments that a particular sector should be exempt from, for example, a price-fixing prohibition, if clear legislative intent can be derived from the Act itself regarding which industries should enjoy that exception. This does not prevent parties from using the same argument, in relation to specific agreements, during the characterisation enquiry. It also cannot prevent industry lobbying, although it is unclear whether this is more likely to happen than lobbying for the more advantageous exemptions that already exist in the Act.

Overall, legal certainty is unlikely to be diminished by a legislative introduction of a *per se* exception in sports related cases. In fact, such an exemption, which would be limited in scope and industry-specific, has the potential to improve litigation efficiency.

As discussed above, regardless of whether sports rules and agreements have pro-competitive values, many of them are already likely to avoid being characterised as *per se* prohibited conduct, if the approach adopted in the *SA Breweries* cases are to be consistently followed by competition authorities. This is due to the unique relationships that exist among the various stakeholders in sports organisations. Although the evidence used to establish the relevant relationships should not relate to efficiency gains of the agreement in question, it is inevitable that some of the same evidence will be introduced during the characterisation enquiry and the subsequent rule-of-reason analysis. Therefore, making the *per se* exception explicit would allow parties to focus immediately on the issue of whether the conduct's overall effect is anti-competitive.

Additionally, while a large number of sports-related agreements can avoid being *per se* prohibited through the characterisation enquiry, this will not be the case with every sporting scenario. As mentioned above, rules relating to, e.g., transfers of players between different leagues are not auxiliary agreements similar to those found in joint ventures that the court in *SA Breweries (CAC)* found to be outside the ambit of *per se* prohibitions. However, these rules may be designed to achieve the same objectives as their intra-league counterparts, and in some cases, may even serve more important regulatory functions.

For example, one of the aims of FIFA's regulations relating to international transfers is the protection of minors and the prevention of child trafficking.[135] It is obvious that this is an important objective, and it would be sensible not to prohibit such rules on a *per se* basis. It highlights the different rationale behind a sports-specific exception from a case-by-case characterisation enquiry. In the former, the exclusion is warranted on the basis that the majority of sports-related agreements have redeeming features that deserve consideration under a rule-of-reason analysis. In the latter, our competition authorities have seemingly adopted an approach that focuses on the relationships between parties, in order to determine the "character" of the conduct in question. The example of international transfer rules would escape *per se* characterisation in the former, but not in the latter.[136]

Therefore, it is submitted that the present legal position on *per se* prohibitions would adversely affect the proper functioning of sports organisation, should a case arise. In particular, our characterisation enquiry cannot adequately account for the specificities in the sports industry. As a result, a sports-specific exemption from the application of the Act's *per se* provisions should be introduced.

8.4 The consideration of non-economic justifications

Once exempt from the *per se* provisions, however, sports-related agreements should still be subject to the rule-of-reason test. Here, the second issue outlined at the beginning of this chapter becomes relevant, namely the relevance of purely sporting justifications.

It should be stressed that most sporting objectives will also have an economic dimension. For example, the *Meca-Medina* case, discussed in Chapter 7, dealt with whether the International Olympic Committee's rules regarding performance enhancing drugs were anti-competitive. While these rules may be designed with non-economic objectives such as health, fairness and equality in mind,[137] it should also be recognised that doping-free competitions will enhance the appeal of Olympic events to spectators, thereby improving the quality and value of the "product". Benefits of the latter kind are already acceptable as pro-competitive gains under our Act, as argued above, while the purely sporting benefits are not.

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[135] C Lembo "FIFA Transfer Regulations and UEFA Player Eligibility Rules: Major Changes in European Football and the Negative Effect on Minors" (2011) 25 *Emory International Law Review* 539 at 576.

[136] See also the discussion on the transfer system in the next chapter.

[137] World Anti-Doping Agency "World Anti-Doping Code" (2015) https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf (accessed 30 September 2016) at 11.

This distinction is not trivial or purely academic. Since the magnitude of pro-competitive gains must eventually be weighed against the anti-competitive effects, the inclusion (or otherwise) of purely sporting arguments may be decisive in whether a conduct is lawful overall.

The obvious objection to recognising purely sporting benefits is that they are simply not relevant in a competition law sense. While the eradication of doping in sports may ensure fairer competition among athletes, this form of competition has nothing to do with the market competition that competition law regulates. Similarly, the objective of maintaining competitive balance refers to competition in a sporting sense, rather than economic competition. However, competition law is only concerned with the latter, and one may argue that it is no business of competition lawyers to try and improve sporting affairs.

Additionally, even if purely-sporting arguments are permissible, it would be difficult, if not impossible, to compare them with anti-competitive effects. Here, the argument is that competition authorities are experts in market economics, not sports administration. Therefore, they should not be asked to balance the non-pecuniary benefits of sports welfare against economic losses that are, in theory, measurable in monetary terms. Attempts to do so may lead to arbitrary amounts being assigned to sporting benefits.[138] This may lead to either an underestimation of the benefits, or worse, an overestimation which would essentially allow sports organisers to exercise their powers without supervision.

Both of the above criticisms are valid, and must be considered in detail. Regarding the issue of competition law relevance, it is submitted that the question here is not whether competition authorities have a duty to promote sporting interests, but whether they should avoid making decisions that can negatively impact the growth of sports in our country.[139] This requires a judgment call in cases where the conduct in question is overall anti-competitive within the market, but promotes sports development at the same time.

It should be noted that this kind of conflict is not unique to sports. The Legislature clearly foresaw the possibility that free competition may adversely affect the proper functioning of certain professions or the prosperity of some economic sectors. The provision of explicit and

[138] See, for example, the *NZRU* case on the difficulty of calculating non-pecuniary gains.

[139] In the context of merger control, the Competition Commission has said "Our job … is not to make the world a better place, only to prevent it becoming worse as a result of a transaction." Competition Commission "Tribunal statement on the conditional approval of the merger between Wal-mart Stores Inc. and Massmart Holdings Limited - 31 May 2011" http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/Walmartpressrelease-31.05.2011.doc (accessed 17 April 2015).

specific exemptions, which must be obtained outside the context of a complaint hearing, makes it unnecessary for courts to second guess which interest to prioritise.[140] If no exemptions are applicable, then the competition authority must consider the case as normal, and may find the conduct in question to be anti-competitive. If the parties involved obtain an exemption thereafter, then that is a separate matter entirely.

However, because sports do not qualify for any of the existing exemptions, and the courts are not obliged to consider this issue, the result is that there are no mechanisms to determine which interest should take precedence. This can be problematic because without such a mechanism, the maintenance of competition will trump the promotion of sporting interests in every case, even where the gain in market competitiveness may be small relative to the harm to sports development.

Therefore, it is necessary to examine some of the sporting objectives that are likely to be rejected on purely economic competition grounds, but may be instrumental to the development of sports. It should be clarified that although the term "sporting objectives" is used here, it is usually the rules or agreements designed to achieve these objectives that are actually being rejected by the courts. Occasionally, however, the courts have held that it is the objectives themselves that are not worthy of protection.[141] Nevertheless, it is difficult to consider the merits of specific objectives in isolation without their context.

Therefore, the discussion below will be organised along the types of sports-related practices that frequently appear before competition authorities. It should be emphasised that the focus here is on sporting objectives themselves, rather than the overall merit of the conduct in question. The latter is examined in the next chapter.

The most common category of agreements examined in the previous chapters has been the restrictions on player movement. These have usually related to the players' ability to freely move to other clubs after the expiration of their contracts, although some also deal with compensation schemes for transfers within the duration of contracts. As argued in Chapter 4 above, this scenario is not exclusively a restraint of trade matter, but a competition law concern as well.

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[140] These exemptions are provided under Schedule 1 and s 10 of the Act, respectively.

[141] See, for example, the manner in which arguments relating to the development of youth players and the maintenance of team stability were rejected by the courts in *NCAA* and *Mackey*.

A number of objectives have been used to justify the restrictions (on competition and players' freedom of trade), including the promotion of competitive balance, the maintenance of team stability, the development of youth players, and the fostering of national identity within domestic clubs.[142] The relevance of each of these objectives will be considered within the South African context.

The first of these is the promotion of competitive balance. Here, sports organisers have often argued that it is preferable to have competitions with unpredictable outcomes and evenly matched teams. The problem with this argument, from a competition law perspective, is that there simply is insufficient empirical data to suggest that more balanced competitions are more attractive to spectators. As was found in the *NZRU* case, improvement in competitive balance had little effect on the number of either live or broadcast audiences. Therefore, the Commission in that case concluded that this objective could not be considered as an efficiency gain.

Although the Commerce Commission did not speculate on this, it is not difficult to imagine the reason behind the fans' overall indifference to competitive balance. Supporters are not evenly spread amongst the individual teams. Some clubs will enjoy more followers due to their geographic location, as teams in more populated cities can draw from a larger support base; other clubs may gain more support through historical success, as spectators want to identify and associate with winning teams.[143]

Examples of this are particularly prevalent among football leagues. In South Africa, Kaizer Chiefs F.C. and Orlando Pirates F.C. enjoy overwhelming support in the Premier Soccer League, to the extent that their supporters can often outnumber opposition fans even when playing away from home.[144] Both teams are based in Soweto, and have won the largest number of domestic titles.[145] It is not uncommon to find domestic leagues in other countries enjoying the lion's share of supporters either. Famous examples include Celtic F.C. and Rangers F.C. in Scotland;[146] F.C. Barcelona and Real Madrid F.C. in Spain;[147] or C.A. Boca Juniors and C.A.

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[142] See the discussion of the *Bosman* and *Bernard* cases in Chapter 7 above.

[143] *NZRU* para 127.

[144] R Fisher "South African sport still divided by race" *The Guardian* 21 January 2013 https://www.theguardian.com/world/2013/jan/21/southafrica-sport-divided-race (accessed 17 April 2015).

[145] Mzansi Football "Kaizer Chiefs most successful side in South African football history" (2013) http://www.kickoff.com/news/36170/kaizer-chiefs-most-successful-side-in-south-african-football-history (accessed 17 April 2015).

[146] See, for example, I Duff *Follow, Follow: Classic Rangers Old Firm Clashes* (2011) 55.

River Plate in Argentina.[148]

In these competitions, where the majority of fans support a concentrated number of teams, it would be difficult to increase game attendance or viewership by improving the smaller teams' chances of success. On the contrary, from a utilitarian perspective, overall enjoyment by fans may even increase if the odds of winning are heavily in favour of the most popular teams.

However, such an approach by league organisers would be disastrous from a sporting perspective, as it would cast doubt on the fairness and legitimacy of sporting outcomes. Sporting bodies have a responsibility to promote the spirit of fair-play,[149] and whether this is best achieved through neutral inaction or a positive attempt to maintain competitive balance may depend on the circumstances of each case.

It is submitted that there are several reasons why an active attempt to address competitive imbalance may be appropriate. Firstly, the successes of dominant teams may be the result of natural advantages (such as geographical location) or human factors (for example, the involvement of wealthy team owners). Depending on the state of disparity, corrective measures may be necessary to "level the playing field".[150] Secondly, one of the symptoms of a competitively imbalanced league is the stockpiling of star players by dominant teams.[151] If this occurs to the extent that top athletes are being kept as reserves, then a redistribution of talents may be necessary so that as many skilled players can showcase their abilities as possible.[152] Thirdly, competitive imbalance may be perpetuated by top clubs' ability to attract the best young athletes through superior facilities, monetary incentives and historical reputations. However, the concentration of youngsters in teams already populated by established star

[147] S Lowe "Barcelona-Real Madrid hegemony tarnishes Spanish football's golden age" *The Guardian* 15 August 2012 https://www.theguardian.com/football/blog/2012/aug/15/barcelona-real-madrid-spanish-football (accessed 17 April 2015).

[148] S Kelly "River Plate vs. Boca Juniors, a rivalry rooted in Argentine culture and history" *ESPN* 05 February 2015 http://www.espnfc.com/blog/espn-fc-united-blog/68/post/2278717/river-plate-boca-juniors-rivalry-rooted-in-history (accessed 17 April 2015).

[149] See *Meca-Medina (ECJ)* para 43 and *Lehtonen* para 53.

[150] KG Quinn *Sports and Their Fans: The History, Economics and Culture of the Relationship Between Spectator and Sport* (2009) 159.

[151] See, for example, A Magowan "Premier League: Is the loan system being abused by clubs?" *BBC* 08 September 2015 http://www.bbc.com/sport/football/34125476 (accessed 08 September 2015).

[152] It may be recalled that in *NZRU*, the Commerce Commission acknowledged that redistributing players across all teams can improve the quality of individual matches. The fans' extra enjoyment of the sport as a result was recognised as a non-pecuniary benefit.

players may decrease their chance of playing, thereby hindering their development.[153] Therefore, in the long term, it may be beneficial that smaller clubs are able to produce a cohort of upcoming skilled players.

Whether action is necessary in each of these scenarios requires a judgment call by sports governing bodies.[154] Competition authorities cannot be expected to have the expertise to decide whether each reason is ideal for the optimal development of the sport in every case. However, it is submitted that they should recognise that consumer appeal is not the only reason why organisers may want to promote competitive balance, and be open to the possibility that there may be sporting justifications behind their decisions.

It should be noted that promoting competitive balance, even if it may not be favoured by the majority of fans, should not be equated to consumer harm. As discussed above, the Competition Commission is likely to demand evidence that alleged benefits of restrictive conduct will be passed on to consumers, particularly in cases where the gains are pecuniary in nature. Sporting justifications are not market competition gains, and cannot be classified as either real or pecuniary as a result. Nevertheless, objectives which harm, rather than benefit, consumers will obviously have less persuasive force with competition authorities. However, it is submitted that the promotion of competitive balance should not be construed as consumer harm on its own, unless it leads to an increase in price or decrease in quantity of available product.

Another objective often associated with the player movement restrictions is the maintenance of team stability. Here, the argument is that teams perform better when there is a certain level of consistency within the team roster.[155] This is because players would have more time to become familiar with their teams' tactics, and develop better on-field understanding with teammates with whom they have played together for a long period of time.[156] On the other hand, constant changes to team rosters may negatively affect fans' ability to identify with their clubs.[157] This is

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[153] See, for example, N Ames "How Premier League clubs' 'endless loans' impact the transfer market" *ESPN* 31 August 2016 http://www.espnfc.com/english-premier-league/23/blog/post/2941416/how-premier-league-big-clubs-stockpiling-and-loans-impact-transfer-market (accessed 01 September 2016).

[154] Quinn *Sports and Their Fans* 159.

[155] See, in general, E Franck and S Stephan Nüesch "The effect of talent disparity on team productivity in soccer" (2010) 31(2) *Journal of Economic Psychology* 218 at 227.

[156] *Ibid* at 219.

[157] R Giulianotti "Supporters, followers and flaneurs: A taxonomy of spectator identities in football" (2002) 26(1) *Journal of Sport and Social Issues* 25 at 35.

especially the case where clubs have strong local identities and comprise of players from their own geographical region.[158] However, as the beneficiaries of team stability are primarily the supporters and the clubs themselves, this may be a case where the sporting considerations are outweighed by arguments relating to economic efficiencies.

Within the context of a single league season, however, team stability may be more important for sporting reasons. Short-term movement of players is restricted by imposing "transfer windows", outside the period of which no player may move between clubs.[159] This may be necessary, especially towards the end of the competition schedule, in order to prevent teams from acquiring the best performing players during the most crucial stage of the tournament.[160] Obviously, it would not be in the interest of fair-play to allow teams to gain this kind of advantage, and most domestic championships impose some form of a transfer window.[161]

In *Lehtonen*, although it was recognised that transfer windows are necessary to prevent the distortion of league outcomes, it should be noted that the court considered the case in light of the specificities of sports principle. It is uncertain whether the same rule would be deemed legitimate if a purely economic analysis were to be conducted.

The third objective associated with player transfer rules relates to the development of young athletes. Two aspects are relevant here: firstly, the transfers of underage players may be regulated in order to protect minors; and secondly, rules may also be adopted that encourage clubs to invest in youth training. The first objective is unquestionably a legitimate one (although this does not automatically mean that all measures adopted to achieve this objective would be reasonable). For example, the need to eliminate sports-related child-trafficking does not depend on consumer preference - it is rooted in ethical concerns.[162] This does not mean that

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[158] The Toyota Free State Cheetahs are a prominent South African example. Internationally, Athletic Bilbao is a Spanish football club known for featuring exclusively players of Basque origin. See N Stacey "This is Athletic Bilbao: The club whose loyalty to local talent is not negotiable" *The Guardian* 15 January 2016 https://www.theguardian.com/football/copa90/2016/jan/15/athletic-club-bilbao-loyalty-spain-liga-basque (accessed 16 January 2016).

[159] This was the issue in dispute in the *Lehtonen* case. See Chapter 9 below regarding the implication of the transfer periods in football.

[160] *Lehtonen* para 45.

[161] For example, the PSL has both winter (01 July to 31 August) and summer (04 January to 29 January) transfer windows.

[162] D McGee "Displacing childhood: labour exploitation and child trafficking in sport" in A Quayson and A Arhin (eds) Labour Migration, Human Trafficking and Multinational Corporations: The Commodification of Illicit Flows (2012) 118.

it is not a sporting justification, as it is within the purview of governing bodies to ensure that the integrity of their sports is not violated.[163]

Here, the admissibility of sporting justifications becomes important. While it is difficult to imagine that a court would disregard the objective of protecting minors, the court must find a reason why the consideration of this non-economic issue is permissible under competition law. In this case, it allows no conclusion other than that non-economic factors must play a role in the enquiry.

Once it is accepted that some non-economic considerations are relevant, it is difficult to reject other sporting justifications purely on the ground that they do not impact market competitiveness or consumer welfare. As mentioned above, the second aspect of the youth development objective involves encouraging the development of young players, either through improvement of training facilities at poorer clubs, or the imposition of compensation mechanisms when young players are acquired by wealthier clubs. This argument has been rejected as antithetical to the objectives of free competition in the U.S. cases,[164] and the comparison usually drawn is that training of young professionals occurs in every industry, including law, where no similar compensation mechanisms exist.[165]

This is perhaps where the persuasiveness of non-economic considerations may be most decisive, in that the argument of training compensation is almost certain to be rejected under a traditional competition law analysis. Yet, the objective is uniformly recognised as legitimate, at least in principle, in jurisdictions that incorporate the specificities of sport as part of their competition law.

The discussion of the E.U. law above features a number of cases where the development of young players was recognised as an important goal that should not be hindered by the Community law. However, as mentioned, these decisions are supported by several E.U. policy documents that promote the congruence of sports and competition law. Although the Department of Sport and Recreation South Africa has also recognised the need to encourage

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[163] According to *Meca-Medina*, it is the responsibility of sports governing bodies to ensure the "proper conduct" of sports.

[164] In South Africa, this argument has also been rejected in the context of restraint of trade cases. See, for example, *Highlands Park Football Club Ltd v Viljoen* 1978 (3) SA 191 (W).

[165] Another criticism levelled at the justification is that compensations usually bear no relation to the actual cost of training. However, this speaks to the reasonableness of the measures designed to achieve the objective, rather than the reasonableness of the objective itself.

more youth development in sport through its White Papers and other publications,[166] there has been no attempt to promote this goal through harmonisation with competition law.

This does not mean that South African courts can ignore the social aspect of the objective. From an economic perspective, only the most dedicated of supporters will be concerned with their club's commitment to train youngsters, and the clubs themselves only derive benefit from the development of players that actually go on to play for the first team or are "sold" to other teams through transfers. It should be noted that only a small percentage of players trained by clubs will possess the requisite skills and physical attributes to become professional players,[167] and from economic impact alone, it is difficult to imagine that courts would find the (sometimes astronomical) compensation figures to be justified.[168]

Yet, it is easy to overlook the social benefits that clubs' training facilities provide. Chapter 2 examined the health benefits that can be derived through physical exercise and development. The Department has emphasised the role that sports clubs play in introducing sports to youngsters, especially those from previously-disadvantaged backgrounds with little access to other sports facilities. Youth participation in sports has also been linked to a reduction in crime, and as a pathway to escape poverty.[169] Regarding the latter, it should be pointed out, again, that the number of people who can become professional athletes is relatively low. However, the positive impact it has on those that do succeed is often life-changing, and has the potential to inspire the younger generation by providing role models and sporting heroes.[170]

Lastly, a committed approach to youth development is also necessary in order to discover, and train, the most skilled athletes that can represent their country on the world stage one day.[171] The Department of Sport and Recreation SA (SRSA) has emphasised the need to maximise South Africa's chances of success in international tournaments, which is hardly surprising, as

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[166] See the discussion in Chapter 2 above.

[167] *Bernard* paras 42-43.

[168] *Bosman* para 109.

[169] SRSA "Sport and Recreation South Africa Strategic Plan 2015-2020" (2015) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/STRAT%20PLAN.pdf (accessed 28 March 2015) 43.

[170] See, for examples, J Ehrmann and G Jordan *InSideOut Coaching: How Sports Can Transform Lives* (2011) 5; and The Sport Changes Life Foundation "The Foundation" http://sportchangeslife.com/the_foundation (accessed 17 April 2015).

[171] SRSA "The White Paper on Sport and Recreation for the Republic of South Africa" (2012) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/23%20WHITE%20PAPER%20FINAL%20August%202012.pdf (accessed 13 March 2015) 8.

past successes of our national teams and individual athletes have been a unifying force for the country.[172]

While the objective of promoting youth development is important, it should be stressed that the argument here is not that it should precede competition law goals. Instead, the sporting considerations should be weighed against the possible harms to market competitiveness in order to determine whether the conduct under scrutiny should be sanctioned.

The balancing of sporting benefits against effects on competition is especially important when the objective presented is less than clear-cut. This may be the case with the preservation of national identity, the last justification associated with restrictions on player movement. The argument was used, and rejected, in *Bosman*, to justify limitations on international transfers. It may be recalled that the ECJ found the objective to constitute discrimination against nationals of other E.U. members, but the finding could not prevent limitations on transfers between E.U. and non-E.U. countries.

In South Africa, although there are no restrictions on clubs' ability to sign players from other countries, another form of nationality limitation exists in domestic football. Each PSL team has a quota (presently five) of foreign players that may be registered in their squad.[173] Clubs may have more than this number of foreign players on their books, but those who are not registered for the season will not be eligible to play. It should be noted that this rule is not subject to competition law scrutiny as it is subject to collective bargaining between the players' union and the PSL.[174]

While player transfer restrictions are typically justified on non-economic grounds, broadcasting rights agreements are often ripe for traditional economic analysis. Sports organisers have often used the increased negotiation power and reduced transaction costs to justify collective selling of broadcast and other media rights.[175] Consumer demand has also

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[172] SRSA "White Paper on Sport and Recreation" 31.

[173] Rule 34.2 of the "National Soccer League Rules" (2015) http://images.supersport.com/content/2015-03-31-NSL-Handbook.pdf (accessed 21 September 2016).

[174] See Sport and Recreation Portfolio Committee "Premier Soccer League Commission controversy; SA Professional Footballers' Union: Briefing" (2007) https://pmg.org.za/committee-meeting/8412/ (accessed 15 February 2015). Section 3(1) (*a*) of the Competition Act states that the Act does not apply to collective bargaining within the meaning of s 23 of the Constitution of the Republic of South Africa, 1996. The role of the South African Professional Footballers' Union is also discussed in the next chapter. It should be noted that, in addition to SAPFU, the SA Rugby Players' Association has also been involved with collective bargaining with the SA Rugby Union and SA Rugby (Pty) Ltd since 2004. See A Louw *Sports Law in South Africa* (2010) 325.

[175] See, for examples, European Commission Decision No. 2003/778/EC (*COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League*), 2003 O.J. L 291/25 para 197 and European Commission

been used to justify limited output in live-televised sports events.[176]

However, these arguments have not found favour with competition law authorities. The negotiation power and transaction cost benefits are pecuniary efficiency gains,[177] which the Competition Tribunal has held to be the least persuasive form of pro-competitive benefits that typically require associated consumer pass-through.[178] The latter is usually absent in broadcasting agreements, as the limitation on output has been perceived as an attempt to maximise producer surplus at consumers' expense.[179]

However, this does not mean that these agreements are never permissible under competition law. Again, sporting considerations may be a crucial factor, although it will become clear that these objectives do not justify all forms of broadcasting restraints. Here, the associated sporting issues include, once more, the maintenance of competitive balance,[180] as well as the encouragement of live attendance of games[181] and the redistribution of resources to the grassroots level of sports.[182]

The motivations behind the maintenance of competitive balance were discussed above, and are not repeated here. For present purposes, it should be explained that the issue is only relevant where the revenues from the sale of broadcasting rights are shared either equally or under another fair and determinable formula. This can be contrasted with systems where each club is permitted to sell its individual media rights, which may result in the larger and the smaller clubs receiving very different revenues.[183] Under such a system, it becomes easier for established teams to continue their dominance through their financial resources, thereby furthering imbalance in the league.[184]

Decision Summary of 22 March 2006 (*COMP/38.173 - Joint selling of the media rights to the FA Premier League*), 2006 O.J. C 7/18.

[176] See the *NCAA* case discussed in Chapter 6 above.

[177] RD Blair *Sports Economics* (2012) 152. See also OECD "Competition issues in television and broadcasting - DAF/COMP/GF(2013)13" (2013) https://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf (accessed 17 April 2015) 92.

[178] *Trident Steel* para 81.

[179] See *NCAA* at 120.

[180] *Joint selling of the commercial rights of the UEFA Champions League* para 126.

[181] *NCAA* at 115.

[182] *Joint selling of the commercial rights of the UEFA Champions League* para 142.

[183] T Evens *et al The Political Economy of Television Sports Rights* (2013) 42.

[184] B Van Rompuy and O van Maren "Why the European Commission will not star in the Spanish TV rights telenovela" (2015) http://www.asser.nl/SportsLaw/Blog/post/why-the-european-commission-will-not-star-in-the-spanish-tv-rights-telenovela-by-ben-van-rompuy-and-oskar-van-maren (accessed 17 April 2015).

Following the Spanish La Liga's departure from this system,[185] there are now very few major sports leagues that practice individual sales of television rights.[186] The PSL sells its media rights (which also includes mobile and internet content rights) on a collective basis. Its exclusive deal with SuperSport International, worth R2 billion, is currently the largest sports broadcasting contract on the African continent.[187] Although the revenues are not shared equally among the Premier and First Divisions clubs, each team receives a base grant, with additional money distributed according to performance-related calculations.[188]

In addition to competitive balance, the limited broadcasting of games has also been justified on the basis that it improves live attendance of games. The rationale behind this argument is that people are less likely to watch sports games in the stadiums if they can see the same events on television, with the latter being more convenient and, in theory, less expensive.[189] It should be noted at the outset that the latter is not necessarily true in South Africa, where a large part of the population does not have access to pay-TV packages that cover live sports events.[190] Therefore, watching games on television is only the cheaper alternative where the events are available on free-to-air channels.[191] Furthermore, the justification may also be dubious in cases where live attendance would reach capacity level regardless of the availability of the match on television.

Nevertheless, it is submitted that the rationale behind the U.S. Supreme Court's rejection of the argument in *NCAA* should not be followed in South Africa. What the court objected to, in that

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[185] A Guede "Why joint selling is crucial to La Liga's future" (2016) http://www.lawinsport.com/articles/item/why-joint-selling-is-crucial-to-la-liga-s-future (accessed 24 September 2016).

[186] However, individual selling schemes do exist. See, for example, B Pekic "NOS leads in Portugal's football rights free-for-all" (2016) http://advanced-television.com/2016/01/05/nos-leads-in-portugals-football-rights-free-for-all/ (accessed 24 September 2016).

[187] S Majola "PSL strikes new deal with SuperSport" *Mail & Guardian* 19 August 2011 http://mg.co.za/article/2011-08-19-psl-strikes-new-deal-with-supersport (accessed 24 September 2016). It appears that the deal may soon be renewed on improved terms. See C Klate "Irvin Khoza hints at new bumper broadcast deal with SuperSport" http://www.kickoff.com/news/70712/irvin-khoza-hints-at-new-bumper-broadcast-deal-with-supersport (accessed 16 November 2016).

[188] I Khoza "Benefits of TV deal: Part 1" http://www.psl.co.za/column.asp?id=6330 (accessed 17 April 2015). See also Rule 22 of the "National Soccer League Rules" (2015) http://images.supersport.com/content/2015-03-31-NSL-Handbook.pdf (accessed 21 September 2016).

[189] *NCAA* at 115.

[190] See, for example, N Moodley "Pay TV: A cost comparison" *Fin24* 04 October 2015 http://www.fin24.com/Tech/Opinion/Pay-TV-A-cost-comparison-20151003 (accessed 04 October 2015).

[191] It should be noted that even for sports events available on Free-to-air channels, the cost of access to these events are set to increase. See T Ferreira "Millions of South African TV viewers will have to fork out R800 soon" (2016) http://www.channel24.co.za/TV/News/millions-of-south-african-tv-viewers-will-have-to-fork-out-r800-soon-20160917 (accessed 17 September 2016).

case, was the goal of promoting live attendance itself, rather than the necessity of it or the reasonableness of the rule adopted to achieve it. It was found that that the increase in live spectators, at the expense of television audience, reduced the overall consumption, which cannot be acceptable.

With respect, this perhaps ignores the social benefits of live attendance at sports events. Here, the benefits do not refer to financial gains that clubs may gain from gate receipts and increased merchandise sales, but rather the socialisation experienced by match-going fans, when they interact with fellow supporters.[192] As discussed in Chapter 2, the psychological need for socialisation was one of the original functions addressed by public sports events. The SRSA has also committed to promoting this aspect in sports,[193] especially for events such as cricket, where attendance is generally lower than the other two popular sports of football and rugby.[194]

Regardless, the effect of broadcasting agreements on attendance is likely to be small, compared to its other oft-cited objective of grassroots development. This has occasionally been termed a "solidarity mechanism", and it refers to the redistribution of revenues from professional to amateur levels of sports.[195] Since television deals are often the largest source of income for governing bodies, they act as an efficient means of spreading resources to the lower levels of sport. For example, in England, the Premier League has committed to distributing a portion of its broadcasting rights revenue to the lower divisions of the Football League, amateur leagues and youth leagues, so that the wealth of the country's elite division can be shared at all levels of the sport.[196]

The desirability of youth development in sport has already been discussed above. It should be noted, however, that the encouragement of amateur participation in sports is also considered socially desirable by the SRSA, which has prioritised the motivation of communities to adopt

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[192] P Taylor *et al* "A review of the social impacts of culture and sport" (2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416279/A_review_of_the_Social_Impacts_of_Culture_and_Sport.pdf (accessed 04 April 2015) 51.

[193] M Pedersen "International perspective on sport governance" (2015) 2(4) *Think Sport Journal SRSA* 37 at 39.

[194] K Lancaster "Empty seats at tests a concern" *Independent Online* 02 January 2014 http://www.iol.co.za/sport/cricket/empty-seats-at-tests-a-concern-1627899 (accessed 15 April 2015).

[195] European Commission Decision No. 2003/778/EC (*COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League*), 2003 O.J. L 291/25 Para 164.

[196] A Richards "Premier League clubs to share £1billion of TV money with lower leagues" *The Mirror* 27 March 2015 http://www.mirror.co.uk/sport/football/news/premier-league-clubs-share-1billion-5409795 (accessed 27 March 2015). It should be noted that television incomes from other English competitions (including the FA Cup) are already distributed across the leagues. See "FA Cup 2017 prize money & gate receipts share" (2016) http://www.totalsportek.com/money/fa-cup-prize-money/ (accessed 20 November 2016).

active lifestyles.[197] In addition to the health and socialisation benefits, it also has the potential for social upliftment if amateur participation can be encouraged in communities with previously little access to sports facilities.[198]

Fortunately, this is an objective which can be easily determined. The benefits from the redistribution can also be understood in monetary terms, if the exact figures are specified. Therefore, it is submitted that courts should be open to consider this justification even if the agreement itself does not increase efficiency or alter consumer preference.

In addition to player transfer rules and broadcasting agreements, the cases from the previous two chapters also dealt with imposition of salary caps, the exclusive organisation of domestic competitions by governing bodies, and doping regulations. For these practices, the sporting justifications are only considered below where they have not already been dealt with above.

Regarding the imposition of salary caps, it is not necessary to discuss the merits of competitive balance and youth development again. It suffices to say that the salary cap aims to promote competitive balance by setting a ceiling on the amount of money that wealthy teams may spend on playing talent, while youth development is seen as a by-product if the cap effectively forces these clubs to focus their spending on facilities and training staff instead.

Another justification usually offered for salary caps is to ensure the clubs' financial sustainability. Due to the increasing commercialisation in sports and rising wages of professional athletes, some clubs have tried to achieve success by spending beyond their means. Leeds United F.C., an English football team, made headlines when it tried to qualify for the lucrative UEFA Champions League competition by using loans in order to sign elite players, and eventually went into administration when it could no longer afford to service the debt.[199] Other examples include Portsmouth F.C. (also England) and A.C.F. Fiorentina in Italy.[200] Therefore, fiscal imprudence is not an uncommon cause for the downfall of sports clubs.

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[197] SRSA "Annual Performance Plan 2016/17" (2016) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary/SRSA%20APP%202016_17%20LR.PDF (accessed 12 September 2016) 30.

[198] *Ibid* 61.

[199] P Rostron *Leeds United: Trials and Tribulations* 1 ed (revised) (2012) 49.

[200] See M Scott "Portsmouth go into administration for the second time in three seasons" *The Telegraph* 17 February 2012 http://www.telegraph.co.uk/sport/football/teams/portsmouth/9088561/Portsmouth-go-into-administration-for-the-second-time-in-three-seasons.html (accessed 17 May 2016); and P Kennedy and D Kennedy *Footall in Neo-Liberal Times* (2016) 96 fn 2.

Presently, no salary cap mechanisms exist in South African domestic sports leagues, although it has been the subject of discussion among PSL clubs for a number of years.[201] If introduced, however, it will most likely be included as part of the collective bargaining agreement between the players' union and the PSL, which would place it outside the scope of competition law. This may well be necessary, as the argument that sports clubs should be financially protected due to their social importance among supporters has usually been met with skepticism.[202] It is submitted that the specificities of sport should not go so far as to eliminate cost uncertainty for the clubs, whose largest, and most outcome-determinative, expense is likely its wage bill.[203]

Finally, with regard to the exclusive regulatory authority of governing bodies and anti-doping regulations, while there are clearly sporting objectives, such as the protection of the game's integrity and fairness, these practices are more easily justified on non-sporting grounds. It is submitted that these rules constitute the type of agreements necessary in order for the competitions to exist at all. This is because spectators, as well as other stakeholders including sponsors and broadcasters, pay value for games which are officially organised and adhere to the standards set by governing bodies. Competitions distorted by the use of performance-enhancing drugs (or other forms of cheating) is antithetical to the principle of fair-play, and would diminish spectator interest dramatically.

It is clear, however, that sporting objectives have a major role to play in most other cases. At the same time, it is important to realise that not all sporting objectives can be accepted at face value, and determining which justifications are legitimate may be a daunting task. However, the alternative, which is to ignore all non-economic considerations, would have far more disastrous consequences. The development of sports may be seriously undermined if courts cannot distinguish which scenarios are justifiable limitations to competition, and which are merely abuses of sports bodies' market power.

Therefore, it is proposed that competition authorities in South Africa should take the unique characteristics of sport into account when considering sports-related cases. This requires the the economic effects of the conduct in question to be balanced against its purely sporting

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[201] "PSL on a mission to cap players' salaries" *News 24* 05 December 2010 http://www.news24.com/Archives/City-Press/PSL-on-a-mission-to-cap-players-salaries-20150429 (accessed 17 February 2015).

[202] SF Ross "Player restraints and competition law throughout the world" (2005) 15 *Marquette Sports Law Review* 49 at 60-61.

[203] *Cf NBA v Williams* 94 Civ. 4488 (KTD) (S.D.N.Y. 1994) and European Commission and UEFA "Joint statement of 21 March 2012 on Financial Fair Play (FFP) rules and state aid control in professional football" (2012) http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf (accessed 22 May 2015).

objectives. Competition authorities should adopt a discretionary approach in this regard, by taking into account factors such as the importance of the objective in question, the means used to achieve the objective, as well as its impact on consumers.

This approach should also be combined with an exemption from *per se* prohibitions for sports-related practices, as argued in 8.3 above. These activities should be examined under a rule-of-reason standard instead. With the above in mind, the following insertion may be considered as a starting point for amending the Competition Act:

Section 10A. Restrictive practices relating to professional sport

(1) This section applies to practices that -

(*a*) are related to the organisation and/or regulation of professional sport; and

(*b*) involve a firm or an association of firms which is -

(i) a sports administration body, as defined in section 1 of the South African Institute for Drug-Free Sport Act 14 of 1997;

(ii) a sport or recreation body, as defined in section 1 of the National Sport and Recreation Act 110 of 1998;

(iii) an event organiser, as defined in section 1 of the Safety at Sports and Recreational Events Act 2 of 2010;

(iv) a team or club engaged in professional sport;

(v) an athlete, defined in section 1 of the South African Institute for Drug-Free Sport Act 14 of 1997.

(2) The provisions of sections 4(1) (*b*), 5(2), 8 (*a*) and 8 (*b*) do not apply to a practice referred to in subsection (1), unless that practice has the effect of substantially preventing, or lessening, competition in a market, and a party to the practice cannot prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

(3) When determining whether a practice referred to in subsection (1) constitutes a prohibited practice in terms of this Chapter, the Competition Tribunal or Competition Appeal Court before which the contravention is alleged shall have regard to whether -

(*a*) the practice in question is designed to achieve any sporting objective; and

(*b*) the objective described in paragraph (*a*) has social, educational or consumer benefits; and

(*c*) the practice is the least restrictive means of achieving the objective described in paragraph (*a*).

(4) For the purposes of this section, "professional sport" means sport in which participants receive remuneration for their services as participants.

In order to demonstrate how the above proposal may operate in practice, the next chapter examines the issue of the transfer system in football with the suggested approach in mind.

CHAPTER 9

THE FOOTBALL TRANSFER SYSTEM AND COMPETITION LAW

In Chapter 8, it was identified that in order to properly account for the specificities of sports in competition law, two legislative changes are necessary: Firstly, sports-related cases should be examined under the rule of reason, rather than the *per se* provisions of the Competition Act; secondly, when conducting the rule-of-reason enquiry, the anti-competitive aspects of the practice in question should be weighted against not only the pro-competitive gains, but also any purely sporting objectives achieved by the same practice.

In addition to identifying the changes necessary, it was also argued that the general rule-of-reason approach adopted by South African competition authorities is appropriate in the sports context as well, with the exception of non-economic justifications' admissibility.

This chapter applies these principles to a practical scenario, by examining the rules regulating player transfers in football. This concerns the changing of a player's registration from one football club to another, which must take place in accordance with the rules approved by the sport's governing bodies, before he can officially play for another team.

This issue is topical for three reasons: Firstly, the European Commission is currently investigating a complaint against FIFA, the sport's international governing body.[1] The complaint was lodged by the world football players' union, FIFPro, who alleged that the governing body's transfer rules violate the E.U. competition law.[2] The outcome of this matter will have a significant impact on football transfers, just as the *Bosman* judgment transformed out-of-contract transfers worldwide.[3]

Secondly, FIFA is currently reviewing its existing transfer regulations, regardless of the verdict of the above investigation. The governing body's previous president, Sepp Blatter, was

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[1] FIFPro World Players' Union "FIFPro board discusses FIFA reform" (2016) https://www.fifpro.org/news/statement-following-fifpro-board-meeting/en/ (accessed 06 November 2016).

[2] *Ibid.*

[3] A Duval "The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of *Bosman*" in A Duval and B Van Rompuy (eds) *The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport* (2016) 84.

suspended in 2015 amid corruption charges, along with other former officials.[4] The incident eventually resulted in the election of a new president, Gianni Infantino, who has committed to revising the transfer system, in order to improve its transparency and clarity.[5] It remains to be seen whether any changes proposed will improve or impair the sport's compliance with the competitions laws of its member states.

Thirdly, after many years of negotiation, a collective bargaining agreement was finally concluded between the Premier Soccer League ("PSL") and the South African Football Players Union ("SAFPU") in 2012.[6] The CBA, which is also the first of its kind in Africa,[7] demonstrates the growing negotiating power of the union since its formation in 1997.[8] A key part of the agreement, which relates to the Standard Professional Contracts ("SPCs") between all players and their clubs, is in the process of renegotiation.[9] This comes at a time when SAFPU is finally in a position to influence the terms of the SPCs in the interests of members. Should the parties be unable to agree on the issue, however, the union may either resort to traditional labour law remedies under the Labour Relations Act,[10] or, as the FIFPro complaint has shown, use competition law an alternative avenue.

From the perspective of competition lawyers, such a challenge would certainly provide an interesting test case. However, it is submitted that the competition law alternative is preferable, not because of its academic significance, but because of its capacity to account for the nuanced interrelations between professional players, football clubs, league organisers and governing bodies. As will be argued below, this relationship is more complicated than the dispute between the employer-clubs and the employee-players, because in the context of transfer regulations, not all clubs are beneficiaries of the system. At the same time, not all players are placed at a disadvantage, with elite players in football often earning astronomical sums as a

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[4] S Borden "Sepp Blatter and other top officials are suspended, deepening FIFA's turmoil" *New York Times* 08 October 2015 http://www.nytimes.com/2015/10/09/sports/soccer/sepp-blatter-michel-platini-jerome-valcke-fifa-suspended.html?_r=1 (accessed 09 October 2015).

[5] B Homewood "Infantino wants to clean up transfer system" *Reuters* 3 Noveber 2016 http://in.reuters.com/article/soccer-fifa-infantino-idINKBN12Y2C4 (accessed 04 November 2016).

[6] T Gaoshubelwe "The Collective Bargaining Agreement" (2013) http://www.safpu.org/read.php?post=8 (accessed 02 April 2015).

[7] *Ibid.*

[8] "About SAFPU" http://www.safpu.org/about.php?content=history (accessed 04 November 2016).

[9] Gaoshubelwe "The Collective Bargaining Agreement".

[10] Act 66 of 1995.

result of the demand created by the transfer rules.[11] What is required, therefore, is a holistic approach that reflects the relationships within the stakeholder groups, rather than simply pitting the clubs against the players.

Such an approach will be attempted through the lens of competition law in this section. The discussion below attempts to highlight two issues, namely the need to subject powerful sports organisers to competition law regulation, and the importance of achieving this goal in a manner that will not inhibit the development of sport in South Africa. Part 1 provides a historical background of the transfer regulations dispute, while Part 2 outlines the present transfer system. Part 3 establishes the jurisdictional requirements for a competition law enquiry, and Part 4 examines whether the transfer system should be considered anti-competitive for the purpose of the Competition Act, whilst applying the proposed changes from Chapter 8.

9.1 Contextual background of the football transfer system

The Fédération Internationale de Football Association, or "FIFA", is the world governing body for association football ("soccer").[12] It was founded in 1904 under Swiss law, and is based in Zurich.[13] Typical of the pyramid governance structure in sports, FIFA is an "association of associations". Its membership comprises 211 national associations of the sport, each of which is also affiliated with one of the six continental confederations.[14] For example, the hierarchy of football governance in South Africa would see FIFA at the top, followed by the Confederation of African Football ("CAF") at the regional level, and then the South African Football Association ("SAFA") at the national level.[15]

As the international governing body of the sport, FIFA has two important powers. Firstly, it is responsible for the organisation and promotion of major international tournaments, including

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[11] See C Settimi "Cristiano Ronaldo, Lionel Messi top the world's highest paid soccer players" *Forbes* 11 May 2016 http://www.forbes.com/sites/christinasettimi/2016/05/11/cristiano-ronaldo-lionel-messi-top-the-worlds-highest-paid-soccer-players/#48ffad3b5a35 (accessed 12 May 2016) for a list of top earning international footballers. In the PSL, players' salaries can vary from R450,000 to R5,000 per week. See S Mseleku "PSL salaries a crying shame" *News24* 21 July 2015 http://www.sport24.co.za/Columnists/SBusisoMseleku/PSL-salaries-a-crying-shame-20150721 (accessed 11 May 2016); and T Wort "SA soccer stars earn up to R500k/pm" *EWN* 21 July 2014 http://ewn.co.za/2014/07/21/SA-footballers-and-their-salaries (access 11 May 2016).

[12] FIFA "How does FIFA work?" 04 May 2015 http://www.fifa.com/about-fifa/videos/y=2015/m=5/video=how-does-fifa-work-2602035.html (accessed 21 September 2016).

[13] FIFA "Who we are" http://www.fifa.com/about-fifa/who-we-are/index.html (accessed 21 September 2016).

[14] FIFA "How does FIFA work?".

[15] *Coetzee v Comitis* 2001 (1) SA 1254 (C) para 2.

the FIFA World Cup.[16] As part of this responsibility, FIFA is entitled to conclude commercial deals with various sponsors, through which it receives its revenue. According to the association's financial report, its annual revenue in 2015 amounted to USD 1,152 million.[17]

The governing body's second important function is the regulation of the sport. It is partly responsible for revising the rules of the game itself, as it appoints representatives that make up half of the International Football Association Board, the body which considers such amendments on an annual basis.[18] In addition to the laws of the game, FIFA also lays down the regulations relating to the administrative aspects of the sport. These are known as the FIFA Statutes, and they govern matters from competitions, doping and transfers.[19] Changes to these regulations are made by the FIFA Congress, which comprises of all the affiliated national associations, with the latest set of Statutes adopted at the Extraordinary Congress on the 26 of February, 2016.[20]

The statute dealing with the registrations of players at club level is known as the Regulations on the Status and Transfer of Players ("RSTP" or "the Regulations"). In order to discuss whether the current version of the Regulations is problematic from a competition law perspective, it is necessary to first provide some historical context for these rules.

9.1.1 The early days of professional football

Before football was recognised as a professional activity by the English Football Association in 1885, players could play for any number of teams within the span of a single season.[21] Professionalisation was permitted on the condition that players must register with their clubs every year, and may not change their registrations during the course of the season without the

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[16] FIFA "Competition organisation" http://www.fifa.com/governance/competition-organisation/index.html (accessed 21 September 2016).

[17] FIFA "Financial and Governance Report 2015" (2016) 14 http://resources.fifa.com/mm/Document/AFFederation/Administration/02/77/08/71/GB15_FIFA_web_en_Neutral.pdf (accessed 18 March 2016). It should be noted that this was also the first time since 2002 that FIFA posted a loss in its financial reports. However, it also has a reserve of over USD 1.3 billion. See FIFA "FIFA reports loss for 2015, but increases middle-term financial objectives" (2016) http://www.fifa.com/about-fifa/news/y=2016/m=3/news=fifa-reports-loss-for-2015-but-increases-middle-term-financial-objecti-2770880.html (accessed 18 March 2016).

[18] IFAB "Overview" http://www.theifab.com/#!/overview (accessed 21 September 2016).

[19] FIFA "FIFA Statutes" http://www.fifa.com/about-fifa/who-we-are/the-statutes.html (accessed 21 September 2016).

[20] Article 2 (*t*), Chapter II of FIFA "FIFA Governance Regulations 2016" (2016) http://resources.fifa.com/mm/document/affederation/administration/02/11/20/75/forenweb_neutral.pdf (accessed 21 September 2016).

[21] D McArdle *Football Society & The Law* (2013) 17.

permission of their employers and the FA. However, players were free to choose a new club before the start of each season. This system allowed organisers to exert some control over the employment of footballers, and became the model for the more restrictive rules on the transfer of players later on.[22]

It was this player registration system that saw the sport's first challenge to its transfer rules in court. In 1890, the case of *Radford v Campbell*[23] was heard by the Court of Appeal. The matter arose when the player in question renewed his contract with his existing club, thereby committing himself for the rest of the season. Before the season began, however, he concluded a more lucrative contract with a different club, and left his old employers as per the rules of the registration system. As a result, his previous club applied for an injunction against the move.

The matter was dismissed both at first instance and on appeal. Lord Esher, who delivered the final judgment, was said to have displayed an attitude of disdain for the sport, which had only recently been professionalised, and commented that it was too trivial a matter for the courts to be concerned with.[24]

It is possible that the *Radford* judgment encouraged the clubs and league organisers to implement more restrictive player movement rules. Shortly after the formation of the English Football League in 1888, the so-called "retain-and-transfer" system was introduced to replace the player registration system.[25] Under the new system, once a player is registered with a club, he may not play for another team without the current employer's permission.[26] At the end of each season, a club can place its players on either the "retain" list or the "transfer list". Players on the former may not transfer to another club, even in cases where one of the parties does not wish to renew their contract, or where the club has no intention of playing, or paying, the player in question.[27] This can be contrasted with those on the "transfer" list, who are players that the club no longer wish to keep, and may be released upon payment of a "transfer fee" by their prospective clubs.

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[22] McArdle *Football Society* 17.
[23] (1890) 6 TLR 488.
[24] S Boyes "*Eastham v Newcastle United FC Ltd* [1964] Ch 413" in J Anderson *Leading Cases in Sports Law* (2013) 79.
[25] McArdle *Football Society* 17.
[26] *Ibid* 19.
[27] *Ibid* 19-20.

In essence, this became the model adopted by leagues outside of England as well, and the "retain-and-transfer" system became the norm. Clubs quickly realised, however, that even for players on the retain list, they could generate income by demanding monetary compensation from clubs that wished to acquire the services of these players, in order forfeit their registration rights.[28] This allowed the smaller clubs to receive more money than they normally would from the "sale" of players on the transfer list.[29]

This meant that "retained" players no longer useful to their clubs were mostly able to arrange transfers to other clubs. However, this does not mean that clubs did not use the system purely to prevent a player from playing elsewhere, as was in the case of *Kingaby v Aston Villa FC*.[30] In this case, a player's new club was unimpressed with the abilities of its latest recruit, but decided to retain him after his contract expired and it had failed to find a prospective club willing to match his transfer fee.[31] The player, Herbert Kingaby, left to play for clubs outside the English League (which are not bound by the league's rules), like many other players in similar situations. However, when these clubs were later assimilated into the league, it became apparent that his registration rights reverted back to Aston Villa, his original club.[32] Once again, the club demanded a release fee that no other club was willing to meet.

As a result, Kingaby was effectively prevented from playing for any club in the country. He challenged the matter in court, alleging that the club was malicious in its use of the transfer system.[33] Boyes argues that this strategy was a misjudgment on the part of the player's counsel, as it did not allege that the transfer system was, itself, an unreasonable restraint of trade.[34] Because of legality of the league's rules was not challenged, the club's intent was irrelevant, and the matter was dismissed.[35] It would be another 50 years before the retain-and-transfer system was considered by the courts again.

9.1.2 "Retain-and-transfer" system challenged, in South Africa and abroad

In 1963, a player named George Eastham agreed to become a test case for the players' union in order to challenge the lawfulness of the league's transfer rules. Unlike Kingaby, Eastham had

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[28] McArdle *Football Society* 20.
[29] *Ibid.*
[30] "*Kingaby v Aston Villa*" *The Times* 28 March 1912.
[31] McArdle *Football Society* 20.
[32] *Ibid* 22.
[33] *Ibid* 23.
[34] *Leading Cases in Sports Law* 79.
[35] McArdle *Football Society* 23.

already retired from the game several years previously, after unsuccessfully requesting a release from his contract with Newcastle United FC.[36]

On this occasion, the court found that the "retain" aspect of the league's transfer system was an unreasonable restraint of trade, because it prevented players from finding new clubs when they were no longer employed at their old ones.[37] At the same time, the court did not agree that the "transfer" aspect was also unreasonable. Wilberforce J held that as players who were placed on the transfer list could still apply to have their fees reduced, this was a reasonable means of maintaining competitive balance in the league.[38]

Following this judgment, the leagues introduced a new set of rules based entirely on the transfer aspect.[39] Under this system, a player who is offered a renewal on less favourable terms than his existing contract may leave the club for free. In all other cases, a player who does not want to sign a new contract may refer the issue to a tribunal, which can decide to either permit a transfer subject to compensation or encourage the parties to conclude a contract more favourable to the player.[40] Although the rules were now less restrictive than the previous system, players were still not free to leave after the expiry of their contracts in all cases.

This was substantially the system that South African football had in place when its first player movement-related case came before the courts. In *Highlands Park Football Club Ltd v Viljoen*,[41] a player's former club applied for an interdict to prevent him from playing for a new club. It was argued that as the holder of the player's registration rights, the club had to agree to the transfer before the player could be released. As the case was heard before *Magna Alloys and Research (SA) (Pty) (Ltd) v Ellis*,[42] the court held the club had the onus of showing that the withholding of the registration constituted a reasonable restraint of trade.[43] As the club had not discharged this onus, Vermooten J dismissed the matter and the player was permitted to play for his new club.[44]

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[36] McArdle *Football Society* 24.
[37] *Eastham v Newcastle United FC* [1963] 3 All ER 139 at 147.
[38] At 149.
[39] McArdle *Football Society* 27.
[40] *Ibid* 28.
[41] 1978 (3) SA 191 (W).
[42] 1984 (4) SA 874 (A).
[43] At 201A-B.
[44] *Ibid.*

However, as the *Highlands Park* case was only concerned with one specific instance, the legality of the transfer system itself was left intact, as far as South African law was concerned. It was not until 2001, when the actual rules became the subject of the court's attention, in *Coetzee v Comitis*.[45]

In this case, the Applicant's club (Ajax Cape Town FC) refused to release the player after the expiry of his contract, unless a compensation fee was paid.[46] Subsequently, the player took the matter to court, alleging that the National Soccer League's[47] transfer rules regarding out-of-contract players were against public policy, and inconsistent with the Constitution.[48] The court agreed with the player's contentions, and held that the rules were an unenforceable restraint of trade.[49] It was found that players who wished to leave their clubs were at the mercy of the arbitration tribunal, whose formulaic approach to determining the compensation amount did not account for the personal circumstances of the players involved.[50] The court held that this violated the players' constitutional right to human dignity.[51]

In addition, it was found that the right to freedom of movement and the right to choose a profession or occupation freely were also affected by the rules.[52] As the club and the league organisers did not produce arguments as to why the limitations of these rights were justifiable in the circumstances, the court concluded there was no rational connection between the transfer system and its purported purpose.[53] Therefore, the rules in question were invalidated for being inconsistent with the Constitution.

However, the *Coetzee* judgment had little practical implication, as FIFA had already announced a new transfer system, which would eliminate transfer fees for out-of-contract players, before the matter was decided. This was largely due to the milestone case of *Bosman*[54] and its impact on European football.[55]

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[45] 2001 (1) SA 1254 (C).
[46] Para 13.
[47] This is the predecessor of the Premier Soccer League.
[48] Para 14.
[49] Para 32.
[50] Paras 23-24.
[51] Para 34.
[52] Para 38.
[53] Paras 39-40.
[54] *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* Case C-415/93 ECR I-4921.
[55] McArdle *Football Society* 47.

9.1.3 *Bosman* and the new TSRP

The *Bosman* case was discussed in Chapter 7 above in the context of how the specificities of sport were explicitly acknowledged by the ECJ. Here, the factual background and legal outcome are summarised in order to show how the case affected the development of the transfer system.

The football player involved in this case was Jean-Marc Bosman, a Belgian player who refused to renew his contract and was placed on the transfer list. Under the transfer rules in Belgium, his release was subject to the payment of a pre-determined fee. When it became clear that this fee was much higher than any other club was willing to pay, it effectively meant that Bosman could no longer play professional football.[56]

As a result, the player challenged the legality of the transfer system in court.[57] It should be noted that in addition to the issue of compensation in out-of-contract transfers, the nationality quota was also alleged to have contravened European Community law. However, for present purposes, we need only be concerned about the former issue. By the time that the matter had reached the ECJ, the case against the transfer system was based on two arguments: that the rules infringed the freedom of movement,[58] and that they violated the Community's competition law.[59]

It may be recalled that the ECJ decided the matter on the freedom of movement aspect alone. However, Christine Stix-Hackl, Advocate General at the time, later published her opinion regarding the applicability of competition law to the issue,[60] which is discussed later in this chapter. Regarding the restriction on free movement, it suffices to say that the court found that the rules prevented players from pursuing their playing activities in other Member States, for the reasons outlined in Chapter 7 above. One aspect of the judgment is worth repeating: although the court explicitly acknowledged the legitimacy of the sporting objectives pursued

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[56] McArdle *Football Society* 39.

[57] It should be said that his decision to do so subjected him to heavy pressure from the football authorities, who attempted to persuade him to either abandon the case entirely or settle the matter out of court. See S Van den Bogaert "From *Bosman* to *Bernard* C-415/93; [1995] ECR I-4921 to C-325/08; [2-1-] ECR I-2177" in J Anderson *Leading Cases in Sports Law* (2013) 94.

[58] Article 45 TFEU, or Article 39 TEEC at the time of the judgment.

[59] Articles 101 and 102 TFEU, or Articles 85 and 86 TEEC at the time of the judgment.

[60] A Egger and C Stix-Hackl "Sports and competition law: A never-ending story?" (2002) 23(2) *ECLR* 81.

by the governing bodies, the transfer rules *in casu* were nevertheless found to be excessive due to the availability of less restrictive alternatives.[61]

This appeared to be a clear invitation for FIFA and UEFA[62] to re-examine their transfer rules.[63] At the same time, the judgment did not invalidate the entire system, and left the issue of transfers for under-contract players to the sports authorities.[64] However, after these authorities declared that no further changes to the rules will be made other than the ones prescribed by the ECJ,[65] the European Commission announced that it would investigate the rules left unexamined in *Bosman*, and their compatibility with the Community laws.[66]

This left the governing bodies with the prospect of another embarrassing defeat in the courts, and compelled FIFA and UEFA to re-examine the transfer system, in consultation with the Commission.[67] In 2001, a new transfer system was implemented with the latter's approval.[68] It introduced provisions such as the protection of minors, protected contractual periods, training compensation for youth players, "solidarity mechanisms" that distribute transfer fees among players' previous clubs, and the establishment of a new dispute resolution system. While minor amendments have been made since then, the core of this transfer system remains today.[69]

Two aspects of the current system have already been challenged with partial success, although they did not lead to an overhaul of the rules similar to *Bosman*, for reasons that will become apparent.

9.1.4 Legal challenges under the present transfer system

In the *Bernard* case,[70] also discussed in Chapter 7 above, Olivier Bernard's former club (Olympique Lyonnais) claimed an amount from his new employer, Newcastle United FC, as training compensation when the player left after the expiry of his contract. Under French law, clubs were entitled to this compensation when a youth player refused to sign his first

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[61] Para 96.

[62] The Union of European Football Associations. This is the European equivalent of the Confederation of African Football.

[63] Van den Bogaert *Leading Cases* 96.

[64] *Ibid* 100.

[65] At this point, courts have also begun extending the *Bosman* ruling to non-EU players as well. See *Balog v Royal Charleroi Sporting Club ASBL (RSCS)* Case C-264-98.

[66] Van den Bogaert *Leading Cases* 100.

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

[70] Case C-325/08 *Bernard* [2010] ECR I-2177.

professional contract with the club that trained him.[71] The matter was referred to the ECJ in order to determine whether such a scheme was compatible with E.U. law.[72]

The court answered this in the affirmative, and held that the scheme can promote the legitimate goal of encouraging youth development.[73] However, it was further held that the damages must relate to the actual costs incurred by the club, although this can also include expenses associated with training youngsters that do not develop into professional players.[74] In this case, however, French law prescribed compensation amounting to the total loss suffered by the club, which allowed Olympique Lyonnais to claim one year's remuneration that the player would have earned.[75] This figure bore no relation to the actual costs of training, according to the ECJ, and was deemed to be disproportionate.[76]

However, as the court only considered the French rules in this case, and not the FIFA provisions regarding training compensation, the latter's legality was unaffected by the judgment.[77] Nevertheless, while the compensation prescribed by FIFA is calculated differently than the one applicable in *Bernard*, it is clear that the ECJ's comments regarding the proportionality of such schemes will inevitably be relevant.

In addition to youth training compensation, FIFA's rules relating to contractual breach have also been challenged. Under the Regulations, a player that unilaterally terminates his contract without just cause is liable to pay compensation, although the manner in which this compensation is to be calculated is not prescribed in the RSTP.[78] The Court of Arbitration for Sport ("CAS") has had the opportunity to determine an appropriate figure in two separate cases, which have resulted in contrasting outcomes.

In *Webster*,[79] a player joined another club with one year left on his four-year contract with his previous employer. The CAS awarded the former club a £150,000 compensation, which was

[71] *Bernard* para 6.
[72] Para 16.
[73] Para 41.
[74] Para 42.
[75] Para 47.
[76] Para 48.
[77] Van den Bogaert *Leading Cases* 101.
[78] Article 17.1 of FIFA "Regulations on the Status and Transfer of Players (2016)" (2016) http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransferofplayersjune2016_e_neutral.pdf (accessed 21 September 2016).
[79] *Webster, Hearts & Wigan Athletic FC* CAS 2007/A/1298-1300.

equivalent to the player's salary for the remaining season.[80] This can be contrasted with the €12 million awarded by the same body in *Matuzalem*.[81] The latter case also involved a unilateral termination of contract by the player, with the breach taking place outside of the so-called "protected period" under the FIFA Regulations.[82] The damages awarded by the CAS included not only the equivalent of the player's wages, but also the club's lost earnings and the player's market value,[83] even though these factors were considered irrelevant in *Webster*.[84] The Swiss Federal Court upheld the decision on appeal, but overturned a subsequent CAS decision that imposed a ban on the same player, due to the latter's (and his new club's) inability to pay the compensation awarded in the initial judgment.[85] The ban was lifted as it infringed the player's right to privacy under Swiss law, although the court did not make any further decisions regarding the original compensation award.[86]

The CAS's contrasting approaches in *Webster* and *Matuzalem* in terms of relevant factors in the determination of damages have yielded vastly different outcomes. However, the latter case is more likely to be predictive of the quasi-judicial body's future approach in such cases, as it has withstood the scrutiny of a civil court (at least insofar as the magnitude of damages was concerned). Therefore, factors such as a player's market value and a club's lost earnings are likely to be relevant in future disputes.

This means that despite the provision for unilateral termination of contracts under FIFA rules, a player that elects to do so will still be liable, jointly and severally with his new club, for a compensation that approximates the transfer fee that would have been payable otherwise. The rarity of instances where players have unilaterally terminated their contracts following the CAS cases suggest that transfers for under-contract players subject to fees remain the order of the day. It appears that although the overwhelming majority of past challenges on the transfer rules were based on the players' right to freedom of trade and/or movement, this approach may no longer be as successful in the future, as the authorities have seemingly found a point that balances the players' freedom with contractual stability.

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[80] *Webster* 30.

[81] *Matuzalem, FC Shakhtar Donetsk (Ukraine) & Real Zaragoza SAD (Spain)* CAS 2008/A/1519-1520.

[82] This is either the first two or three years of the contract, depending on the player's age. See Definition 7 of the TSRP.

[83] Paras 108 and 120.

[84] Para 36.

[85] *Matuzalem v FIFA* 4A_558/2011 (27 March 2012) para 5.

[86] Para 4.3.5.

Therefore, it is perhaps unsurprising that FIFPro's latest challenge to the transfer system is based on competition law. The ECJ's application of the EU's competition law to sports in *Meca-Medina* has undoubtedly opened the door to such an approach regarding football transfers. After all, the problematic aspects identified by the former Advocate General were not remedied by FIFA's transfer system overhaul, and therefore, remain open to examination.

9.2 Current transfer rules and the South African regulatory framework

Having discussed how the transfer system has changed since the days of amateur football, it is now appropriate to outline the rules as they are presently. For the sake of brevity, only rules that have competition law implications are discussed below.

9.2.1 The regulations applicable in South African football

At the outset, it should be noted that while FIFA's TSRP contains rules that are applicable to all international transfers, i.e. those that take place between clubs from different countries, they are not automatically applicable to all domestic transfers.[87] Some of these rules, such as player eligibility and registration periods, are non-derogable, and are applicable at every level of organised football, including domestic transfers.[88] Rules which are not binding at the domestic level, however, must still be provided by the national associations for domestic transfers.[89] These rules, such as the protection of contractual stability and the provision of solidarity mechanisms, may be adapted in order to comply with national laws and collective bargaining agreements, but they must reflect the basic principles of the FIFA document.[90] Furthermore, FIFA has the power to approve or reject the rules issued by its member associations.[91]

As mentioned above, SAFA is the national association for South African football, which means it is responsible for providing the regulatory framework for domestic transfers. However, the matter is complicated by the fact that SAFA comprises various regional (provincial and local) football associations and other associate members, which may all provide their own rules regarding player transfers.[92] SAFA's rules, which are virtually the same as FIFA's, only

[87] Article 1.1 of the TSRP.
[88] Article 1.3 of the TSRP.
[89] Article 1.2 and Article
[90] FIFA "Commentary on the Regulations for the Status and Transfer of Players" (2016) http://resources.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf (accessed 21 September 2016) 9.
[91] Articles 1.2 and 1.3 (*b*) of the TSRP.
[92] Article 1 of SAFA "Regulations on the Status and Transfer of Players" (2011) http://www.safa.net/images/pdfs/Regulations-Status-Transfer-Players.pdf (accessed 21 September 2016).

regulate transfers that take place between clubs belonging to different members.[93] Therefore, it is also necessary to consider the transfer rules of the latter.

However, as this thesis is only concerned with professional (as opposed to amateur) football, the scrutiny at this level of governance may be confined to the rules of the National Soccer League ("NSL"), which is a special affiliate member of SAFA and organiser of the only professional league structure in South Africa.[94] The latter is commonly known as the PSL (which is the organiser's trading name), and it consists of the South African Premier Division and the National First Division.[95] Although the two acronyms are often used interchangeably, in this chapter "NSL" is used when discussing the administrative body, while "PSL" is used to refer to the league itself.

To recap, with respect to international transfers, the Regulations issued by FIFA are applicable in all instances. Regarding domestic transfers, however, the regulations of SAFA (which are nearly identical to FIFA's RSTP) must be read together with the rules of the NSL. In order to illustrate these distinctions, therefore, the following explanation of the relevant transfer rules are divided into those that are binding at all levels and those which may be adapted at the national and competition level.

9.2.2 The basic principles of the TSRP

This section outlines the transfer rules deemed to be universally applicable by FIFA. These rules govern international transfers by virtue of FIFA's Regulations, which also oblige the national associations to include them without modification in their regulations governing domestic transfers. According to Article 1.3 (*a*) of the TSRP, these provisions are Articles 2-8, 10, 11, 12bis, 18-19bis. From these, the rules which are relevant to the discussion in Part 9.4 are explained below.

Article 5 deals with the registration of players in general. It provides that every player must be properly registered in order to take part in organised football.[96] It further states that at any time, a player may only be registered with one club, and that in any event, his registration may not be

[93] Article 1 of SAFA's TSRP.
[94] PSL "About the PSL" http://www.psl.co.za/content.asp?id=5488 (accessed 21 September 2016).
[95] It should be clarified that despite its name, the National First Division is in fact the second-highest league in South Africa, and to which lowest ranking teams from the Premier Division are relegated.
[96] Para 1 of the Article.

changed more than twice during the course of a single season.[97] This article is fundamental to the transfer system, as registration cannot be obtained unless a player and his club follow the prescribed transfer procedure, which means that a player may only play professional football if he adheres to the rules under the Regulations.

Related to the requirement of registration is Article 6, which provides that registrations may only occur during the designated registration periods. These are commonly known as "transfer windows", and the Regulations stipulate that there must be two such periods per year. This restriction is designed to ensure the sporting integrity of ongoing championships, by preventing teams from altering their playing strengths near the most crucial stage of competitions.[98] Therefore, although the Regulations permit the registration of players outside these periods if their contracts expire before then, such instances are not to take place near the end of the championship schedule.[99]

According to the RSTP, the exact occurrence and duration of the transfer windows are to be fixed by national associations.[100] SAFA has further delegated this task to its regional associations and competition organisers.[101] This means that the transfer windows for the PSL are set by the league itself. Under the NSL Rules, the first period takes place off-season, and runs from 1 July to 31 August.[102] The second period takes place mid-season, and runs for the entire month of January.[103] Players who are under contract may not change clubs outside of these periods.

In addition to the above two provisions, the only other rule which may be relevant for present purposes is Article 19, which deals with the protection of minors. It states that the international transfer of players under the age of 18 is prohibited, except in specific cases provided for under Paragraph 2. However, it is perhaps superfluous to include this as a non-modifiable rule at national levels, as it only deals with international transfers, a matter over which national associations have no jurisdiction.

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[97] Paras 2 and 3 of the Article.
[98] FIFA "Commentary on the TSRP" 21.
[99] Para 1 of Article 6.
[100] *Ibid.*
[101] Article 6 of the SAFA Regulations.
[102] Rule 31.5.1 of the "National Soccer League Rules" (2015) http://images.supersport.com/content/2015-03-31-NSL-Handbook.pdf (accessed 21 September 2016).
[103] *Ibid* Rule 31.5.2.

In any case, it is submitted that this restriction should be permitted on common sense grounds. Studies show that sport-related child trafficking is becoming an increasingly serious human rights concern.[104] The majority of victims in these cases originate from Africa or South America.[105] On the other hand, the restriction on competition as a result of clubs being unable to employ minor athletes from foreign countries is likely to be insignificant, especially as cases where a player is genuinely migrating to a new country are granted exceptions under the RSTP. Therefore, the issue of limitation on minors' international transfers is not included in the analysis below.

9.2.3 Rules relating to the protection of contractual stability

Having discussed the so-called "basic principles" of FIFA's RSTP, it is now possible to examine the modifiable aspects of the Regulations. It should be noted that compliance with these rules is still mandatory with respect to international transfers. Therefore, whenever a South African club acquires a player registered with a foreign football association (even if the player himself is South African), or a foreign club wishes to register a player currently playing in South Africa, the RSTP is applicable. The rules of the NSL are only in force when a transfer takes place between two PSL clubs. However, as will be seen below, the two sets of rules are remarkably similar in substance, although the PSL version is much more restrictive in one aspect.

The rules to be discussed under the present section can be divided into those that relate to protection of contractual stability and those that relate to mandatory compensations. The former category is founded on the principle expressed in Article 13, titled "Respect of contract", which stipulates that a professional contract between a player and his club may only terminate on the expiry of the contract or by mutual agreement. The former is the natural consequence of the *Bosman* judgment, which prohibited clubs from retaining players after the expiry of their contracts. The latter refers to the the type of amicable transfers that are usually seen in the transfer market.

The payment of transfer fees is not explicitly mentioned as a precondition of mutual termination. However, this can be inferred from the Regulations' later explanation of compensation in unilateral terminations, which includes any transfer fee that would otherwise

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[104] See D McGee "Displacing childhood: labour exploitation and child trafficking in sport" in A Quayson and A Arhin (eds) *Labour Migration, Human Trafficking and Multinational Corporations: The Commodification of Illicit Flows* (2012).
[105] *Ibid* 118.

be due to the former club. The NSL Rules is more explicit about the permissibility of transfer fees. Rules 38.2 and 33.5 provide that when requested to release a player, a club may either grant the player a free transfer, or it must enter into a written transfer agreement with the player's new club, specifying the transfer fee payable.

Thus it is clear that clubs may still demand transfer fees for under-contract players. Professionals who leave their clubs without having obtained the necessary consent are liable to pay compensation. This is regulated by Article 17 of the RSTP, which deals with unilateral termination "without just cause". In order to discuss the implications of this provision, it is first necessary to explain the two types of "just causes" under the Regulations.

Article 14 deals with termination of contracts with "ordinary" just cause. According to the commentary on the RSTP, the existence of just cause is something to be determined from the facts of each case.[106] However, examples of just causes may include persistent non-payment of salaries by the club (which may allow the player to terminate), or persistent uncooperative attitude displayed by the player (which may allow the club to terminate).[107] Therefore, these appear to be ordinary grounds of termination normally found in the law of contract.

The NSL Rules have distinguished this recourse for clubs and players. Rule 41.16 states that clubs may "terminate a player's contract at any time for reasons that are fair and in compliance with fair procedure consistent with South African law". Rule 43.1 establishes circumstances in which a player may apply to the Dispute Resolution Chamber ("DRC") to be declared a free agent.[108] It should be noted that clubs are not required to apply to the DRC in order to terminate with just cause under the NSL Rules.

The consequence of termination with just cause is that no damages or compensation will be payable by the party terminating the contract. Furthermore, no sporting sanctions (such as a ban from official matches) may be imposed in such cases.[109]

In addition to the contractual just cause, the Regulations also permit unilateral termination on the grounds of "sporting just cause" under Article 15. This provision entitles a player to prematurely terminate his contract when he has participated in fewer than 10% of his club's

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[106] FIFA "Commentary on the RSTP" 39.

[107] *Ibid* 39-40.

[108] For an example of a dispute regarding whether there was just cause for termination, see *South African Football Players Union v Ria Stars Football Club* (J4909/00) [2002] ZALC 140 (24 May 2002).

[109] Article 14 of the RSTP. It should be noted that damages and/or sporting sanctions may still be imposed on the party at fault. See FIFA "Commentary on the RSTP" 40.

official matches in a season. However, this form of termination is not entirely free of consequences, unlike termination under Article 14. A player who resorts to this form of termination may still be liable to pay compensation, together with his next club, although he will not be subject to sporting sanctions.[110]

Rule 42 of the NSL provides the substantially same rule. It provides that the existence of sporting just cause must be decided by the DRC on a case-by-case, with consideration of the player's injuries and/or suspensions (if any), age, playing positions and number of matches played in the previous season.[111] The DRC must also decide the amount of compensation payable in such instances.[112]

Except for termination under the two scenarios above, all other forms of unilateral termination are regarded as "without just cause" under the RSTP, and are to be "vehemently discouraged".[113] In all cases, the party in breach will be liable to pay compensation. According to Article 17 paragraph 1, the amount of compensation is to be calculated with "due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria". The inclusion of "specificity of sport" is particularly interesting, as the phrase is also repeated under Article 17 of the SAFA Regulations. However, one should not read too much into its inclusion in the latter, as the text is an almost identical reproduction of the FIFA document.

Nevertheless, the phrase certainly indicates the relevance of the sporting objectives associated with transfer restrictions discussed in Chapter 10 above. In matters such as *Matuzalem*, it has been used to justify multi-million figure compensations that resemble the transfer fees which the former clubs would have received absent the unilateral termination. According to Article 17, other criteria which may be considered, in cases where the contract is terminated by the player, include remuneration due on the existing or new contract, time remaining under the terminated contract, fees paid and/or expenses incurred by the former club, and lastly, whether the termination occurred within or outside the so-called "protected period" of the contract.[114]

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[110] However, the club may lose its right to compensation if it has neglected the said player entirely. See FIFA "Commentary on the RSTP" 43.
[111] Rule 42.2.
[112] Rule 42.3.
[113] FIFA "Commentary on the RSTP" 38.
[114] Article 17 para 1 of the RSTP.

The last phrase deserves some explanation, as it is relevant in the context of sporting sanctions as well. According to its definition under the RSTP, the protected period is the first three years of a professional contract, in cases where the contract is signed by the player before the age of 28. If the player is 28 or older when he signed the contract, then the protected period shall only be the first two years of the said contract. As will be seen below, a breach by the player during the protected period attracts more severe penalties.

Returning to the issue of compensation, it is clear that a higher amount is likely to be awarded when the contract is terminated within the protected period. It should be noted that FIFA has, in principle, recognised that the parties may agree on a pre-determined compensation fee as part of their contract (the so-called "buy-out clause").[115] In such case, the agreed upon amount will be legally binding. As mentioned above, in cases where the breach is committed by the player, both he and his new club will be liable for the compensation.[116]

The joint liability only applies to financial compensation, however. The Article also provides that the player will receive a ban if (1) the breach occurred during the protected period; or (2) the player did not give due notice of his intention to terminate, regardless of when the breach occurred.[117] As for the player's new club, however, sporting sanctions will only be imposed if it induced the player in question to unilaterally terminate his contract.[118] Such a sanction will take the form of a "transfer embargo", under which the club cannot register any new players for a period of time.[119]

Nevertheless, it is clear that in an international transfer, a player may unilaterally terminate his contract, if its protected period has expired, subject to a payment of compensation. While the same is provided under the SAFA Regulations, the NSL Rules do not mention "termination without just cause", or provide a similar rule in substance. However, this does not mean that players may unilaterally terminate their contracts without consequences. Instead, it shows that the organisers only foresaw two circumstances for the transfer of under-contract players: Either the club must grant a free transfer, or a written transfer agreements must be entered into by all parties involved.

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[115] FIFA "Commentary on the RSTP" 47.
[116] Article 17 para 2 of the RSTP.
[117] Para 3.
[118] Para 4.
[119] *Ibid.*

Thus, as the Rules do not provide for unilateral termination without just cause, a player that signs a contract with a new team without his previous club's permission will inevitably be under two contracts. The NSL considers this to be misconduct, which may attract penalties such as suspension or a ban from any football activities.[120] In any case, under the league's rules, parties may still refer disputes not governed by any existing provisions to the DRC, who has the power to impose a non-exhaustive list of orders.[121] It is probable that in such instances, the DRC will at least take into account the provisions on termination without just cause under the SAFA Regulations.

One last remark may be made about unilateral termination, which is that it may not occur during the course of the season, regardless of the player's willingness to pay compensation.[122] The ostensible purpose behind this restriction is to protect the sporting stability of clubs involved in ongoing competitions, as teams should be able to rely on the services of their contracted players throughout the season.[123] It should be noted that this restriction does not apply in cases of mutual termination or termination with just cause, as the clubs in these instances will have either agreed to the early termination, or neglected their contractual obligations in the first place.[124] With respect to the PSL, this rule only applies to termination with sporting just cause, since unilateral termination without just cause is not provided under the NSL Rules.

To summarise, FIFA's rules relating to the maintenance of contractual stability provide that, firstly, contracts can ordinarily only terminate on their expiry or by mutual agreement; secondly, unilateral termination without just cause will attract penalties in the form of compensation and/or sporting sanctions; and lastly, unilateral termination, either with sporting just cause or without any just cause, may only occur after the end of the sporting season. These rules apply to all international transfers, but only the first rule is domestically applicable in its entirety. Unilateral termination is only relevant in South Africa if there is just cause or sporting just cause, the latter of which may only take place at the end of a season.

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[120] See Rules 41.15 and 56.13.
[121] Rule 44 of the NSL Rules.
[122] Article 16 of the RSTP.
[123] FIFA "Commentary on the RSTP" 44.
[124] *Ibid.*

9.2.4 Rules relating to compensation for player development

In addition to establishing the circumstances in which under-contract players may transfer to other clubs, the RSTP also provides two types of compensations relating to the training and development of footballers. These fees are payable in addition to any compensations awarded by the DRC or transfer fees agreed upon by the clubs themselves. This is because in many cases, the recipients of these compensations are not just the clubs releasing the transferring players, but also those clubs that have contributed to these players' development in their earlier years.

The first form of compensation is known as training compensation. It is stipulated in Article 20, and set out in Annexe 4 of the RSTP. The Regulations provide that this compensation is payable when a player signs his first professional contract, and thereafter upon every transfer to another club until the age of 23.[125] The fee is payable to every club that trained and/or educated the player from the age of 12 to 21, with each club receiving a *pro-rata* amount of the compensation depending on the number of years for which the player was with the club.[126]

The exact calculation of the training compensation is somewhat technical. For present purposes, it suffices to say that under the Regulations, all clubs are to be divided into four categories, depending on their level of financial investment in training facilities and staff. Each category has its own training costs payable, which also account for factors such as the average amount spent per player per year and the average number of youngsters trained in order to produce one professional player.[127]

Notably, it is the category of the club signing the player that is relevant when calculating the training compensation, in order to represent the costs that the club would have incurred had it trained the player itself.[128] Additionally, this may also discourage clubs from signing players from clubs or countries with lower training costs.[129]

Regarding players who received all their training in South Africa, both SAFA and the NSL provide the same requirement regarding training compensation as FIFA.[130] As for the categorisation of clubs, the NSL Rules stipulate that all Premier Division teams are considered Category 1 clubs (which incur the highest training costs), while the National First Division

[125] Article 20 of the RSTP.
[126] Annexe 4, Items 1.1 and 3.1 of the RSTP.
[127] Annexe 4, Item 4.1 of the RSTP.
[128] Annexe 4, Item 5.1 of the RSTP.
[129] FIFA "Commentary on the RSTP" 119.
[130] See Article 20 of the SAFA Regulations and Rule 45 of the NSL, respectively.

clubs fall within Category 2. The third and fourth categories are then made up of the clubs in SAFA's provincial, regional and local competitions.[131]

The second form of compensation is known as the "solidarity payment". It has a similar purpose to that of training compensation, but operates somewhat differently. Article 21 of the RSTP provides that this compensation is payable every time a player is transferred whilst under contract with his previous club. This means that the solidarity mechanism is applicable in mutually agreed transfers as well as unilateral terminations. Unlike training compensation, this liability is not cut off once a player turns 23. However, both compensation mechanisms share the similarity that they are payable in addition to any transfer fees or damages for which the new club is liable. Therefore, if a player is transferred before the age of 23, a club that contributed towards his development will be due both a training compensation and a solidarity payment.[132] According to FIFA, this mechanism has proven especially efficient in supporting the day-to-day operation of grassroots football.[133]

The calculation of the solidarity payment is somewhat simpler than the training compensation. The total amount payable by the club acquiring the player will be 5% of the agreed-upon or imposed transfer fee.[134] This will then be shared on a *pro-rata* basis among every club that had trained the player from the age of 12 to 23.[135]

With respect to domestic transfers, SAFA imposes the identical requirement on solidarity payments under Article 21 of its Regulations. However, the same mechanism is absent under the latest amended version of the NSL Rules. This was previously provided under Rule 34 of the 2012 Handbook, but was later removed without explanation.[136] Therefore, as far as transfers between PSL clubs are concerned, only training compensation is payable, which means that no payments (other than transfer fees) are necessary when the player involved is

[131] Rule 46 of the NSL. According to Rule 47, the training costs associated with Category 1 clubs are R50,000/year, while the costs of Category 2 clubs are R25,000/year. Category 3 and 4 clubs, which do not have professional status, have associated costs of R5,000 and R2,000 per year respectively.

[132] If a player is transferred after the age of 23, then only the solidarity will be due.

[133] FIFA "Commentary on the RSTP" 129.

[134] Annexe 5, Item 1 of the TSRP. This further confirms the assumption that mutually agreed termination of contracts are accompanied by a payment of transfer fees.

[135] *Ibid.* Each club receives a 10% share of the total solidarity payment for every year it trained the player being transferred. The exception to this are clubs responsible for the player's development from 12 to 15, who receive a 5%/year share instead.

[136] See NSL "The National Soccer League Rules" (2012) http://images.supersport.com/2012-08-30-NSL-Rules.pdf (accessed 21 September 2016).

over the age of 23. Solidarity payments are still applicable, however, in international transfers as well as transfers involving clubs from other member associations of SAFA.

9.2.5 Other remarks regarding the transfer system

As mentioned above, FIFA permits its national associations to adopt its own rules relating to transfer and registration of players, so long as they do not violate the basic principles of the RSTP outlined in 9.2.2. SAFA, in turn, has permitted its members to do the same. While the majority of the NSL Rules have the same practical effects as their FIFA counterparts,[137] the league organiser does impose two notable additional restrictions.

The first of these is the limitation on the number of foreign players that a club may register in its squad. As argued in Chapter 8, however, this issue falls outside the purview of competition law, and is therefore not examined in this thesis. Nevertheless, the rule on foreign player eligibility has recently been amended in order to afford clubs some flexibility, by allowing them to replace their registered foreign players during the season.[138]

The second limitation is only applicable in the National First Division. It imposes a minimum fielding requirement for players under the age of 23 who are also eligible to represent the South African national team. However, this rule has also been significantly relaxed recently. Under the previous Rule 35.2, every club playing in an NFD match had to field, out of the eleven players in the starting line-up each game, a minimum of five players that met the age and eligibility requirements. However, the league organisers have agreed, in 2016, to reduce this number from five to two in future seasons.[139]

Technically, the requirement is not a registration or transfer rule, but rather a fielding restriction, since teams in the division are not limited in the number of non-eligible players it may have on its books. Despite this, the rule in its previous form had the same potential to restrict competition as the transfer-related provisions discussed above, since the limitation on fielding indirectly affects the manner in which clubs will conduct their transfer businesses. However, it is submitted that the recent amendment has significantly reduced the impact it has on NFD clubs' ability to recruit players, and is not discussed as a potential violation of competition law below.

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[137] This is notwithstanding the absence of "termination without just cause" discussed earlier.

[138] Compare Rule 34.2 of the present NSL Rules with Rule 30.2 under the 2012 version.

[139] "PSL confirms change to U-23 rule in NFD" (2016) http://www.kickoff.com/news/68196/psl-confirms-change-to-u-23-rule-in-nfd (accessed 23 September 2016).

9.3 Jurisdictional issues in applying competition law to the transfer system

Therefore, for the purposes of this chapter, the focus of the discussion will be on the following aspects of the transfer system: the time limitation on player registration (and de-registration), the compensation requirement for transfers and unilateral terminations, and compensation for training and development of players. Before the merits of these issues can be discussed, however, it must first be shown that the jurisdictional requirements of the Competition Act are met. The latter issue was discussed in general in Chapter 5 above, and is revisited here specifically with the transfer system in mind. The section is divided into three topics, namely the preliminary issues, the relevant markets and lastly, the subjects and objects of the conduct under scrutiny.

9.3.1 Preliminary issues regarding competition law applicability

At the outset, it should be repeated that the Competition Act is undoubtedly applicable to the transfer system, regardless of whether the rules are issued by FIFA or the NSL. The starting point here is whether the conduct constitutes economic activity, and if so, whether it takes place, or alternatively has an effect, within South Africa.[140] In addition to the general remarks made in Chapter 5, the following can be added regarding the economic nature of transfer-related activities in football.

Firstly, the transfer regulations are closely related to the training and development of football players. A club that wishes to recruit young players for their sporting potential must follow the rules of registration as set out by FIFA and the competition organisers. These rules often contain provisions, such as training and solidarity compensations, that are aimed at incentivising clubs' investment in youth development. The training of players should be regarded as an economic activity, as it can ultimately serve economic objectives.[141] These include the achievement of sporting success, which can lead to increased revenue for the club, or the receipt of transfer fees that can supplement other sources of income.[142]

Secondly, the transfer system also impacts the ability of professional players to perform remunerated work. As football's history with the law relating to restraint of trade shows, rules on players' registration requirements inevitably hinder their ability to pursue more lucrative

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[140] Section 3(1) of the Competition Act 89 of 1998.
[141] Egger and Stix-Hackl 2002 *ECLR* 84.
[142] *Ibid.*

career opportunities. The work performed by footballers, which forms the basis of the sporting product offered by their employer-clubs, should also be considered economic in nature.[143]

Lastly, the act of transferring players itself should also be regarded as an economic activity. Although players are often described as being "bought" and "sold" when they register with a new club, it should be noted that these transactions involve human beings, who are not subject to purchase or trade.[144] While it is important not to overlook that it is in fact the services of players over which clubs negotiate, the reality remains that the development of players with the aim of maximising their eventual transfer values is a significant revenue source for many clubs.[145] It can even form the core business model for clubs that have a keen eye for identifying potential talents.[146] Therefore, regulations such as the RSTP directly concern the economic activities of football clubs, and go beyond the type of rules which are purely of sporting interest and may be exempt from competition law.[147]

The territorial requirement under s 3(1) is also easily met. With respect to domestic transfers, which are regulated by the NSL Rules, it is obvious that they constitute activities which occur exclusively within South Africa. As for international transfers, which are regulated by the rules of FIFA, they will inevitably have an effect within the country whenever a club under the jurisdiction of SAFA is involved.[148] Therefore, it is submitted that competition authorities have the territorial jurisdiction to examine both domestic and international regulations concerning the transfer system, insofar as they affect clubs in South Africa.

It is also necessary to state that none of the exemptions under the Competition Act is applicable here. With respect to the employment nature of football contracts, it should be noted the ss 3(1)

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[143] See *Dona v Mantero* [1976] ECR 1333 para 12.

[144] *Coetzee v Comitis* 2001 (1) SA 1254 (C) para 33.

[145] Receipt from transfer fees are even recorded as incomes, while the potential transfer values of existing players are reflected as assets in the financial accounts of professional clubs. See Egger and Stix-Hackl 2002 *ECLR* 84. This is, in part, enabled by the rise in the volume and magnitude of transfer fees since the *Bosman* judgment. See KEA/CDES (The Centre for the Law and Economics of Sport) "The economic and legal aspects of transfers of players" (2013) http://ec.europa.eu/sport/library/documents/cons-study-transfers-final-rpt.pdf (accessed 12 March 2015) 164.

[146] See, for examples, S Stone "Southampton: How Saints thrive despite selling best players & losing managers" *BBC* 17 November 2016 http://www.bbc.com/sport/football/37954971 (accessed 17 November 2016); and B Newman "After selling Danilo to Real Madrid, Porto have made over €600m in player sales since 2004" (2015) http://www.101greatgoals.com/news/transfers/selling-danilo-real-madrid-fc-porto-e600m-player-sales-2004-graphic/ (accessed 2 April 2015).

[147] Egger and Stix-Hackl 2002 *ECLR* 83 and 85.

[148] Alternatively, it may also be argued that the rules applicable to international transfers involving PSL clubs are implemented within South Africa, and therefore constitutes an economic activity within the Republic. See the discussion in 5.1.2 above.

(*a*) and (*b*) do not exempt all employment relationships, but only collective bargaining[149] and collective agreements[150] from the scope of the Act. The transfer rules examined in this chapter are issued by the executive committees of football governing bodies, rather than as the result of agreements between management and labour.[151] While a distinction should still be made that footballers are remunerated employees, and not independent service providers, the transfer rules cannot be exempt on the ground that they govern employment relationships.[152]

The Act also provides two other grounds of limited exemptions, under s 10 and Part A of Schedule 1, respectively. The former is inapplicable here, as none of the objectives listed under subsection (3) are relevant to the transfer of footballers. The same conclusion can be drawn regarding the latter, as football (or, indeed, any other sport) is not included as one of the recognised professions under Part B of the Schedule. Even if the Act were to be amended to include professional football players, it is doubtful that sports bodies like FIFA and the NSL would qualify as "association[s] that represent the interests" of the profession.[153] Therefore, it is clear that the issue of football transfer system is subject to competition law in South Africa.

9.3.2 The relevant markets

It may be easy to overlook the element of the relevant market(s) when analysing the transfer system. This is because the term "transfer market" is common parlance in the world of football, which may lead one to assume that the answer is self-evident. As mentioned above, however, it would be incorrect to think of the players themselves as being bought and sold on the transfer market, since that would equate them with tradable objects.[154]

Furthermore, while the services of footballers are certainly the primary "product" which the transfer system regulates, it is not the only market affected by the rules. In this regard, the analysis of Alexander Egger and former Advocate-General Christine Stix-Hackl, published in

[149] Within the meaning of s 23 of the Constitution, and the Labour Relations Act.

[150] Within the meaning of s 213 of the Labour Relations Act.

[151] Egger and Stix-Hackl 2002 *ECLR* 83.

[152] It may be recalled that this distinction was critical in the *NZRU* case, as the exemption sought by the governing body in that case was not applicable to employees.

[153] This is indicated by the persistent challenges to the rules by footballers' unions such as FIFPro and SAFPU. However, these representative organisations may not be considered "professional bodies" within the meaning of the Act either, as they do not have the power to regulate matters concerning the players.

[154] See FIFPro "FIFPro's EU competition law complaint - executive summary" (2015) https://www.fifpro.org/attachments/article/6156/FIFPro%20Complaint%20Executive%20Summary.pdf (accessed 19 September 2015).

the aftermath of the *Balog v Royal Charleroi* legal battle, is instructive.[155] The *Balog* dispute is still the closest that litigants have come to challenging the legality of the post-*Bosman* transfer system in court.[156] As other authors' continuous references to the case's unofficial opinion show, Egger and Stix-Hackl's analysis remains one of the most comprehensive and considered on the issue.[157]

In particular, the learned authors' classification of the relevant markets has become generally accepted.[158] Accordingly, there are three product markets affected by the transfer system. These markets are interconnected, in that a restriction in an upstream market will impact its downstream market(s) as well.[159]

The first of these markets is the "exploitation market", so named as it is the market where clubs financially exploit their sporting performances. Examples of such activities include the selling of media coverage rights, merchandisation of official memorabilia and the attraction of sponsorships. This is a secondary market, as clubs rely on strong on-field results to enhance their own financial marketability.[160]

Naturally, the "contest market" is immediately upstream of the exploitation market. This is where the actual sporting events are produced by clubs, through contests organised by a league or other governing bodies. Here, clubs not only compete against each other in the sporting sense, but are also incentivised by financial objectives such as gate receipts (from match-attending fans) and prize-money (through on-field successes).[161]

The product in this market is somewhat less substitutable than those in the exploitation market. The cases surveyed from the previous chapters show that courts generally consider each sporting code to be its own market, especially with regard to live attendance.[162] This can be

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[155] *Balog v Royal Charleroi Sporting Club ASBL (RCSC)* C-264/98, 29 March 2001. In this matter, a player challenged the legality of the transfer system under competition law grounds. The dispute was settled on the day that Stix-Hackl, the then Advocate-General, was due to publish her official opinion on the case.

[156] This may change should FIFPro's complaint reach the ECJ. However, at the time of writing, the European Commission is yet to announce an official investigation of the system's lawfulness.

[157] G Pearson "Sporting justifications under EU free movement and competition law: The case of the football 'transfer system'" (2015) 21 (2) *European Law Journal* 220 at 230.

[158] K Pijetlovic *EU Sports Law and Breakaway Leagues in Football* (2015) 170.

[159] Egger and Stix-Hack 2002 *ECLR* 86.

[160] *Ibid.*

[161] *Ibid.*

[162] See *NCAA v Board of Regents* 468 U.S. 85 (1984) 95 and 111; European Commission Decision No. 2003/778/EC (*COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League*), 2003

contrasted with the pursuit of sponsorships, for example. As the Commerce Commission of New Zealand remarked in the *NZRU* case, clubs must not only compete against each other, but also other sectors, in order to secure the most lucrative deals.[163]

In order to maximise success in the contest market, which also enhances a club's power in the exploitation market, playing talent is necessary. Therefore, both the contest and exploitation markets are downstream of the "supply" market, where clubs compete against each other in order to secure the services of the most skillful players.[164] At the same time, clubs that already have developed players in their squads are also competing to ensure that they retain the services of these players. While it is objectionable to regard players as marketable goods, the ECJ has held that it is not necessarily problematic to consider human labour as the subject of economic activity in many cases.[165]

The services of footballers are arguably even less substitutable than the products of the downstream markets. While players that perform the same sporting function within a team may be replaceable, their replacements can only be other football players. Nevertheless, the individuality here should not be exaggerated to the same degree of uniqueness as, for example, the performance of an artist.[166]

The exact extent of substitutability here also depends on the sub-market to which a player's services may belong. According to a report commissioned for the European Commission, three categories can be observed.[167] The first of these is the higher primary market, which consists of players who are considered the "superstars" of the game. These players command the highest transfer fees and wages, and are only available to a select few clubs who can afford such expenditure.

The second category is the lower primary market, and the players found here can be described as "good and experienced", rather than elite. Because of their competence in the basic areas of

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O.J. L 291/25 para 59; and European Commission Decision Summary of 22 March 2006 (*COMP/38.173 - Joint selling of the media rights to the FA Premier League*), 2006 O.J. C 7/18 para 20.

[163] It should be noted that under the Competition Act's s 1 definition of "goods and services", the test here is whether a product is reasonably capable of being substituted, taking into account ordinary commercial practice and geographical, technical and temporal constraints.

[164] Egger and Stix-Hack 2002 *ECLR* 86.

[165] *Höfner and Elser v Macrotron GmbH* [1991] E.C.R. I-1979 para 21.

[166] Egger and Stix-Hackl 2002 *ECLR* 87.

[167] KEA/CDES "The economic and legal aspects of transfers of players" (2013) http://ec.europa.eu/sport/library/documents/cons-study-transfers-final-rpt.pdf (accessed 12 March 2015)" 4-5.

the game, they can attract the interest of a large number of clubs. However, they do not earn the astronomical salaries of players in the first category.[168]

Players outside of these two groups are considered to be in the secondary market. Due to their limited sporting abilities, they have significantly less career opportunities than players in the primary markets. As a result, the majority of market power here lies with the clubs, who can replace the services of these players with ease and relatively little expense.[169]

With respect to the supply of players' services, the geographically relevant market also deserves some consideration. According to Egger and Stix-Hackl, the geographic market of the transfer rules covers all territory under the jurisdiction of the sporting authority which issued the rules in question.[170] Therefore, the rules of FIFA affect the global market for players' services, while the rules of SAFA affect the South African market for the same. The NSL rules also affect the South African market, in cases where only PSL clubs are involved.

On a practical level, however, the geographical impact of the FIFA and SAFA regulations should not be exaggerated.[171] Regarding the former, while South African clubs may resort to foreign players as substitutes for domestic players, the NSL's nationality quota means that clubs will have a preference to sign South African players instead. As for the SAFA regulations, while a footballer playing in one of the local competitions may transfer to another club anywhere in the country, in most cases, his skills level dictates that he will most likely only attract the interest of other local clubs.

In summary, the most important market with respect to transfers involving a PSL club is the services of South African footballers, and in limited cases, their foreign counterparts. Any impact in this market is also likely to be felt in the downstream exploitation and contest markets. The degree to which these services are substitutable depends on the level of playing talent that a particular club is looking for, which in turn depends on the availability of financial resources at that club.

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[168] KEA/CDES "The economic and legal aspects of transfers of players" 4-5.

[169] *Ibid.*

[170] 2002 *ECLR* 85-86.

[171] This is because the geographic market does not only depend on the nature of restriction in question, but also the nature of the conduct involved. HA Jordaan and MM Loubser "Sport: The Law of Employment and Competition Law" in JAA Basson and MM Loubser (eds) *Sport and the Law in South Africa* (2000) 8.45.

9.3.3 The subjects and objects of the prohibited practices

In order for conduct to violate the Competition Act, it must not only be anti-competitive in nature, but also take a certain form and involve parties in a certain relationship. The latter requirement is perhaps a more logical starting point, since it informs the type of practice which may be prohibited.

Chapter 2 of the Act applies to "firms". In Chapter 5, it was noted that a sports entity (or person) may constitute a firm, provided that it performs economic activities.[172] Therefore, the term includes football clubs and regulatory bodies, to the extent that their functions are economic in nature.[173] The qualification of clubs as "firms" is the most important one for present purposes. It is clear that football clubs perform economic functions in each of the three product markets outlined above. Furthermore, when performing these activities, the clubs are also competing against other clubs in the economic sense.[174] This form of competition illustrates that the clubs do not possess the characteristics of a single economic entity that would be exempt them under s 4(5) (*b*) of the Act.[175]

Nevertheless, there is a great degree of cooperation among clubs when they perform their economic activities. With respect to the exploitation market, league organisers commonly sell the television broadcasting rights of all the teams collectively, in order to maximise their market value.[176] In the contest market, it is paramount that clubs agree to various aspects of the competitions in which they participate, including the match schedules, stadium standards, and the rules of the game. Even in the supply market, clubs must arrive at some form of consensus regarding player eligibility and registration. Otherwise players would be able to switch clubs from one game to the next, thereby devaluing the sporting integrity of the contest.

Therefore, it appears that football clubs within the same league structure exhibit joint venture-like characteristics, similar to many other sports competitions. However, two things should be noted here. Firstly, the Competition Act does not exempt a group of firms merely because it is a joint venture, although the status may be relevant during the *per se* prohibited

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[172] See also Jordaan and Loubser *Sport and the Law* 8.44.

[173] P Sutherland and K Kemp *Competition Law of South Africa* 20 SI (2000) 5.37.

[174] For example, in the supply market, clubs compete against each other in order to secure the services of the most talented players. In the contest market, clubs compete in the sporting sense, in order to achieve higher league positions, which also leads to financial rewards. Lastly, in the exploitation market, clubs must remain competitive when negotiating sponsorship deals.

[175] See also Egger and Stix-Hackl 2002 *ECLR* 86.

[176] See, for example, Rule 22 of the NSL, and Jordaan and Loubser *Sport and the Law* 8.44.

conduct enquiry.[177] Secondly, it is submitted that the degree of cooperation is much weaker once clubs outside of the league structure is considered. In other words, while regulations imposed on clubs within the PSL may be considered incidental and necessary restraints, the same cannot be said about rules which affect clubs in every competition across every country. As argued in Chapter 10 above, this is why reliance on joint ventures is not an entirely convincing argument for *per se* exemptions in sport.

Having discussed the individual clubs, it is also necessary to consider the status of the league organisers and governing bodies. In Chapter 5, it was argued that these entities also constitute firms on their own. While this is true with respect to the NSL, SAFA and FIFA in the football context as well,[178] classifying these bodies as firms themselves does not take the matter further in the transfer system enquiry. This is because these entities are neither suppliers nor customers in any of the three relevant product markets outlined above,[179] which means it is not necessary to determine their status in the context of prohibited vertical practices.[180] At the same time, as these bodies do not compete with individual clubs for the services of professional footballers, it is also not necessary to determine whether they constitute firms that can exert market power within the abuse of dominance context.[181]

However, since the regulations issued by these bodies constitute almost the entirety of the transfer system, it is necessary to examine whether they constitute associations of firms within the meaning of s 4(1). According to Rule 10 of the NSL, its member clubs are all clubs which participate in the Premier Division and the National First Division of the PSL.[182] Rule 7.1.1 further states that the NSL itself is a special member of SAFA, along with the 52 regional

[177] See the discussion in Chapter 8 above.

[178] As Rule 22 of the NSL provides, the league organiser is authorised to financially exploit the various marketable rights of its constituent clubs. According to Article 74.4 of the SAFA Statutes (2015) http://www.safa.net/images/pdfs/statutes/201609/SAFAStatutes2015-26Sept2015.pdf (accessed 21 September 2016), SAFA has multiple sources of revenues, including subscription fees from its member associations and player registration fees. The enormity of FIFA's financial resources of FIFA were already discussed above. It should be noted that 90% of the world governing body's revenue derives from the sale of various rights related to the FIFA World Cup. See FIFA "Financial reports" (2016) http://www.fifa.com/governance/finances/ (accessed 21 September 2016).

[179] In the exploitation market, the product is produced by the clubs themselves, and purchased by their commercial partners. In the contest market, the clubs are the producers once again, while the spectators are considered the customers. Finally, in the supply market, the clubs are the buyers of footballers' services, and act as sources of supply at the same time (it should be noted that the clubs are not the suppliers themselves).

[180] Section 5 of the Act only applies to agreements between parties in a vertical relationship, which, in turn, is defined as one between a firm and its suppliers and/or customers under s 1.

[181] This can be contrasted with, for example, the sale of broadcasting rights. In such a scenario, both league organisers and their clubs may be attempt to market the same product, and the former's regulatory authority over the latter may be a concern for s 8 purposes. See Jordaan and Loubser *Sport and the Law* 8.50.

[182] The rule also provides for membership requirements, as well as the rights and obligations of member clubs.

football associations in South Africa.[183] SAFA, in turn, is a member association of FIFA, along with every accepted national association worldwide.[184] Therefore, it is clear that the NSL is an association of firms (the clubs in the PSL), while both SAFA and FIFA may be considered "associations of associations".[185]

The status of the footballers themselves may also be briefly considered. In Chapter 5, it was argued that individual athletes may be regarded as firms in some situations.[186] However, it is submitted that this would not be appropriate in the context the transfer system, because the players supply their services as employees, rather than independent contractors.[187] The employment relationship is generally not regarded as the type of vertical relationship governed by s 5 of the Act.[188] In any case, in order for the latter provision to be relevant, there must be an agreement between the parties in the vertical relationship concerning the restriction on competition, and no such agreements are applicable in the transfer context.[189]

Having discussed parties who may be considered the subjects of any restrictive conduct, it is now possible to look at the object(s) of their conduct. Section 4(1) only applies to conduct in the form of agreements or concerted practices among firms in a horizontal relationship, or decisions by an association of firms. The discussion above illustrates the various manners in which clubs compete against each other in the three relevant product markets. Therefore, the horizontal nature of the relationship between these clubs is apparent.

Nevertheless, it is submitted that the relevant conduct in the transfer context does not take the form of an agreement between these clubs. While it is possible to infer such consensus from their acceptance of membership under the league,[190] the better view is perhaps that the rules are

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[183] This is confirmed under Article 10 of the SAFA Statutes.

[184] FIFA "South African Football Association" http://www.fifa.com/associations/association=rsa/index.html (accessed 21 September 2016).

[185] See alo Egger and Stix-Hackl 2002 *ECLR* 85.

[186] Jordaan and Loubser *Sport and the Law* 4.48.

[187] SAFPU "South African Transfer Systems - 16 September 2013" (2013) http://www.safpu.org/content/documentation/statements/SA_TransferSystem_16Sep2013.doc (accessed 21 September 2016) para 1.3.

[188] *International Quality & Productivity Centre (Pty) Ltd v Tarita* [2006] JOL 18294 (W) para 22.

[189] This is because players are bound by the rules of the transfer system regardless of their consent to the relevant regulations.

[190] This would require the clubs to agree to be bound by the rules of the various governing bodies. See, for example, Rule 10.2 of the NSL.

a decision by associations of firms, namely the NSL, SAFA and FIFA.[191] This is because the statutes of these bodies provide mechanisms under which the transfer rules may be implemented and/or amended,[192] and their members do not have complete power over the content of the rules.[193] Therefore, the rules constitute binding decisions on the member clubs or associations, as the case may be.[194]

However, it should be noted that the payment of transfer fees during mutual termination of a playing contract is only explicitly mentioned in the NSL Rules, and not in the regulations of SAFA and FIFA. The latter documents only provide for the payment of compensation in cases of unilateral termination. Nevertheless, clubs have continued to transfer players upon payment of mutually agreed-upon fees, and the feature remains central to the transfer system.

In this regard, it is concluded that the clubs have a mutual understanding that any attempt to sign a player who is under-contract with another club will be met with a demand for transfer fees. Clubs have evidently regarded this as a legitimate claim, which lends strength to the argument that an understanding exists among the clubs, with regards to the payment of transfer fees.[195] Under the s 1 definition of "agreement", such an understanding is sufficient for the purposes of s 4(1) of the Act.

Therefore, it is submitted that the transfer system is a combination of rules issued by associations of firms, and agreements between football clubs. These rules have the capacity to affect at least three football-related markets. This conclusion means that it is necessary to examine the system on its merits.

9.4 The effect of the transfer system on competition

This section applies the rule-of-reason test to the transfer system, whilst taking into account the two proposals made in Chapter 8, namely the exemption from *per se* provisions of the Act and the consideration of sporting justifications during the enquiry. In order to apply the first of these proposals, it is necessary to examine whether the rules discussed in this chapter would otherwise violate s 4(1) (*b*) of the Act.

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[191] The relevant association in each case would depend on whether a transfer is domestic or international. However, *cf* the Competition Tribunal's remarks in *Venter v Law Society of the Cape of Good Hope*, that such decisions will necessarily constitute agreements between the members. 24/CR/Mar12 14/10/2013 para 51.

[192] See, for example, Rule 30.8.7 of the NSL.

[193] Egger and Stix-Hackl 2002 *ECLR* 85.

[194] However, as Sutherland and Kemp argue, even non-binding recommendations may satisfy the requirement of a "decision" for the purposes of s 4(1). *Competition Law* 5.27.

[195] Sutherland and Kemp *Competition Law* 5.23.

9.4.1 The relevant *per se* prohibitions in the transfer market

For present purposes, the main *per se* prohibition which may be applicable to the transfer system is provided under s 4(1) (*b*) (i) of the Act, which proscribes any conduct that meets the jurisdictional requirements discussed in 9.3 above, if it involves "directly or indirectly fixing a purchase or selling price or any other trading condition". This is commonly referred to as "price-fixing",[196] and its applicability to football transfers is the focus of the discussion below.

At the outset, it should be noted that the Act clearly indicates that prices may be fixed by both purchasers and sellers. Although most instances of price fixing involve the selling price, purchasing prices are capable of being fixed where the buyers have monopsony power.[197] As the discussion in 9.3.2 shows, this is the case with football clubs when they conduct salary negotiations with players.[198] However, the focus of enquiry here is the fees charged between the clubs themselves during a transfer. In this context, the "buying" club has no more market power than the "selling" club, who may refuse to release the players in question should it not be satisfied with the transfer offer.

It should be emphasised that the "selling" club is not the supplier in this context, but rather a source of supply for players' services. Therefore, it may be inappropriate to refer to the transfer fee as either a purchasing or a selling price. It is submitted that the transfer compensations should be considered as trading conditions instead. Whether a transfer fee constitutes a fixing of a trading condition may be difficult to determine, however. Here, direct price fixing is not likely to be applicable, due to the absence of any express *a priori* agreement on price or trading conditions.[199]

The issue remains whether clubs co-ordinate prices by indirect means. As will be argued in more detail below, the requirement to pay transfer fees reduces the frequency of player transfers, which in turn restricts clubs' access to the supply of players' services.[200] It is generally accepted that any attempt to control supply amounts to price fixing.[201] Nevertheless,

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[196] M Neuhoff *et al A Practical Guide to the South African Competition Act* (2006) 63.

[197] Sutherland and Kemp *Competition Law* 5.50.

[198] This is particularly the case where the player is from either the so-called "secondary market" or the "lower-primary market".

[199] Sutherland and Kemp *Competition Law* 5.60.

[200] Egger and Stix-Hackl 2002 *ECLR* 87.

[201] Neuhoff *et al Practical Guide to Competition Act* 64. See, for example, *Federal Trade Commission v Superior Court Trial Lawyers Association* 493 US 411 (1990) 423. *Cf National Home Products (Pty) Ltd v Vynide Ltd* 1988 (1) SA 60 (W), decided under the old Act.

the argument by Sutherland and Kemp, that a clear link between firms' concertation and the establishment of trading conditions must exist before the concertation in question can be regarded as indirect price fixing, is a convincing one.[202] It is submitted that the link between the agreement to pay transfer fees and the control of supply would be too tenuous to satisfy the requirement laid down by the learned authors.

On the other hand, however, the compensation requirement in cases of unilateral termination is likely to constitute price fixing by direct means. This is because the rules, stipulated by FIFA or the NSL (as the case may be), impose a trading condition that would not otherwise exist if players were permitted to leave without consequences. Although the requirement is framed in the form of guidelines, it may nevertheless constitute price fixing if the guidelines are intended to be followed by the members.[203]

Furthermore, the compensations relating to training and development of players may also constitute direct price fixing. The provisions relating to these compensations set out exact formulae in which the amounts must be calculated. Although these payments do not make up the entire amount payable upon transfers, they do establish a material element of the eventual trading condition.[204]

Finally, the rules of FIFA and the NSL also stipulate registration periods, outside of which an ordinary transfer cannot take place. On a literal interpretation of the Act, this would qualify as a trading condition as well. However, it has been argued that such an approach may be unduly restrictive.[205] Sutherland and Kemp have considered whether s 4(1) (*b*) applies to restrictions on business hours, and concluded, albeit with some reservation, that such restrictions would be *per se* prohibited under the Act.[206] It is submitted that the registration periods, which only take place twice a year, have a much greater capacity to restrict clubs' access to supply of players' services, and are more likely to be considered a direct fixing of trading conditions.

Before applying the exemption argued in the previous chapter, however, it should also be considered which of the above practices would escape the *per se* prohibition by virtue of the joint venture argument. As discussed in Chapter 8, competition authorities are unlikely to apply

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[202] *Competition Law* 5-61.
[203] See, for example, *Competition Commission v Association of Pretoria Attorneys* 33/CR/Jun03 30/07/2003.
[204] Sutherland and Kemp *Competition Law* 5.60.
[205] *Ibid* 5-68.
[206] *Ibid.*

the *per se* provisions of the Act to restrictions which are indispensable to joint ventures.[207] In the context of a football league, the match schedules may be considered an example of a necessary output restriction, and is unlikely to be prohibited under s 4(1) (*b*).[208] However, restrictions which are naked price fixes may be *per se* prohibited under the section.[209] Therefore, it is necessary to consider under which category the restrictions considered in this section fall.

It is submitted that the registration period requirement is the only rule discussed above that is necessary to the functioning of a league. Permitting clubs to register new players at any time during the course of a season may be disruptive. More importantly, it can undermine the sporting integrity of the competition, as it allows teams to drastically alter their playing strengths during the most crucial stages of a championship. Therefore, even if the rule relating the so-called transfer windows is excessive, that is an issue to be considered under the rule-of-reason enquiry instead.

Regarding the other requirements, however, it would be difficult to argue that compensation during transfers are essential to the operation of a sports league. While the rules may serve admirable objectives such as the encouragement of youth development, such an issue is only relevant under the rule-of-reason enquiry. In any case, the compensation scheme for unilateral termination of contracts cannot be regarded as indispensable to the league's operation. This is compounded by the fact that the rules also apply when clubs from different countries are involved. In such a scenario, it is submitted that the joint venture relationship is absent between the parties.

As a result, it is clear that a number of transfer-related rules would be subject to the *per se* provisions even if the competition authorities take the unique relationship between football clubs into account. The implication of this is that sporting justifications would be irrelevant without the exemption proposed in the previous chapter. The next section examines the lawfulness of these rules once the said exemption is applied.

9.4.2 The possible anti-competitive effects of the transfer system

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[207] However, it was also argued that the correctness of this approach is not settled. See also J Campbell "Restrictive Horizontal Practices" in M Brassey (ed) *Competition Law* (2002) 147.
[208] Sutherland and Kemp *Competition Law* 5.66.
[209] *Ibid* 5.64.

The starting point for the rule-of-reason test under s 4(1) (*a*) is whether the conduct in question has the effect of substantially preventing or lessening competition. The fact that a number of the transfer rules would otherwise constitute *per se* prohibited practices already hint at the answer here.[210] Nevertheless, the exact effect of these rules should be considered.

It may be recalled that the first of these requirements is that players must be properly registered in order to be eligible to play in official matches. While this rule does not appear to be overly restrictive on its own, its effect in combination with the other aspects of the transfer system must be taken into account. In order to satisfy the registration requirement, an under-contract player who is seeking a transfer must abide by all the other rules set out in the relevant regulations, and ensure his new club does the same.

These requirements are, broadly, the time period within which contracts may be terminated; the transfer fee payable upon mutually agreed transfers, or compensation in the case of unilateral terminations; and lastly, compensations relating to the training and development of players.

The time period limitation takes two forms. Firstly, an amicable transfer may only occur during one of the two registration periods; and secondly, a unilateral termination of contract, either with sporting just cause or without just cause, may not take place during the course of the season. As mentioned above, the primary anti-competitive effect of this restriction is that it limits the conditions under which clubs may compete for the services of football players.

Take, for example, the registration periods, which only last for a combined three months in the case of the PSL. This means that clubs are prevented from acquiring the relevant services for the majority of the year, and the substantiality of such a restriction is self-evident. As argued above, restrictions in the supply market will inevitably affect the downstream markets as well. For instance, a club which unexpectedly suffers a large number of injuries among its playing staff may wish to find urgent replacements in the transfer market. However, it must wait until one of the registration periods is in effect, by which time its on-field results have already been negatively affected.[211] Alternatively, a club may also wish to offload some of its players due to

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[210] However, the assumption should not be taken too far. It is possible that an act may constitute a *per se* prohibited practice under the Act without having the requisite anti-competitive effect under the rule-of-reason enquiry. For example, a price-fixing arrangement may be so insignificant that it does not meet the requirement of "substantiality" under s 4(1) (*a*). See Campbell *Competition Law* 144.

[211] S Camatsos "European sports, the transfer system and competition law: Will they ever find a competitive balance?" (2005) 12 *Sports Law Journal* 155 at 170.

dire financial situations. Again, this cannot occur until one of the transfer windows is open.[212] It has been argued that this restriction is more likely to affect clubs with few financial resources, as the wealthier clubs are likely to have larger squads capable of dealing with injury problems or to withstand financial difficulties.[213]

The anti-competitive effect of the time period limitations, however, may not be as severe as that the transfer fees, which generally tends to distort the forces of supply and demand in the market.[214] This is indeed the case under the current transfer system.[215] In particular, the rules regarding mutual termination have effectively given clubs the ability to retain their players (for the duration of their contracts), with a right to compensation. In many cases, the potential club may be unwilling to meet the fees demanded. This reduces the opportunity which players have to join new clubs, and conversely, the clubs' access to the supply of these players' services is also restricted.[216] Once again, a restriction on clubs' ability to recruit talented players also limits their ability to pursue their interests in the downstream markets.

However, this restriction does not affect all clubs equally. In their attempts to realise the maximum transfer value of their players, clubs are more likely to encourage players, especially those with the most skills, to transfer to clubs and/or countries which can make the most lucrative offers.[217] As a result, the wealthiest clubs benefit from a transfer system that restricts the player services market in their favour.[218] Both the new president of FIFA and the secretary general of FIFPro have recognised this to be the reality of the present transfer system.[219]

The above applies to compensation when a contract is unilaterally terminated by the player as well. As the *Matuzalem* decision has shown, such compensation is likely to reflect the would-be transfer fee, which means that the supply of these players' services is not more accessible to prospective clubs. In fact, clubs considering the recruitment of players who have unilaterally terminated their contracts also have to contend with the fact that, firstly, the exact

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[212] *Ibid.*
[213] Camatsos 2005 *Sports Law Journal* 170.
[214] Jordaan and Loubser *Sport and the Law* 8.45.
[215] Egger and Stix-Hackl 2002 *ECLR* 87.
[216] *Ibid.*
[217] Jordaan and Loubser *Sport and the Law* 8.45.
[218] Pearson 2015 *ELJ* 235.
[219] See B Homewood "Infantino wants to clean up transfer system" *Reuters* 3 Noveber 2016 http://in.reuters.com/article/soccer-fifa-infantino-idINKBN12Y2C4 (accessed 4 November 2016) and FIFPro World Players' Union "Football revenue sharing 'miserly", MEP says" (2016) https://www.fifpro.org/news/football-revenue-sharing-miserly-mep-says/en/ (accessed 1 June 2016).

compensation amount will be uncertain until it is determined by an external body;[220] and secondly, these players may also face sporting sanctions if the termination was without just cause.

The issues of uncertainty and possible sporting sanctions do not apply to compensation relating to training and development of youngsters. However, the arguments regarding the transfer fees in general are applicable to such compensation. Additionally, it has been argued that the provisions may also have the unintended consequence that clubs would emphasise recruiting older players in order to avoid paying training compensation.[221] This is particularly relevant for PSL clubs, which are not liable for solidarity payments in domestic transfers. This can be contrasted with the rules of FIFA, where the compensation is payable regardless of the player's age.

Therefore, it is clear that the transfer system has a number of aspects which can substantially prevent or lessen competition in the identified markets. The rules are *prima facie* anti-competitive in nature, and would be prohibited under s 4(1) (*a*) of the Act unless there are outweighing pro-competitive arguments.

9.4.3 Economic and sporting justifications of the anti-competitive effects

This section discusses the relevance of any pro-competitive or sporting arguments which may justify the restrictive aspects of the transfer system. Purely sporting justifications are not presently admissible under the rule of reason enquiry. However, as proposed in the previous chapter, an exception is necessary in order to account for the specificities of sport and to ensure that its development is not unduly hindered. Therefore, this section will attempt to illustrate how sporting justifications may complement arguments relating to economic gains.

The latter serves as a starting point in the analysis. According to s 4(1) (*a*), technological, efficiency and other pro-competitive gains are acceptable, but they must outweigh the anti-competitive effects of the conduct in question in order to justify the said conduct.

In terms of economic benefits, only efficiency-related arguments appear relevant in the context of the transfer rules. Here, a distinction may be made between restrictions essential to the league's operation and restrictions that merely enhance the appeal of the competition to consumers. This was already discussed in the context of *per se* prohibitions above, and it may

[220] Pearson 2015 *ELJ* 236.
[221] Camatsos 2005 *Sports Law Journal* 171.

be recalled that only two aspects of the transfer system may be regarded as necessary, namely the requirement that all players must be duly registered by their clubs, and that such registrations may only occur during the specified periods. Allowing clubs to sign any player during any stage of the season would resemble the state of the game during its amateur days, and undermine the integrity and structure of professional leagues.

However, as argued in the previous chapter, competition authorities should also examine whether a claimed pro-competitive gain can be obtained through less restrictive means. With respect to the registration requirement, it is submitted that the obligation on clubs to register their new players is not an unreasonable one. The additional conditions that the player can only be registered with one club at any time, and may only play for a maximum of two clubs within any given year are also unproblematic, as exceptions are granted in the rules to players who are temporarily "loaned" to other clubs, or who have transferred between countries where the registration periods do not coincide.

On the other hand, the time period limitations may be more difficult to reconcile with the reasonableness requirement. If the rationale behind the registration period is to ensure the sporting integrity of the competitions, by preventing clubs from altering the balance of play towards the end of a championship, then it is unclear why the restriction is also imposed during the first half of the season. Perhaps the true logic behind the so-called transfer windows is to be found in FIFA's own explanation of the rule. In its official commentary on the RSTP, it states that the purpose of the main registration period is to allow clubs to set up their squads for the upcoming season, while the second period is mainly used for "technical adjustments" and the replacement of injured players.[222] Therefore, a strategic element can be deduced from the timing of the registration periods: Clubs must either "live or die" by their recruitment decisions made during the off-season, with a metaphorical "window" of opportunity to adjust for unexpected inadequacies in their squads during the mid-season point. It seems that the rule is also aimed at generating fan interest, and thus goes beyond merely protecting the sporting integrity of the competitions.

However, this does not necessarily mean that the gains relating to the registration periods are invalid. Its effects may still be regarded as pro-competitive if it can be shown that consumers benefit from the excitement surrounding transfer periods, although it may be dubious to claim the requirement as one of the essential aspects of a sports league.

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[222] FIFA "Commentary on the RSTP" 22.

By comparison, the rule that players may not unilaterally terminate their contracts during the course of the season appears to be excessive. The rule applies to players who wish to terminate with sporting just cause and those who are terminating without just cause. The limitation on the former is a reasonable one, as a player would not know if he meets the 10% threshold until the end of the season, but the same logic does not hold for the latter, who may have made up his mind to leave the club at any time.

As mentioned above, the rationale for the off-season requirement in such cases is to protect these players' existing clubs from squad instability. Allowing players to leave at the end of a season gives their clubs a chance to find suitable replacements during the registration period. However, this does not explain why players may not terminate their contracts while the second registration period is operational, as clubs already use that opportunity to adapt to injuries and other mid-season departures. Therefore, to the extent that terminations are only permitted after the end of the season, the rule should be regarded as unnecessarily restrictive.

The next issue to be considered is whether the other aspects of the transfer rules offer any pro-competitive gains within the meaning of s 4(1) (*a*). It may be observed that these rules all relate to compensation to a player's former clubs, through transfer fees, compensation for unilateral termination, or training and/or solidarity payments. As may be recalled from the discussion in Chapter 10, the most relevant justifications offered for the existence of these compensation schemes are the promotion of competitive balance, the maintenance of team stability, the encouragement of youth training, and the development of grassroots football.

From the above objectives, it is clear that the last issue (also referred to as "solidarity" efforts) is non-economic in nature. Both team stability and training compensation have also been dismissed in jurisdictions that do not accept purely sporting justifications, on the ground that they are antithetical to competition law. Competitive balance, however, has consistently been recognised as a legitimate pro-competitive gain, at least in theory. But as the case studies from the previous chapters have shown, there is a very weak link between spectator interest and the existence of a relatively balanced and unpredictable competition.

Therefore, in a traditional competition law analysis, it is submitted that competition law authorities will likely find that the anti-competitive effects of these rules outweigh their pro-competitive gains. The issue must thus turn on whether accepting the sporting benefits of the above justifications would alter this outcome.

The first issue here is the promotion of competitive balance. As argued in Chapter 8, there are convincing reasons why this should be accepted as a justification even if it does not enhance spectator interest. The problem in the transfer context, however, is whether the present system in fact promotes or even maintains such a balance.

In the discussion regarding the anti-competitive effects above, it was shown that the compensation requirements tend to restrict smaller clubs more than their wealthier counterparts. The ECJ remarked, in *Bosman*, that the then compensation scheme did not promote competitive balance, because under the system, wealthy clubs were not precluded from hiring the most talented players, and it does not address the problem that financial resources remain the decisive factor in determining sporting success.[223] Egger and Stix-Hackl have observed that this has remained unchanged with respect to the present transfer compensation schemes.[224] Some writers have suggested that the new system has in fact increased the degree of imbalance between rich and poor clubs.[225] This appears to be supported by the statistics, which show that despite the increase in transfer fees and volumes since the *Bosman* judgment, these transfers have become ever more concentrated among the elite clubs in Europe.[226] This has led to on-field successes being dominated by the clubs that can afford to outspend their rivals.[227] Therefore, the inevitable conclusion is that competitive balance cannot be accepted as either a economic or sporting justification for the transfer system.

The second objective to be considered is the maintenance of team stability. Here, it is clear that the rule regarding unilateral termination without just cause does give clubs the ability to retain players that they want. In particular, players whose contracts are within the so-called "protected period" are heavily discouraged from terminating their contracts, as they face the prospect of a sporting sanction. Regardless of whether the protected period is active, clubs are compensated if a player leaves whilst under contract.

The criticism here, however, is the excessive nature of the compensation claims. As the CAS cases have shown, the amounts awarded to clubs will account for circumstances such as the player's transfer value. These considerations have been argued as being unreasonable, and as

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[223] Para 107.
[224] 2002 *ECLR* 89.
[225] Pearson 2015 *ELJ* 235.
[226] KEA/CDES "The economic and legal aspects of transfers" 148 and 164.
[227] *Ibid* 11.

not reflecting any objective criteria.[228] It is submitted that if the rationale of the rule is to compensate clubs for the disruptions in their squad, and any resulting sporting losses, a less excessive alternative would be to base such compensation on objective factors such as the player's outstanding salary remaining on his contract, the player's age (and thus his potential to contribute to the club's future success) and playing performances.[229] In this regard, the compensation awarded in *Webster* is closer to such a criteria than the one seen in *Matuzalem*.

The objectives relating to youth development and grassroots football appear to be addressed by both the training compensation and the solidarity mechanism. It should be repeated that the latter is not required under the rules of the NSL. The previous chapter discussed the social benefits related to these two objectives. However, the problem regarding the compensation provided under the RSTP is not that it is excessive, but whether it actually achieves the goals of encouraging youth recruitment and developing amateur (or other lower-level) football at all.

Since the requirements were implemented, training and solidarity compensation have only constituted 1.84% of the total transfer fee exchanged by clubs globally.[230] It has been argued that this does not sufficiently incentivise investment on player development.[231] This has prompted calls for the compensation mechanisms to be increased.[232]

While this thesis has argued that competition law should account for sporting justifications so as to not hinder the development of sport, it must be acknowledged that it is not the responsibility of competition authorities to dictate whether the measures adopted by sporting bodies sufficiently promote these interests. Therefore, it appears that even if more can be done to promote youth development and grassroots football under the transfer system, the competition lawyer must be satisfied if it can be shown the the rules already adopted are not excessive.

Nevertheless, it can be concluded that with respect to the rules examined in this chapter, only the three aspects can be regarded as complying with the Competition Act, namely the registration requirements, the training compensation and the solidarity mechanism. The

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[228] Egger and Stix-Hackl 2002 *ECLR* 89.

[229] Egger and Stix-Hackl 2002 *ECLR* 87 and 89. See also KEA/CDES "The economic and legal aspects of transfers" 12.

[230] KEA/CDES "The economic and legal aspects of transfers" 11.

[231] Pearson 2015 *ELJ* 235.

[232] KEA/CDES "The economic and legal aspects of transfers" 12.

residual aspects of the transfer system either do not achieve their stated objectives, or do so in an unnecessarily restrictive manner.

Even when the unique characteristics of sport are taken into account, it is submitted that the following aspects of the transfer system in football are in contravention of s 4(1) (*a*) of the Competition Act:

1. The registration periods, as prescribed under Article 6 of the FIFA RSTP, Article 6 of the SAFA RSTP and Rule 31.5 of the NSL Handbook;
2. The payment of transfer fees for registration of under-contract players;
3. Compensation for unilateral termination of contracts, as prescribed under Articles 15 and 17 of the FIFA RSTP and Articles 15 and 17 of the SAFA RSTP; and
4. Sporting sanctions for unilateral termination of contracts, as prescribed under Article 17 of the FIFA RSTP and Article 17 of the SAFA RSTP.

A few remarks may be made as to what sports bodies can do to ensure that the above aspects of the transfer system comply with competition law. Regarding the registration periods, it is submitted that the rule need not be abolished in its entirety. Limiting clubs' ability to register players during the latter part of a championship can achieve the legitimate aim of ensuring the fairness of outcomes. Therefore, the transfer windows can still be justified under the approach proposed in this thesis, provided that their durations are extended so as only to prevent transfers which would cast doubt on the integrity of results.

On the other hand, the payment of transfer fees for under-contract players should no longer be permitted at all. Unlike the registration period, the problem with transfer fees is not that they are more restrictive than necessary to achieve their objectives. As argued above, the practice has adversely impacted competitive balance in football, and its effect on team stability appears to be negligible. Therefore, it is submitted that the link between transfer fees and the ostensible sporting objectives is too tenuous to warrant justification under the proposed approach.

Whether the compensation scheme for unilateral termination of contracts achieves any legitimate sporting objective is somewhat debatable. Assuming that the rule is necessary to supplement FIFA's other compensation mechanisms aimed at promoting training and development of young players, its justification still depends on the elimination of its unnecessarily restrictive aspects.

Firstly, it is submitted the compensation amounts must be capable of objective calculation. Therefore, the current method of determination, which requires the verdict of a Dispute Resolution Chamber after the termination has taken place, is riddled with uncertainty. The relevant criteria for determining compensations should (1) be explicitly stipulated in the regulations; and (2) be capable of calculation *a priori*.

Secondly, the compensation amounts must also be proportionate to the objective of youth development. Therefore, an amount that reflects the transfer fee which would have been due to the previous club cannot be regarded as reasonable, as it does not relate to the actual costs of training and development.

Thirdly, governing bodies must also be able to show why the objective of youth development cannot be achieved through existing training compensations and solidarity mechanisms. The latter two systems already meet the requirements discussed above, and were specifically designed to encourage the training of young players. Therefore, it will be necessary to show why they are inadequate in achieving the goal.

Finally, regarding the imposition of sporting sanctions for unilateral terminations, it is submitted that the rule may still be justifiable if it is only applied to terminations without adequate notice. However, the sanction must remain limited to its purpose, i.e. preventing team disruptions. Therefore, an excessively long ban may still be regarded as unreasonable. Furthermore, sporting sanctions for unilateral termination (with notice) during the "protected period" of a player's contract should be struck down for the same reason that monetary compensation is regarded as excessive in such a case.

CHAPTER 10

CONCLUSIONS AND RECOMMENDATIONS

10.1 Conclusions

This thesis set out to determine the appropriate approach in applying competition law to sports-related practices. The approach had to satisfy two requirements: firstly, it had to be capable of eliminating anti-competitive conduct in the sports industry, and secondly, it had to do so without inhibiting the growth of sports in the country.

The second requirement is necessary due to the social significance of sport. Chapter 2 examined sport's sociological functions and benefits, which are also clearly recognised by the Department of Sport and Recreation. At the same time, the importance of sport does not mean that sports authorities should have complete autonomy. Chapter 3 argued that sport should be subject to competition law regulation, in order to prevent sports bodies from abusing their regulatory powers for commercial purposes.

The next two chapters discussed the jurisdictional applicability of the Competition Act[1] to sport generally. Chapter 4 concluded that the Act is applicable even when the law on contracts in restraint of trade may be relevant, while Chapter 5 considered the jurisdictional elements of the Act in relation to sports entities. It was argued, crucially, that despite the various social aspects of sporting endeavours, professional sport must be regarded as an economic activity within the meaning of the Act.

However, the social aspects of sport meant that applying competition law to sport may require special consideration. Due to the lack of South African case law dealing with the issue, other jurisdictions were examined in order to compare foreign competition authorities' approaches to sports-related cases.

Chapters 6 and 7 surveyed the laws of Australia, Canada, India, New Zealand, the U.S. and the E.U.. Divergent approaches on three issues were identified in these jurisdictions. The first issue is whether sports cases may be considered under the rule of reason, even when they would

[1] Act 89 of 1998.

otherwise be regarded as *per se* prohibited conduct. The second issue is whether non-economic justifications for restrictive sporting practices may be considered during the rule-of-reason enquiry. The last issue concerns the manner in which sporting justifications (economic or otherwise) should be evaluated against adverse effects on competition.

Chapter 8 considered the approach that South African law should adopt with respect to each of these issues. On the first issue, it was argued that all restrictive conduct in sport should be considered under the rule of reason, even though such an approach is not currently permitted under the Competition Act. Therefore, it was proposed that the law be amended in order to exempt sports-related practices from the *per se* prohibitions contained in ss 4, 5 and 8 of the Act.

Regarding the second issue, it was argued that sporting justifications should be considered during the rule-of-reason enquiry irrespective of whether they relate to any economic benefits. This approach is not currently permissible under the Competition Act either. Therefore, it was also proposed that competition authorities considering sports-related cases should have regard to any sporting justification that the conduct is designed to achieve, and whether the justification alleged is beneficial from a social perspective.

Regarding the last issue, it was argued that South African competition authorities' current approach to evaluating pro-competitive gains is appropriate when adapted for sporting justifications. In particular, it was noted that the familiar criteria relating to consumer benefit and adoption of least restrictive means should be emphasised in sports-related cases. It was finally proposed that these two factors be considered when determining the justifiability of sporting objectives.

Chapter 8 also provided a draft new section for insertion into the Competition Act, incorporating the proposed changes. Chapter 9 applied the proposed approach to the transfer system in football. It was concluded that several aspects of the system could not be justified even when their ostensible objectives are accounted for. The most problematic aspect was the payment of transfer fees or compensation during the transfer of under-contract players. At the same time, other aspects of the transfer system, including FIFA's training compensation and solidarity mechanism, are compatible with competition law despite their adverse effect on competition, provided that they are not more restrictive than necessary to achieve their legitimate sporting objectives.

The proposed approach illustrates that it is possible to account for the unique characteristics of sport without undermining the effectiveness of competition law. It should also be used by sports governing bodies as a guide for revising their existing rules, not only to comply with the law, but also to ensure that the economic interests of sports entities and the rights of sportspersons are not compromised as a result of the development of sport.

10.2 Recommendations and future research

Further research regarding a number of issues relating to this thesis should be welcomed. Firstly, there still appears to be some uncertainty regarding cases that are simultaneously subject to competition law and the law relating to contracts in restraint of trade. Although it is clear that a competition authority would have jurisdiction in such a scenario, there is some doubt as to what a civil court should do when it is alleged that it is precluded from hearing a case due to the applicability of the Competition Act.

Secondly, the competition cases dealing with the Act's *per se* prohibitions indicate that a degree of uncertainty regarding the precise scope of these prohibitions. In particular, clarification may be beneficial with respect to the type of evidence permissible during the enquiry that the SCA has termed the "characterisation of the conduct". Furthermore, the wisdom of the CAC may be necessary in order to determine, once and for all, whether conduct incidental to otherwise lawful agreements is subject to the Act's *per se* provisions.

Thirdly, there is a decidedly limited amount of data relating to the sports market available in South Africa. Therefore, empirical studies will be crucial in determining the true extent of sporting practices' effect on competition. The author of this thesis acknowledges the limitation that the scarcity of data has placed on the arguments herein, and urges that more resources be directed towards exploring the relationship between sports and competition law in practice.

In addition to the need for further research, two practical issues also emerge from this thesis. Firstly, the discussion in Chapter 8 illustrated that the present legal position may be inadequate to address competition law issues relating to sports. It was argued that the Competition Act lacks a mechanism for recognising why clearly legitimate sporting practices, for example anti-doping regulations, are permissible under the Act, despite their adverse effects on competition. It is hoped that the proposed amendment can stimulate debate concerning the issue, and lead to legislative action.

Secondly, regardless of the outcome of FIFPro's complaint regarding the transfer system in football, sports authorities in South Africa should more readily acknowledge the restrictive aspects of the rules. Instead of preparing for an adversarial battle in the courts, the European experience has shown that a more satisfactory solution can be found when sports bodies work in tandem with competition authorities. It is hoped that the suggestions made in this thesis can serve as a starting point for dialogue between the stakeholders. After all, "competition is the spice of sports; but if you make spice the whole meal, you'll be sick."[2]

[2] Attributed to George Leonard.

APPENDIX A

PROPOSED AMENDMENT TO THE COMPETITION ACT 89 OF 1998

Section 10A. Restrictive practices relating to professional sport

(1) This section applies to practices that -

(*a*) are related to the organisation and/or regulation of professional sport; and

(*b*) involve a firm or an association of firms which is -

(i) a sports administration body, as defined in section 1 of the South African Institute for Drug-Free Sport Act 14 of 1997;

(ii) a sport or recreation body, as defined in section 1 of the National Sport and Recreation Act 110 of 1998;

(iii) an event organiser, as defined in section 1 of the Safety at Sports and Recreational Events Act 2 of 2010;

(iv) a team or club engaged in professional sport;

(v) an athlete, defined in section 1 of the South African Institute for Drug-Free Sport Act 14 of 1997.

(2) The provisions of sections 4(1) (*b*), 5(2), 8 (*a*) and 8 (*b*) do not apply to a practice referred to in subsection (1), unless that practice has the effect of substantially preventing, or lessening, competition in a market, and a party to the practice cannot prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

(3) When determining whether a practice referred to in subsection (1) constitutes a prohibited practice in terms of this Chapter, the Competition Tribunal or Competition Appeal Court before which the contravention is alleged shall have regard to whether -

(*a*) the practice in question is designed to achieve any sporting objective; and

(*b*) the objective described in paragraph (*a*) has social, educational or consumer benefits; and

(*c*) the practice is the least restrictive means of achieving the objective described in paragraph (*a*).

(4) For the purposes of this section, “professional sport" means sport in which participants receive remuneration for their services as participants.