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# **Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe**

***Marc Edelman\****

***Brian Doyle†***

Over the past several years, both the National Basketball Association (NBA) and the National Football League (NFL) have taken steps to expand their footprint in Europe.<sup>1</sup>

In February 2008, after playing a limited number of exhibition games in Europe during the 2006–07 and 2007–08 seasons, NBA Commissioner David Stern announced plans to place up to five expansion franchises in Europe within the next ten years.<sup>2</sup> Stern’s plan called for a five-team

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<sup>1</sup> See Doreen Carvajal, *U.S. Leagues Race to Give up Home-Court Advantage*, INT’L HERALD TRIB., Nov. 11, 2006, at 13, available at 2006 WLNR 21360133 (“[T]he NBA brought four teams to Western Europe and Russia to play exhibition games.”); Juan Jose Mateo, *Rumor Linking Real Madrid with NBA Causes Uproar at Club as Official Quits*, EL PAÍS, Dec. 14, 2006, at 6, available at 2006 WLNR 21533147 (discussing possibility of Spain’s Real Madrid team being eventually invited to join the NBA); *Stern: NBA Needs More Money to Expand to Europe*, SOUTHTOWN STAR (Chicago, IL), Mar. 28, 2008, at B-2 (discussing NBA Commissioner Stern’s interest in expanding the NBA into Europe). Cf. Doreen Carvajal, *U.S. Leagues Race to Give up Home-Court Advantage*, INT’L HERALD TRIB., Nov. 11, 2006, at 13, available at 2006 WLNR 21360133 (“NBA.com draws more than 2.6 million daily visits, with more than half of the traffic coming from fans outside the United States, according to league officials.”); *Powerlunch Europe 2007-10-26 11:13:11*, CNBC GENERAL PROGRAMMING, Oct. 26, 2007, available at 2007 WLNR 21209763 (discussing NFL regular season game in Europe as first step toward expansion overseas).

<sup>2</sup> See Michael Hunt, *Michael Hunt In My Opinion: In Need of Cultural Revitalization*, MILWAUKEE J. SENTINEL, Feb. 15, 2008, at C1; *Stern: NBA Needs More Money to Expand to Europe*, SOUTHTOWN STAR (Chicago, IL), Mar. 28, 2008, at B-2 (NBA plans to place one

European division, with new basketball franchises located in several European Union (EU) Member States.<sup>3</sup>

Meanwhile, on October 28, 2007, London's Wembley Stadium hosted the first regular-season NFL game played overseas.<sup>4</sup> According to NFL Commissioner Roger Goodell, the NFL is committed to play at least one regular-season game in England during each of the next three seasons.<sup>5</sup> The NFL has also indicated interest in playing games in Frankfurt, Germany, where the league has long maintained an international office.<sup>6</sup>

From a marketing perspective, the expansion of U.S. professional sports leagues into Europe opens up new revenue opportunities.<sup>7</sup> However, from a legal perspective, if either the NBA or NFL expands into EU Member States, the league would expose itself to potential liability under the European Community Treaty (EC Treaty).<sup>8</sup>

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team in Europe); Marc Tandan, *Cubby Hole*, VIRGINIAN-PILOT (Norfolk, VA), Feb. 18, 2008, at C2 (NBA plans to place "up to five teams" in Europe). Cf. Terry Lefton, *NBA Still Doing Some Interesting Deals on Homefront Too*, STREET & SMITH'S SPORTS B. J., Oct. 29, 2007, at 14 ("After being continually pestered by those touting the NBA's declaration of manifest destiny in both Europe and Asia, we felt the need to verify that there is still a healthy domestic business for the league.").

<sup>3</sup> *NBA May Expand into Europe*, IRISH TIMES, Feb. 15, 2008, at 19, available at 2008 WLNR 2952981.

<sup>4</sup> See David Picker, *Keeping Things Normal for an Abnormal Event*, N.Y. TIMES, Jan. 25, 2008, at D-3; see also Greg Bishop, *It's a Scrimmage, Not a Scrum*, N.Y. TIMES, Oct. 28, 2007, at 42 ("The contest, the first regular-season National Football League game played outside of North America, brings the American version of the sport full circle. If you trace football back to its origins, you end up, well, in London."); John Branch, *English Reserve Meets N.F.L. Bombast*, N.Y. TIMES, Oct. 29, 2007, at D-1 ("To introduce the N.F.L.'s overseas arrival, an on-field pregame show included a pop band, the white-booted and short-shorted Dolphins cheerleaders, four dozen people twirling gigantic Dolphins and Giants jerseys, and a circling blimp. Players were announced with fireworks and bursts of flames."); Mark Hodgkinson, *American Sports, American Excess. No Thanks*, N.Y. TIMES, Oct. 28, 2007, § 8, at 10.

<sup>5</sup> See John Branch, *At 90, Giants Trainer Decides He Will Retire After Sunday's Game*, N.Y. TIMES, Feb. 2, 2008, at D-4 ("The N.F.L. also has a three-year commitment to play at least one game in Britain. The New Orleans Saints will play host to the San Diego Chargers on Oct. 26 at Wembley Stadium in London. Goodell noted that many franchises were interested in playing in this year's game.").

<sup>6</sup> See Daniel Kaplan, *NFL Limits Overseas Focus*, STREET & SMITH'S SPORTS B. J., Aug. 6, 2007, at 10 ("The NFL's much-hyped plans to play international regular-season games is focused on two overseas locales: England and Germany."); Daniel Kaplan, *NFL to Put International Office in Frankfurt*, STREET & SMITH'S SPORTS B. J., Jan. 9, 2006, at 4 (accompanying chart).

<sup>7</sup> See Ian Thomson, *FIBA Not Thrilled About NBA's Plan*, SPORTS ILLUSTRATED, Feb. 25, 2002, at 75.

<sup>8</sup> See Consolidated Version of the Treaty Establishing the European Community art. 81, 2006 O.J. (C 321) 73 [hereinafter EC Treaty]; Joined Cases 89, 104, 116, 117, & 125–129/85, A. Ahlström Osakeyhtiö v. Commission, 4 C.M.L.R. 901 (1988), ¶¶ 11–23 [hereinafter *Re Wood Pulp Cartel*]; see also ALISON JONES & BRENDA SUFRIN, EC

This article discusses the legal risks that would emerge if the NBA and NFL decide to expand into Europe. Part I of this article explains the differences in operating structure between U.S. and European professional sports leagues. Part II discusses the differences in competition law between the United States and European Community. Part III explains why the legal status of age and education (age/education requirements) is more favorable to professional sports leagues under U.S. law than under EC law. Part IV explains why the legal status of league drafts and reserve systems also might be more favorable to professional sports leagues under U.S. law.

## I. THE STRUCTURE OF PROFESSIONAL SPORTS LEAGUES

U.S. and European professional sports leagues are structured differently from one another.<sup>9</sup> In the United States, sports leagues operate under a closed-entry structure with a set number of clubs per league.<sup>10</sup> By contrast, in Europe, sports leagues operate under a promotion-and-relegation system that allows any prospective owner to form a club and join.<sup>11</sup> Because of these differences, sports economics literature often refers to U.S. team owners as "profit-maximizing businessmen," while referring to European team owners as "sportsmen."<sup>12</sup>

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COMPETITION LAW: TEXT, CASES, AND MATERIALS 1056 (2001) ("In *Wood Pulp*, therefore, the Court confirmed that Article 81 could be applied extraterritorially."). The major thrust of the extraterritorial scope of European competition law derives from the *Re Wood Pulp Cartel* cases, in which the European Court of Justice (ECJ) held that "by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of [Article 81]." *Re Wood Pulp Cartel*, 4 C.M.L.R. 901, ¶ 14. Moreover, the court in Case 48-69, *ICI v. Commission (Dyestuffs)*, 1972 E.C.R. 619, found that Article 81(1) will apply to a commercial actor situated outside of the EC that implements an agreement through a subsidiary situated within the EC. JONES & SUFRIN, *supra*, at 135 (citing Cases 48, 49, 51-7/69 1972 E.C.R. 619, ¶¶ 125-146).

<sup>9</sup> See STEFAN SZYMANSKI & ANDREW ZIMBALIST, NATIONAL PASTIME: HOW AMERICANS PLAY BASEBALL AND THE REST OF THE WORLD PLAYS SOCCER 3 (2005); Louis P. Cain & David D. Haddock, *Similar Economic Histories, Different Industrial Structures: Transatlantic Contrasts in the Evolution of Professional Sports*, 65 J. ECON. HIST. 1116 (2005).

<sup>10</sup> See SZYMANSKI & ZIMBALIST, *supra* note 9, at 3; Cain & Haddock, *supra* note 9, at 1117-18.

<sup>11</sup> See SZYMANSKI & ZIMBALIST, *supra* note 9, at 4; Cain & Haddock, *supra* note 9, at 1119.

<sup>12</sup> Cain & Haddock, *supra* note 9, at 1117. See also RICHARD PARRISH & SAMULI MIETTINEN, THE SPORTING EXCEPTION IN EUROPEAN UNION LAW 20 (2008) (likening U.S. sports industry to an entertainment industry and distinguishing it from European sport, "which has traditionally stressed, with or without good cause, the more socio-cultural and non-commercialized aspects of its activity."); Andreas Joklik, *The Legal Status of Professional Athletes: Differences Between the United States and the European Union Concerning Free Agency*, 11 SPORTS LAW. J. 223, 229 (2004) ("[T]here are two remarkable distinctions between the development [of sports] in the United States and in the different

### A. Legal Structure of the United States' NBA and NFL

The NBA and NFL are both examples of typical U.S. sports leagues that operate under a mixed-mode private property structure.<sup>13</sup> In both the NBA and NFL, individual club owners enjoy limited off-the-field competition as a result of territorial monopolies or duopolies.<sup>14</sup> Existing clubs further limit competition by controlling the entry of new clubs, as well as the entry of new players.<sup>15</sup>

NBA and NFL clubs limit the supply of new players through various league-wide restraints. First, the NBA and NFL clubs have drafted age/education requirements into their collective bargaining agreements (CBAs). The NBA CBA states that “[a] player shall be eligible for [entry into the NBA only if] the player . . . is or will be at least 19 years of age during the calendar year in which the Draft is held,” and has waited “at least one (1) NBA Season . . . since the player’s graduation [or that player’s class’s] graduation from high school.”<sup>16</sup> Similarly, the NFL CBA stipulates that a player is not eligible for the NFL draft “until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.”<sup>17</sup>

Both the NBA and NFL additionally restrain free movement of prospective players through first-year player drafts and league-wide reserve systems.<sup>18</sup> The first-year player draft is a procedure under which clubs allocate negotiating rights to prospective players in inverse order of the clubs’ previous season on-the-field performance.<sup>19</sup> Under both the NBA

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member states of the EU. First, in the EU, the intention of many sports clubs traditionally was not to make money but to win competitions.”). This distinction, however, does not mean that European sports clubs are not also highly profitable, “as the top-flight English and German soccer leagues consistently make an operating profit, with broadcasting revenues remaining the single largest source for income.” RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION 12 (2003).

<sup>13</sup> See Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 903–04 (2008).

<sup>14</sup> Cain & Haddock, *supra* note 9, at 1117–18. See also SZYMANSKI & ZIMBALIST, *supra* note 9, at 3 (noting that outside of a few large markets, NFL and NBA clubs enjoy a monopoly).

<sup>15</sup> Cain & Haddock, *supra* note 9, at 1117–18. See also SZYMANSKI & ZIMBALIST, *supra* note 9, at 3.

<sup>16</sup> NAT’L BASKETBALL ASS’N, COLLECTIVE BARGAINING AGREEMENT, Art. 10, § 1(b)(i) (2005), available at [http://www.nbpq.com/cba\\_articles.php](http://www.nbpq.com/cba_articles.php).

<sup>17</sup> NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT, Art. 16, § 2(b) (2006), available at <http://www.nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf>.

<sup>18</sup> See PARRISH & MIETTINEN, *supra* note 12, at 21.

<sup>19</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978).

and NFL drafts rules, the team with the poorest playing-field record during the previous season has the first choice of a player seeking to enter the league for the following season.<sup>20</sup> The team with the next poorest record has the second choice, and so on until the team with the best record has picked.<sup>21</sup> After each team has selected one player,<sup>22</sup> the next round of drafting then begins in the same order as the first.<sup>23</sup> These rounds continue until an appropriate number of players is selected.<sup>24</sup> These drafts are designed to promote on-the-field "competitive balance" among teams.<sup>25</sup>

The "reserve system," meanwhile, consists of a set of rules whereby any player, once signed to an initial contract, is bound to play for that club even beyond the contract's expiration.<sup>26</sup> In the early days of U.S. professional sports leagues, clubs implemented an extremely restrictive reserve system that fully restrained player movement for the duration of players' careers.<sup>27</sup> More recently, however, U.S. courts have used antitrust

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<sup>20</sup> *Id.* at 1175. Note that the NBA actually uses a weighted lottery system to determine its draft order, with teams with inferior records having a higher likelihood of selecting earlier. See Sean Devaney, *NBA Draft Lottery Preview*, SPORTING NEWS, May 27, 2005, at 8–9. As a result, sometimes the team with the first pick in the NBA draft does not actually have the worst record from the previous season. See Bob Velin, *Bulls Beat Odds in Draft Lottery*, *Land Top Pick*, USA TODAY, May 21, 2008 at C1.

<sup>21</sup> *Smith*, 593 F.2d at 1175.

<sup>22</sup> *Id.* Alternatively, a team may trade its draft rights for a given round away to another team. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Mackey v. Nat'l Football League*, 543 F.2d 606, 611 (8th Cir. 1976).

<sup>27</sup> See Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 WAYNE L. REV. 601, 604 (2008).

In 1879, however, the National League baseball clubs reached a secret agreement to 'reserve' up to five players per team that would become perennially bound to their current employer. A few years later, the National League clubs extended this secret agreement to include all players that were currently in the league.

*Id.* (citations omitted); see also *Flood v. Kuhn*, 407 U.S. 258, 260 n.1 (1972). The Court stated:

The reserve system, publicly introduced into baseball contracts in 1887 . . . centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum.

*Id.* (citations omitted); see generally *Mackey*, 543 F.2d at 610.

and labor principles to relax reserve systems and allow players some freedom of movement.<sup>28</sup>

### B. Legal Structure of European Sports Leagues

By contrast to the U.S. sports league, the European sports league operates under a pyramid structure, which features merit-based promotion and relegation of clubs based on clubs' on-the-field performance.<sup>29</sup> Clubs that perform well on the field regularly replace weaker clubs in higher divisional play, while the weakest clubs move downward into lower divisions.<sup>30</sup> For example, England's top twenty soccer teams play in the Premier League.<sup>31</sup> Each season, the three best teams from the second-highest British division are promoted into the Premier League, with the three weakest teams in the Premier League demoted down a level.<sup>32</sup>

In Europe, sports leagues have a pyramid structure, with new teams entering at the bottom of the hierarchy without paying any entry fee.<sup>33</sup> All that a prospective owner must do is register his team to play in the league's lowest tier.<sup>34</sup> League registration is regulated by each sport's governing body, rather than by the clubs themselves.<sup>35</sup> For example, in European soccer, the Federation Internationale de Football Association (FIFA) regulates league activity at the world level, and the Union des Associations Européennes de Football (UEFA) regulates league activity at the continental level.<sup>36</sup>

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For a number of years, the NFL has operated under a reserve system whereby every player who signs a contract with an NFL club is bound to play for that club, and no other, for the term of the contract plus one additional year at the option of the club.

*Id.*

<sup>28</sup> See, e.g., *Mackey*, 543 F.2d at 623 (finding version of NFL's reserve system and limited rights to free agent movement violates antitrust law's Rule of Reason); *Kansas City Royals Baseball Corp. v. Major League Baseball*, 532 F.2d 615 (8th Cir. 1976) (affirming arbitrator's decision to award free agency in baseball).

<sup>29</sup> See *PARRISH & MIETTINEN*, *supra* note 12, at 30; *PARRISH*, *supra* note 12, at 9.

<sup>30</sup> Cain & Haddock, *supra* note 9, at 1119. See also *SZYMANSKI & ZIMBALIST*, *supra* note 9, at 3.

<sup>31</sup> See Cain & Haddock, *supra* note 9, at 1119.

<sup>32</sup> See *id.*

<sup>33</sup> *SZYMANSKI & ZIMBALIST*, *supra* note 9, at 4.

<sup>34</sup> See Cain & Haddock, *supra* note 9, at 1119.

<sup>35</sup> See Joklik, *supra* note 12, at 229–30 (discussing the private governing bodies that have evolved in European sport).

<sup>36</sup> *SZYMANSKI & ZIMBALIST*, *supra* note 9, at 8. See also *id.* at 48 (FIFA, which was founded in 1904, is a community of nations that now includes 204 members.); Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football to*

In many ways, the European sports model is less restrictive on player movement than the U.S. model. The European model does not impose any age or education requirements on new players. By contrast, FIFA recently passed a series of rules that ensure minors receive appropriate academic support while playing professionally, and that minors are not transferred away from their families' homes.<sup>37</sup> These rules serve more to increase the range of opportunities available to young professional athletes than to curtail them.<sup>38</sup>

European sports leagues also do not require new players to enter a first-year player draft. Instead, prospective European professional athletes are allowed to sign their first contract with any club of their choosing, at any salary they can obtain on the free market.<sup>39</sup>

Still, there are certain limits on free player movement even under the European system. For example, after signing an initial contract, the European "transfer system" prevents players from moving without a transfer payment.<sup>40</sup> Under the rules of a typical transfer system, at the end of a season, each club produces a list of players that it plans to retain for the

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*Reestablish the Competitive Balance that it Helped to Destroy*, 32 BROOK. J. INT'L L. 709, 712–13 (2007).

<sup>37</sup> See PARRISH & MIETTINEN, *supra* note 12, at 177; PARRISH, *supra* note 12, at 147 (citing the new FIFA rules that came into effect in September 2001); Jenna Merten, *Raising a Red Flag: Why Freddie Adu Should not be Allowed to Play Professional Soccer*, 15 MARQ. SPORTS L.J. 205, 219–20 (2004). Parrish and Miettinen explain this new FIFA rule as follows:

Article 19 of the 2005 FIFA Regulations for the Status and Transfer of Players provide that international transfers of players are only permitted if the player is over the age of 18. Three exceptions to this rule apply. First, if the player's parents move to a country where the new club is located for reasons not linked to football. Second, the transfer takes place between 16 and 18, subject to the new club fulfilling a number of minimum obligations including the provision of education, training and accommodation. Third, the player lives in further than 50 km from a national border, and the club for which the player wishes to be registered in the neighboring Association is also within 50 km of that border. The maximum distance between the player's domicile and the club's quarters shall be 100km. In such cases, the player must continue to live at home and the two Associations concerned must give their explicit consent.

PARRISH & MIETTINEN, *supra* note 12, at 179.

<sup>38</sup> See generally PARRISH & MIETTINEN, *supra* note 12, at 179.

<sup>39</sup> The British Football League used to have a maximum pay rule, but that rule was abolished at the beginning of the 1961 season when players threatened to strike. See SZYMANSKI & ZIMBALIST, *supra* note 9, at 111. In this vein, the European league allows any entrepreneur with ambition to quickly build a dominant team by signing premier young talent. See Cain & Haddock, *supra* note 9, at 1119.

<sup>40</sup> See Schiera, *supra* note 36, at 713.

following season, and a list of players that are subject to league transfer.<sup>41</sup> Players named on the “transfer list” can be purchased by another club for a “transfer fee.”<sup>42</sup>

In recent years, European sports’ transfer systems have undergone substantial reform. Most notably, in September 2001, as a direct result of the European Court of Justice (ECJ) ruling in the case *Union Royale Belge des Societes de Football Association ASBL v. Jean-Marc Bosman*,<sup>43</sup> the UEFA outlawed transfer fees for out-of-contract players over the age of twenty-three.<sup>44</sup> As a result, the rights of European soccer players over the age of twenty-three have increased immensely.<sup>45</sup>

## **II. DIFFERENCES IN COMPETITION LAW BETWEEN THE UNITED STATES AND EUROPE**

In the context of professional sports leagues, competition law applies somewhat differently in the United States and European Community. Although competition law in both regions “seeks to ensure the existence of competitive markets,” the particular manner of doing so diverges.<sup>46</sup>

### **A. Differences in Competition Law Ideology**

U.S. and European competition law emerges from different ideologies. In the United States, Congress implemented its antitrust laws in response to the widespread growth of large-scale business.<sup>47</sup> First, in 1890, Congress

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<sup>41</sup> See *id.*; PARRISH & MIETTINEN, *supra* note 12, at 172.

<sup>42</sup> See Schiera, *supra* note 36, at 713.

<sup>43</sup> Case C-415/93, 1995 E.C.R. I-4921.

<sup>44</sup> See STEVE GREENFIELD & GUY OSBORN, REGULATING FOOTBALL: COMMODIFICATION, CONSUMPTION, AND THE LAW 91 (2001); PARRISH, *supra* note 12, at 147 (explaining that “in the case of players under age 23, a system of training compensation should be in place to encourage and reward the training effort of clubs, in particular small clubs.”); see generally JONES & SUFRIN, *supra* note 8, at 65 (citing EC Treaty, *supra* note 8, at art. 220) (explaining that “[t]he ECJ, the court of European Communities, has the task of interpreting the law set out in the Treaty and secondary legislation and ensuring the law is observed.”); PARRISH & MIETTINEN, *supra* note 12, at 177.

<sup>45</sup> See Joklik, *supra* note 12, at 254.

<sup>46</sup> E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 1 (3d ed. 1998). See also JONES & SUFRIN, *supra* note 8, at 3. Competition law is primarily concerned with making markets behave competitively, with the allocation of resources determined solely by free-market supply and demand. SULLIVAN & HARRISON, *supra*, at 1. See also JONES & SUFRIN, *supra* note 8, at 1.

<sup>47</sup> See W. KIP VICSUCI ET AL., ECONOMICS OF REGULATION AND ANTITRUST (MIT Press, 3d. ed. 2001); Marc Edelman, *Can Antitrust Law Save the Minnesota Twins: Why Commissioner Selig’s Contraction Plan was Never a Sure Deal*, 10 SPORTS LAW. J. 45, 56–57 (2003) (“Enacted in 1890, during the rise of big business and mass production, the Sherman Act was intended to serve both political and economic purposes and to prevent any one business from becoming more powerful than the government.”).

passed the Sherman Act to prevent price-fixing arrangements and monopolization.<sup>48</sup> Then, in 1914, Congress supplemented the Sherman Act with the Clayton Act, which, among other things, serves to prevent anticompetitive business mergers and exempts from the Sherman Act the combination of employees to form unions.<sup>49</sup>

European Community competition law, by contrast, did not emerge until 1958, when the Treaty of Rome, to which the original EU Member States were signatories, went into effect.<sup>50</sup> Unlike its U.S. counterpart, EC competition law was intended to address both antitrust concerns and a wide range of policy goals oriented towards the objectives of European economic integration.<sup>51</sup> Many of the concepts that underlie EC competition law derive from the intellectual ideology that took shape in Austria and Germany during the 1890s.<sup>52</sup> These pre-existing European ideologies embrace safeguards for "social justice" alongside competition law's more general economic purpose.<sup>53</sup>

Historically, the ECJ has applied articles of the Treaty of Rome (and its more recent successor, the EC Treaty), wherever an athlete's job performance constitutes a form of economic activity.<sup>54</sup> In more recent years, European sports policy has also begun to recognize "the social and cultural characteristics of the sports sector within its regulatory

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<sup>48</sup> See VICSUCI ET AL., *supra* note 47, at 66.

<sup>49</sup> See *id.* at 67; see also Clayton Act § 6, 15 U.S.C. § 17 (2008). According to Section 6 of the Clayton Act:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

*Id.* At the same time Congress passed the Clayton Act, it also passed the Federal Trade Commission Act, which created a special agency to investigate and adjudicate certain forms of unfair competition. See JONES & SUFRIN, *supra* note 8, at 27 (noting that, even then, EC competition law did not become fully enforceable until the EC passed Regulation 17 in 1962).

<sup>50</sup> See Council Regulation 17/13, 1962 O.J. Spec. Ed. 204; JONES & SUFRIN, *supra* note 8, at 27.

<sup>51</sup> JONES & SUFRIN, *supra* note 8, at 32.

<sup>52</sup> See Daniel Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, in JONES & SUFRIN, *supra* note 8, at 28.

<sup>53</sup> Gerber, *supra* note 52, at 29.

<sup>54</sup> See Joklik, *supra* note 12, at 246.

approach.”<sup>55</sup> However, this in no way detracts from the ECJ’s broader principle that professional sport is a form of commercial business, and, as a commercial business, it is fully subject to regulation by competition law.<sup>56</sup>

## B. Applicable U.S. Competition Law

### *1. Section 1 of the Sherman Act*

The main section of U.S. antitrust law applicable to U.S. sports leagues is Section 1 of the Sherman Act.<sup>57</sup> Section 1 of the Sherman Act states that “[e]very contract, combination . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal.”<sup>58</sup> This section of antitrust law specifically governs the behaviors of price fixing, wage fixing, tying arrangements, market allocations, and concerted refusals to deal (group

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<sup>55</sup> PARRISH, *supra* note 12, at 5. *See also id.* at 8 (“[T]he ECJ established that sport is subject to EU law in so far as it constitutes economic activity within the meaning of the EEC Treaty.”); *id.* at 62 (stressing the balance between the economic approach and the socio-cultural approach to evaluating sport).

<sup>56</sup> *See generally* Case C-519/04, David Meca-Medina & Igor Majcen v. Comm’n 2006 ECR I-4929, para. 18. The court stated:

The Court has consistently held that, having regard to the objectives of the European Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC. Thus, where such an activity takes the form of paid employment or the provision of services for remuneration . . . it falls, more specifically, within the scope of [the EC Treaty].

*Id.*

<sup>57</sup> In rare instances sports league conduct has also been challenged Section 2 of the Sherman Act. *See, e.g.*, Fraser v. Major League Soccer, 284 F.3d 47, 55 (1st Cir. 2002). The court stated:

Subsequently, at a June 2000 status conference on the remaining section 2 claims, players indicated (apparently for the first time) that they intended to introduce evidence that MLS prohibited all competition for players among the MLS operators/investors as part of their section 2 claim as well . . . .

A three-month jury trial commenced in September 2000 on players’ remaining section 2 claims. At the close of evidence, the court dismissed the section 2 claims against the operator/investors.

*Id.* *See also id.* at 61–69 (analyzing section 2 claim).

<sup>58</sup> 26 Stat. 209 (1890), codified as amended, 15 U.S.C. §§ 1–7 (2000). Enacted in 1890, during the rise of big business, the Sherman Act was intended to serve both political and economic purposes and to prevent any one business from becoming more powerful than the government. *See* Edelman, *supra* note 47, at 56–57.

boycotts).<sup>59</sup> Even though most agreements that violate Section 1 of the Sherman Act involve product markets, the Sherman Act also prohibits anticompetitive behaviors in labor markets, such as in markets for professional athlete services.<sup>60</sup>

The U.S. Supreme Court has strongly supported the public policy rationale against allowing group boycotts.<sup>61</sup> As the Court stated in *Eastern State Retail Lumber Dealers' Association v. United States*:<sup>62</sup>

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and it may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.<sup>63</sup>

The danger combated by Section 1 of the Sherman Act, then, is concerted action that reduces consumers' freedom of choice.<sup>64</sup> This reduction in freedom of choice is "especially troubling because the consumer loses the opportunity to use purchasing power to indicate a preference for boycotted products, materials, or labor sources."<sup>65</sup>

A U.S. court's *prima facie* review of potential violations looks at the challenged conduct using one of the U.S. Supreme Court's three sanctioned tests.<sup>66</sup> If the court determines that the conduct is "so pernicious that [it has] no redeeming value, a court will apply the *per se* test, which presumes there is a *prima facie* case of an antitrust violation without any further investigation of alleged justifications."<sup>67</sup> This first test "is a bright line rule

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<sup>59</sup> SULLIVAN & HARRISON, *supra* note 46, at 159–67. See also MICHAEL J. COZZILLIO ET AL., SPORTS LAW: CASES AND MATERIALS 278 (2d. ed. 2007); Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Age/Education Requirement from a Legal, Ethical, and Cultural Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW J. L. & SOC. POL'Y 1, ¶¶ 35–36 (2008), <http://www.law.northwestern.edu/journals/njlp/v3/n1/1/1Edelman.pdf>.

<sup>60</sup> Edelman & Harrison, *supra* note 59, ¶¶ 35–36 (citing various sources).

<sup>61</sup> *Id.* at ¶ 36 (citing *Klor's Inc. v. Broadway Hale Stores*, 359 U.S. 207, 212 (1959)); see also SULLIVAN & HARRISON, *supra* note 46, at § 4.13.

<sup>62</sup> 234 U.S. 600 (1914).

<sup>63</sup> *Id.* at 614.

<sup>64</sup> Edelman & Harrison, *supra* note 59, ¶ 37 (citing *Fashion Originator's Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); SULLIVAN & HARRISON, *supra* note 46, at 160–61).

<sup>65</sup> Edelman & Harrison, *supra* note 59, ¶ 37 (citing SULLIVAN & HARRISON, *supra* note 46, at 164).

<sup>66</sup> *Id.* at ¶ 38.

<sup>67</sup> *Id.* (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 140, 224, n.59 (1940); SULLIVAN & HARRISON, *supra* note 46, at 124–31).

that facilitates legal certainty and promotes judicial economy,”<sup>68</sup> and its purpose “is to avoid ‘subjective policy judgments’ that most courts recognize ‘are more appropriate for legislative, rather than judicial, determination,’”<sup>69</sup> as well as to preserve judicial resources where the type of agreement is one that courts review regularly and have no doubt is illegal, even upon first impression.<sup>70</sup>

Where the harm caused by the challenged conduct is less apparent, “a court will apply Rule of Reason analysis, under which a court conducts a full economic investigation to determine whether the defendants’ behavior is legal.”<sup>71</sup> Under this test, “a court will determine whether a plaintiff can make a *prima facie* showing of a violation based on the presence of the following three factors: (1) market power; (2) anticompetitive effects that exceed any pro-competitive justifications; and (3) harm.”<sup>72</sup> Where the challenged conduct is “neither completely pernicious nor completely ambiguous, the court will apply a third type of test, called either the ‘quick look’ or ‘truncated’ Rule of Reason.”<sup>73</sup> Under this test the court examines economic effects “based on only a ‘rudimentary understanding of economics.’”<sup>74</sup>

Commentators see antitrust law in “‘creeping transition,’ as courts are moving away from applying the *per se* test and toward applying either the quick-look test, or, even more frequently, the full Rule of Reason.”<sup>75</sup> The transition is the result of changing ideas in industrial economics—ideas that “cast doubt on traditional notions about competitive effects.”<sup>76</sup> This shift has been especially dramatic in the area of joint venture law, where today, according to the Supreme Court, all joint ventures are reviewed exclusively

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<sup>68</sup> Edelman & Harrison, *supra* note 59, ¶ 38 (citing SULLIVAN & HARRISON, *supra* note 46, at 126; Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 57 (2007)).

<sup>69</sup> Edelman & Harrison, *supra* note 59, ¶ 38 (quoting *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1320 (D. Conn. 1977)).

<sup>70</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978) (“[A]s the courts gained experience with antitrust problems[,] they identified certain types of agreements which were so consistently unreasonable that they could be deemed illegal *per se*, without elaborate inquiry into their purported justifications.”).

<sup>71</sup> Edelman & Harrison, *supra* note 59, ¶ 39 (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978)).

<sup>72</sup> Edelman & Harrison, *supra* note 59, ¶ 39 (citing 54 AM. JUR. 2D. MONOPOLIES AND RESTRAINTS OF TRADE § 49 (2007)).

<sup>73</sup> Edelman & Harrison, *supra* note 59, ¶ 40 (citing *Cal Dental Ass'n v. FTC*, 526 U.S. 756, 763–64, 770 (1999)).

<sup>74</sup> Edelman & Harrison, *supra* note 59, ¶ 40 (quoting *Cal Dental Ass'n*, 526 U.S. at 763–64, 770).

<sup>75</sup> Edelman & Harrison, *supra* note 59, ¶ 41 (quoting Crane, *supra* note 68, at 50).

<sup>76</sup> Edelman & Harrison, *supra* note 59, ¶ 41 (citing Crane, *supra* note 68, at 51).

under the Rule of Reason.<sup>77</sup>

## *2. Labor Exemptions to Section 1 of the Sherman Act*

If a plaintiff is able to make a *prima facie* showing of an antitrust violation under Section 1 of the Sherman Act, the alleged conspirators then may seek to defend their conduct by arguing that one of a series of defenses and exemptions to Section 1 of the Sherman Act applies.<sup>78</sup> In the context of professional sports leagues, the two most applicable defenses or exemptions to Section 1 of the Sherman Act are the statutory labor exemption and the non-statutory labor exemption.<sup>79</sup>

### a. Statutory Labor Exemption

The statutory labor exemption, which is contained in Section 6 of the Clayton Act, states that antitrust laws do not apply to union organizations or to union members that act within the legitimate objectives of a union.<sup>80</sup> This exemption was designed to further congressional policy favoring collective bargaining.<sup>81</sup> To qualify for the statutory labor exemption, union members must act collectively in their own self-interest for legitimate union purposes, and not in combination with non-union or third party groups.<sup>82</sup>

### b. Non-Statutory Labor Exemption

The non-statutory labor exemption is a court-created exemption, resulting from judicial decisions to give aspects of collective bargaining agreements further immunity from antitrust law.<sup>83</sup> The non-statutory

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<sup>77</sup> See Texaco, Inc. v. Dagher, 547 U.S. 1, 3 (2006). The Court stated:

We granted certiorari to determine whether it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals.

*Id.* See also *id.* at 7 (stating that a joint venture's challenged price unification policy must be reviewed under the Rule of Reason).

<sup>78</sup> See COZZILLIO ET AL., *supra* note 59, at 297–300 (“Antitrust Exemptions”).

<sup>79</sup> See Joklik, *supra* note 12, at 239.

<sup>80</sup> SULLIVAN & HARRISON, *supra* note 46, at 78 (citing 15 U.S.C. § 17). See also Joklik, *supra* note 12, at 239 (“The statutory labor exemption is based on the Clayton Act and the Norris-LaGuardia Act and applies only to unilateral union activities and not to the relationship between an employer and the union members.”); *supra* note 49 and accompanying text.

<sup>81</sup> SULLIVAN & HARRISON, *supra* note 46, at 78.

<sup>82</sup> *Id.*

<sup>83</sup> See PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 221 (3d ed. West

exemption has an important place in sports law because players' associations (unions) collectively bargain with teams (employers) to form a league's collective bargaining agreement.<sup>84</sup>

The non-statutory labor exemption comes from the public policy rationale that "employees are better off negotiating together rather than individually, and therefore labor law (rather than antitrust law) should apply to situations where collective bargaining occurs."<sup>85</sup> Courts have inferred the scope of the non-statutory labor exemption "from federal labor statutes, which set forth a national labor policy of favoring free and private collective bargaining, which require good faith bargaining [with respect to mandatory terms and conditions of employment], and which delegate related rulemaking and interpretive authority to the National Labor Relations Board."<sup>86</sup> The non-statutory labor exemption therefore not only protects National Labor Relations Board authority but also "allow[s] meaningful collective bargaining to take place."<sup>87</sup>

There is a split among the U.S. Courts of Appeals about how broadly the non-statutory labor exemption applies. In 1976, the U.S. Court of Appeals for the Eighth Circuit in *Mackey v. National Football League*<sup>88</sup> held that the non-statutory labor exemption applies only where an alleged restraint of trade: (1) involves mandatory subjects of bargaining; (2) primarily affects the parties involved; and (3) is reached through bona fide, arm's-length bargaining (the *Mackey Test*).<sup>89</sup> Over the past thirty years, many courts have followed the *Mackey Test*.<sup>90</sup>

Meanwhile, in 2004, the U.S. Court of Appeals for the Second Circuit in *Clarett v. Nat'l Football League*<sup>91</sup> held that the non-statutory labor exemption has a broader application, and that it applies most broadly where the alleged antitrust injuries affect employees rather than competitors (the

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2004); *United Mine Workers v. Pennington*, 381 U.S. 676, 710 (1965) ("[I]n order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to antitrust laws.").

<sup>84</sup> See generally COZZILLIO ET AL., *supra* note 59, at ch. 9 ("Antitrust and Sports: the Labor Exemption"); WEILER & ROBERTS, *supra* note 83, at 221–62 ("Labor Exemption from Antitrust").

<sup>85</sup> Edelman & Harrison, *supra* note 59, ¶ 42 (citing *Pennington*, 381 U.S. at 710; Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 196 (2004)).

<sup>86</sup> *Brown v. Pro Football Inc.*, 518 U.S. 231, 236 (1996).

<sup>87</sup> *Id.* at 237.

<sup>88</sup> 543 F.2d 606.

<sup>89</sup> *Id.* at 614.

<sup>90</sup> See, e.g., *In Re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 463 (6th Cir. 1992); *McCourt v. California Sports Inc.*, 600 F.2d 1193, 1197 (6th Cir. 1979); *Zimmerman v. Nat'l Football League*, 632 F. Supp. 398, 403–04 (D.D.C. 1986).

<sup>91</sup> 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

*Clarett* Test).<sup>92</sup> According to the Second Circuit, the non-statutory labor exemption may apply to any mandatory subject of bargaining where the exemption's application would "ensure the successful operation of the collective bargaining process."<sup>93</sup> Being "far broader than the *Mackey* Test," the *Clarett* Test may insulate from liability many sports league CBAs that would be subject to liability under *Mackey*.<sup>94</sup> Nevertheless, some believe that the Second Circuit's *Clarett* Test is overly broad and will eventually be struck down by the Supreme Court.<sup>95</sup>

### C. European Competition Law Under the EC Treaty

Similar to Section 1 of the Sherman Act, the main section of EC competition law, as relevant to sports, is Article 81 of the EC Treaty.<sup>96</sup> Article 81 prevents anti-competitive collusion among competitors.<sup>97</sup> In addition, Article 39 of the EC Treaty regulates the freedom of movement for workers.<sup>98</sup> Article 39 serves as an important part of EC quasi-

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<sup>92</sup> *Id.* at 131, 134.

<sup>93</sup> *Id.* at 143.

<sup>94</sup> See Edelman & Harrison, *supra* note 59, ¶ 44.

<sup>95</sup> See, e.g., Michael Scheinkman, Comment, *Running Out of Bounds: Overextending the Labor Antitrust Exemption in Clarett v. National Football League*, 79 ST. JOHN'S L. REV. 733, 767 (2005). Scheinkman writes:

This Comment has suggested that in *Clarett v. National Football League*, the Second Circuit extended the nonstatutory exemption beyond its original scope—protecting the NFL's eligibility rule that neither covered a mandatory bargaining subject nor stemmed from actual collective bargaining. The *Clarett* decision set a dangerous precedent, tipping the scales of the delicate balance between federal labor law and antitrust law too far in favor of labor law.

*Id.*

<sup>96</sup> See EC Treaty, *supra* note 8, at arts. 81 & 82 (formerly, respectively, Articles 85 & 86 of the Treaty of Rome); see also JONES & SUFRIN, *supra* note 8, at 71–72; PARRISH & MIETTINEN, *supra* note 12, at 103, 110. Section 82, which concerns the "abuses of a dominant position," also plays an important role in European sports law; however, this section is less important with respect to a mixed-mode professional sports league such as the NBA and NFL because clubs in these leagues are seen as separate entities. See Edelman, *supra* note 13, at 893, n.11 and accompanying text. Cf. EC Treaty, *supra* note 8, at art. 81; PARRISH, *supra* note 12, at 111.

<sup>97</sup> See EC Treaty, *supra* note 8, at art. 81.

<sup>98</sup> See *id.* at 39 (formerly Article 48 of the Treaty of Rome); see also JONES & SUFRIN, *supra* note 8, at 71–72; PARRISH & MIETTINEN, *supra* note 12, at 103, 110 ("Following *Meca-Medina*, it is clear that the analytical process of determining whether a particular rule constitutes a restriction under free movement or under competition law is not identical in relation to sporting rules. Compatibility under one does not *a priori* lead to a similar conclusion under the other.").

competition policy.<sup>99</sup>

### *1. Treaty Article 81*

Article 81 of the EC Treaty (formerly Article 85 of the Treaty of Rome) prohibits agreements among commercial actors that prevent, restrict, or distort competition based on either their object or effect on Member States.<sup>100</sup> Article 81(1) specifically disallows any agreements that “fix purchase or selling prices,”<sup>101</sup> “limit or control production, markets, technical development, or investments,”<sup>102</sup> “share markets or sources of supply,”<sup>103</sup> treat certain trading parties inferiorly to others,<sup>104</sup> or “make the conclusion of contracts subject to acceptance by other parties [that] have no connection with the subject of such contracts.”<sup>105</sup>

All violations of Article 81(1) are *per se* illegal. However, EC case law recognizes a *de minimis* exception to Article 81(1) where the colluding parties control, in total, less than five percent of the total relevant market.<sup>106</sup> EC case law also recognizes that where “a rule which at first sight appears to contain a restriction that is necessary in order to make that competition possible in the first place, it must be assumed that rule does not infringe Article [81(1)].”<sup>107</sup>

Article 81(3) of the EC Treaty provides a discretionary exemption from Article 81(1) for agreements that (1) provide specified benefits (either improving production or distribution, or promoting technical or economic progress), and (2) allow “consumers the fair share of the resulting benefit,” as long as (3) the agreement is “indispensable to the attaining of [Article 81(1)s] objectives,” and (4) does not “afford . . . the possibility of eliminating competition in respect of a substantial part of the products in question.”<sup>108</sup> The Commission has the “sole power . . . to declare Article [81(1)] inapplicable pursuant to Article [81(3)] of the Treaty.”<sup>109</sup>

The specified benefits giving rise to an 81(3) exemption are generally

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<sup>99</sup> See EC Treaty, *supra* note 8, at art. 39.

<sup>100</sup> See *id.* at art. 81(1); Schiera, *supra* note 36, at 727.

<sup>101</sup> EC Treaty, *supra* note 8, at art. 81(1)(a).

<sup>102</sup> *Id.* at art. 81(1)(b).

<sup>103</sup> *Id.* at art. 81(1)(c).

<sup>104</sup> *Id.* at art. 81(1)(d).

<sup>105</sup> *Id.* at art. 81(1)(e).

<sup>106</sup> See Commission Notice, Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101/81) para. 46.

<sup>107</sup> Case C-415/93 Union Royale Belge Des Societes De Football Ass'n ASBL v. Jean-Marc Bosman, 1995 ECR I-4921, para. 265. See also PARRISH & MIETTINEN, *supra* note 12, at 119 (citing same).

<sup>108</sup> EC Treaty, *supra* note 8, at art. 81(3). See also JONES & SUFRIN, *supra* note 8, at 137.

<sup>109</sup> JONES & SUFRIN, *supra* note 8, at 200 (citing 1959–62 O.J. Spec. Ed. 87).

economic; however, in rare instances, the Commission has awarded an Article 81(3) exemption based on purely social reasons.<sup>110</sup> In the context of sport, the Commission has tried to put a stop to restrictive practices that have a significant economic impact, and are unjustified in light of the goal of improving production and distribution of resources.<sup>111</sup> However, according to at least one former EC commissioner, the Commission may show leniency toward certain sports practices that play an important role in fortifying the sport’s existence.<sup>112</sup>

The Commission’s exact standard for applying Article 81(3) is vague.<sup>113</sup> Because the Commission may at times pursue social policy as well as hard economic analysis, certain public policy arguments in favor of allowing collusive conduct could carry greater weight under Article 81(3) review than they would under the Sherman Act’s Rule-of-Reason pro-competitive effects doctrine.<sup>114</sup> Nevertheless, the strength of these policy-based arguments, even in Europe, remains highly speculative.<sup>115</sup>

## *2. Labor Exemption to Treaty Section 81*

Unlike U.S. competition law, EC law does not have a statutory labor

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<sup>110</sup> See Council Regulation (EC) 1/2003 art. 1, 2003 O.J. (L 1), available at [http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numd=oc=32003R0001&model=guichett](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numd=oc=32003R0001&model=guichett); JONES & SUFRIN, *supra* note 8, at 193–96 (discussing cases where the ECJ has found socially desirable results, such as increasing employment rates, decreasing pollution, or increasingly product safety, may each justify otherwise anticompetitive behavior); PARRISH & MIETTINEN, *supra* note 12, at 108 (“Under Article 10 of Regulation 1/2003, the Commission may take a decision that an arrangement is not prohibited under Article 81 or 82 because it is in the Community’s public interest.”); *id.* at 124 (“Within [the Article 81(3) legal] framework it would appear open to the Commission to also consider sporting reasons as legitimate aims.”).

<sup>111</sup> Jean Francois Pons, Deputy Director General, Directorate-General IV—Competition, Sport and European Competition Policy, Address at Fordham Corporate Law Inst., Twenty-Sixth Annual Conference on Int’l Antitrust Law & Policy, (Oct. 14–15, 1999), at 6.

<sup>112</sup> *Id.* See generally PARRISH & MIETTINEN, *supra* note 12, at 36 (explaining that the 1999 White Paper known as the *Helsinki Report on Sport*, which has no binding effect, suggests using the 81(3) exemption for rules that are both sporting and economic in nature); *id.* at 124.

<sup>113</sup> See PARRISH & MIETTINEN, *supra* note 12, at 140–42.

<sup>114</sup> See generally JONES & SUFRIN, *supra* note 8, at 199 (“The Commission, when considering whether to exempt an agreement concerning the collective selling of broadcasting rights for [soccer], may be willing to extend the analysis beyond ‘simple economic considerations.’”). Cf. PARRISH & MIETTINEN, *supra* note 12, at 109 (“US competition law is founded on a balancing exercise between the anti-competitive and pro-competitive effects of agreements. Despite some similarities, the ECJ has consistently denied that a similar doctrine exists in Community competition law.”).

<sup>115</sup> See PARRISH & MIETTINEN, *supra* note 12, at 142 (“[T]his process may involve some legal uncertainty.”).

exemption.<sup>116</sup> Nevertheless, in recent years the ECJ has carved out something similar to the U.S. non-statutory labor exemption for agreements reached between employers and employees in multi-employer collective bargaining. The European non-statutory labor exemption is in certain ways narrower than its U.S. counterpart.

The ECJ first addressed the issue of whether EC competition law recognizes a non-statutory labor exemption in dicta to the 1995 *Bosman* case, which pertained to whether professional soccer's international transfer system violated competition and quasi-competition law principles.<sup>117</sup> In *Bosman*, the UEFA clubs argued that the professional soccer transfer system could not violate Article 81 because "the relationship between employer and employee is not . . . subject to the provisions of competition law."<sup>118</sup> To support this position, the UEFA clubs incorrectly cited U.S. law explaining the importance of applying a non-statutory labor exemption.<sup>119</sup> Ultimately, the *Bosman* court held that the UEFA argument was of no relevance because that case did not "concern collective agreements but simple horizontal agreements between the clubs."<sup>120</sup> However, the court, for the first time, acknowledged that where parties reach agreements through collective bargaining, it may be necessary to exclude certain aspects of these agreements from competition law.<sup>121</sup>

The ECJ again addressed the potential existence of a non-statutory labor exemption in the 1999 case *Brentjens Handelsonderneming BV v. Stichting*,<sup>122</sup> in which it stated that terms of a collective bargaining agreement that contribute directly to improving working conditions are exempt from Article 81.<sup>123</sup> Then, in the 2000 case *Albany International BV v. Stichting*,<sup>124</sup> which related to the legality under Article 81 of a labor agreement that required employees to contribute to a pension fund, the ECJ set forth the specific standard to apply a non-statutory labor exemption.<sup>125</sup>

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<sup>116</sup> See Stefan Szymanski, *Is There a European Model of Sports?*, in INTERNATIONAL SPORTS ECONOMICS COMPARISONS 19, 33 (Rodney Fort & John Fizel eds., 2004) ("Unions in Europe, without protection of an antitrust exemption, have in general held a much weaker position.").

<sup>117</sup> *Bosman*, 1995 ECR I-4921, paras. 254–78. See PARRISH & MIETTINEN, *supra* note 12, at 173.

<sup>118</sup> *Bosman*, 1995 ECR I-4921, para. 271.

<sup>119</sup> See *id.*

<sup>120</sup> *Id.* para. 275.

<sup>121</sup> *Id.* para. 274. The court went on to explain that "[a] corresponding restriction of the scope of Article [81]—similar to that already existing in laws of individual Member States—might indeed exist." *Id.* However, even if there were such an exemption, "[i]t would be admittedly limited in character." *Id.*

<sup>122</sup> Cases C-115/97 to C-117/97, 1999 ECR I-6025.

<sup>123</sup> See *id.* paras. 56–60.

<sup>124</sup> Case C-67/96, 1999 ECR I-5751.

<sup>125</sup> *Id.* paras. 191–93.

In that case, the ECJ concluded that a non-statutory labor exemption to Article 81 must apply where the purportedly anti-competitive conduct emerges from "collective agreements between management and [labor] concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties."<sup>126</sup>

One year later, the ECJ again heard arguments pertaining to the scope of a non-statutory labor exemption in the case *Van der Woude v. Stichting Beatrixoord*.<sup>127</sup> Somewhat similar to the facts in *Albany*, *Van der Woude* involved employees forced to contribute to an employer insurance company that provided health insurance.<sup>128</sup> In addressing whether such conduct violated Article 81, the *Van der Woude* court applied *Albany* and granted antitrust immunity because the insurance payment plan was part of the collective bargaining agreement that affected only those directly involved in the agreement and it also construed a core subject of bargaining.<sup>129</sup> "Accordingly, [under EC law], collective agreements [today] enjoy a limited antitrust immunity."<sup>130</sup>

### 3. Treaty Article 39

Beyond Article 81, the EC Treaty further protects "freedom of movement of workers" by using quasi-competition principles that emerge from Article 39 of the EC Treaty (formerly Article 48 of the Treaty of Rome).<sup>131</sup> Article 39, in essence, gives each citizen of an EC Member State the right to move and work in any country of the EC.<sup>132</sup> Article 39 also prohibits EC Member States from passing statutes that violate this right, and prevents independent parties from passing industry rules to curtail these rights.<sup>133</sup> Although courts occasionally conflate Article 39 with more

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<sup>126</sup> *Id.* para. 194.

<sup>127</sup> Case C-222/98, 2000 E.C.R. I-7111.

<sup>128</sup> *Id.* paras. 11–17.

<sup>129</sup> *Id.* paras. 22–27. Thus, *Van der Woude* reinforces the ECJ's earlier holding in *Albany*. See *supra* note 127 and accompanying text.

<sup>130</sup> Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP* 2007 ECR I-10779, para. 27 (internal citations and quotations omitted).

<sup>131</sup> EC Treaty, *supra* note 8, art. 39(1)–(3).

<sup>132</sup> Joklik, *supra* note 12, at 246. Additionally, EU free movement rules can be relied upon by non-EU nationals if there is an international agreement in place with a third state, and the non-discriminatory provision is directly effective, thus allowing nationals of a state subject to the agreement to rely on it before a national court. PARRISH & MIETTINEN, *supra* note 12, at 193.

<sup>133</sup> See EC Treaty, *supra* note 8, art. 39(1)–(3); see also PARRISH, *supra* note 12, at 83 (noting that Article 39 of the EC Treaty comes from the Treaty's more general requirement in Article 3(c) with respect to the abolition, as between member states, of obstacles to the free movement of goods, persons, services, and capital); Joklik, *supra* note 12, at 246.

traditional European competition law under Article 81, the two articles serve different purposes.<sup>134</sup> Indeed, certain conduct that is permissible under Article 81 may still violate Article 39.<sup>135</sup>

Like Article 81, Article 39 has always applied to the commercial conduct of professional sports leagues.<sup>136</sup> In the 1974 case *Walrave & Koch v. Association Union Cycliste Internationale*,<sup>137</sup> the ECJ held that what is now known as Article 39 of the EC Treaty may apply against sports rules that discriminate based upon nationality.<sup>138</sup> The ECJ further held that Article 39 applies even to work situations carried out outside the EU if the legal relationship of employment was entered into inside the EU, as well as if the legal relationship was formed outside the EU but the effect of the measure is felt within it.<sup>139</sup> This view has since been affirmed by the ECJ in both the 1976 case *Dona v. Mantero*,<sup>140</sup> and the 1987 case *UNECTEF v. Heylens*.<sup>141</sup>

In *Bosman*,<sup>142</sup> the ECJ implemented an even broader view of the “freedom of workers,” explaining that in the context of professional soccer’s transfer rules, UEFA’s system of mandatory transfer payments violated Article 39 even though these restrictions did not particularly discriminate on the basis of nationality.<sup>143</sup> Although the ECJ recognized the aims of maintaining financial and competitive balance among sports teams were legitimate, the ECJ still disclaimed UEFA’s transfer rules as not

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<sup>134</sup> See *Int’l Transp.*, 2007 ECR I-10779, para. 26 (“[T]he fact that an agreement or activity is excluded from the scope of the competition rules does not necessarily mean that is also excluded from the scope of the rules on freedom of movement.”).

<sup>135</sup> See *id.*

<sup>136</sup> Additionally, in recent years there is some abolition, as between member states, of obstacles to the free movement of goods, persons, services, and capital. There also exists support for an even broader proposition that Article 39 today governs even the non-economic rules of sport. See PARRISH & MIETTINEN, *supra* note 12, at 101 (explaining that in the field of fundamental freedoms, the ECJ has even applied principles of free movement to entirely social matters such as family movement with migrant workers).

<sup>137</sup> Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405.

<sup>138</sup> *Id.* para. 25. See *Joklik*, *supra* note 12, at 246–47. Cf. PARRISH & MIETTINEN, *supra* note 12, at 1 (explaining the holding of *Walrave* is limited to where the practice of sport in considered economic activity under the meaning of the Treaty).

<sup>139</sup> *Walrave*, 1974 ECR 1405, para. 28.

<sup>140</sup> Case C-13/76, *Gaetano Dona v. Mario Mantero*, 1976 ECR 1333.

<sup>141</sup> Case C-222/86, *Unectef v. Georges Heylens*, 1987 ECR 4097.

<sup>142</sup> *Bosman*, 1995 E.C.R. I-4921.

<sup>143</sup> *Bosman*, 1995 E.C.R. I-4921, para. 4 (“[H]aving regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.”). See also PARRISH & MIETTINEN, *supra* note 12, at 86–89; PARRISH, *supra* note 12, at 99 (“As such, the ECJ held that the application of Article 39 went beyond a mere prohibition of discrimination but extended to all restrictions.”); SZYMANSKI & ZIMBALIST, *supra* note 9, at 114.

being the least restrictive means available to obtain competitive balance.<sup>144</sup>

In the years following *Bosman*, the European Commission negotiated a settlement agreement with FIFA and UEFA that has allowed professional soccer clubs to continue to claim transfer fees on players up until the age of 23, as a reflection of investments made in the player’s development.<sup>145</sup> Nonetheless, more recent ECJ rulings have confirmed the view that the ECJ is not loosening up its enforcement of Article 39.<sup>146</sup>

Recently, the ECJ made clear that the right to freedom of movement is nearly absolute.<sup>147</sup> Specifically, the ECJ will not award any exemption under Article 39 based on either economic or social benefits, or based on a purported non-statutory labor exemption.<sup>148</sup> Those social policy defenses are limited to Article 81.

### III. LEGALITY OF NBA AND NFL AGE/EDUCATION REQUIREMENTS

The legal status of age/education requirements is more favorable to professional sports leagues under U.S. law than under EC law. In the United States, the legality of the NBA and NFL’s age/education requirements depends upon how broadly a court interprets the U.S. non-statutory labor exemption.<sup>149</sup> Although both the NBA and NFL age/education requirements present *prima facie* violations of Section 1 of the Sherman Act, if the reviewing court applies the *Clarett Test*, the requirements will be exempt from antitrust liability because they involve mandatory subjects of bargaining where applying the exemption would “ensure the successful operation of the collective bargaining process.”<sup>150</sup>

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<sup>144</sup> See *Bosman*, 1995 E.C. R. I-4921, paras. 105–10; PARRISH & MIETTINEN, *supra* note 12, at 174. As a result, the court in *Bosman* held that an EU national not subject to an ongoing contract was free to sign with any club of his choosing without his new club having to pay a transfer fee to his former one. SZYMANSKI & ZIMBALIST, *supra* note 9, at 114. With respect to UEFA’s claim that an adverse ruling would have huge consequences on professional soccer, the ECJ held that the consequences of the judgment cannot interfere with applying the principles of law. PARRISH, *supra* note 12, at 95. Of further importance, the ECJ decided to view the transfer rules as restrictions despite the fact that the existence of the transfer rules did not make it more difficult for a player to move between clubs in different member states than between clubs in the same state. *Id.* at 95.

<sup>145</sup> See SZYMANSKI & ZIMBALIST, *supra* note 9, at 114; PARRISH, *supra* note 12, at 147.

<sup>146</sup> See PARRISH & MIETTINEN, *supra* note 12.

<sup>147</sup> PARRISH & MIETTINEN, *supra* note 12, at 69–70.

<sup>148</sup> See *Int’l Transp.*, 2007 ECR I-10779 paras. 25–26; see also PARRISH & MIETTINEN, *supra* note 12, at 112, 221 (explaining that even if a collectively bargained salary cap in soccer was exempted from Article 81 based on the non-statutory labor exemption, “if the cap restricted a player’s right of free movement, it would still be susceptible to challenge under Article 39.”).

<sup>149</sup> See *supra* Part II.B.2.b.

<sup>150</sup> *Clarett*, 369 F.3d at 143.

By contrast, in the European Community, the NBA and NFL age/education requirements most likely violate Article 81 of the EC Treaty.<sup>151</sup> Not only do the NBA and NFL age/education requirements present *prima facie* violations under the plain language of Article 81, but these requirements are not likely insulated from liability by the EC's version of the non-statutory labor exemption because the age/education requirements "directly affect . . . third parties."<sup>152</sup>

### A. Analysis Under the Sherman Act

Applying Section 1 of the Sherman Act, the legality of the NBA and NFL's age/education requirements hinges upon which test for the non-statutory labor exemption a court applies. If a court applies the Second Circuit's *Clarett* Test, the NBA and NFL age/education requirements are likely exempt from antitrust scrutiny as mandatory subjects of bargaining that would "ensure the successful operation of the collective bargaining process."<sup>153</sup> However, if a court applies the Eighth Circuit's *Mackey* Test, it is uncertain whether or not the NBA and NFL age/education requirements are exempt because it is not absolutely clear whether these requirements "primarily affect[] only the parties to the collective bargaining relationship."<sup>154</sup>

#### 1. Unilaterally Implemented Age/Education Requirements

It is relatively well-settled that under the Sherman Act unilaterally implemented age/education requirements meet the *prima facie* test for an antitrust violation, irrespective of what standard of review is applied.

Courts in the United States have reviewed unilaterally implemented age/education requirements in premier professional sports leagues on three separate occasions, each time finding an antitrust violation. In the first of these challenges, *Denver Rockets v. All-Pro Management Inc.*,<sup>155</sup> the U.S. District Court for the Central District of California overturned an NBA rule that required all prospective men's basketball players to wait at least four years after completing their high school education before applying for the

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<sup>151</sup> See *supra* Part II.C.1.

<sup>152</sup> Joined Cases C-67/96, C-115-17/97 & C-219/97, *Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 1999 E.C.R. I-5751, 2000 C.M.L.R. 446, para. 296; Case C-22/98, *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27.

<sup>153</sup> *Clarett*, 369 F.3d at 143 (emphasis omitted).

<sup>154</sup> *Mackey*, 543 F.2d at 614. See also Edelman & Harrison, *supra* note 59, ¶ 69 ("[T]he fact that a prospective league entrant is not yet a union member creates at least the possibility that a court might interpret this prong as unmet."); *Zimmerman*, 632 F. Supp. 398 at 405 ("Not only present but potential future players for a professional sports league are parties to the bargaining relationship.").

<sup>155</sup> 325 F. Supp. 1049 (C.D. Cal. 1971).

league draft.<sup>156</sup> The NBA thereafter moved for a stay of this ruling, which was granted by the U.S. Court of Appeals for the Ninth Circuit, but was subsequently overturned by the Supreme Court.<sup>157</sup>

In awarding prospective NBA player Haywood his request for summary judgment, the court applied the *per se* rule, explaining that three different types of harm emerged from the NBA age/education restriction.<sup>158</sup> The court stated:

First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.<sup>159</sup>

Six years later in *Linseman v. World Hockey Association*,<sup>160</sup> the U.S. District Court for the District of Connecticut overturned another age/education requirement in sports, finding the facts of that case "indistinguishable from the *Spencer Haywood* case."<sup>161</sup> In *Linseman*, nineteen-year-old amateur Canadian hockey player Kenneth Linseman brought a preliminary injunction suit against the World Hockey Association (WHA), contending that the league's prohibition against players under the age of twenty violated Section 1 of the Sherman Act.<sup>162</sup> Consistent with the court's earlier decision in *Denver Rockets*, the *Linseman* court found that the WHA age/education requirement amounted to a *per se* illegal refusal to deal, and that there was not any valid purpose to the WHA rule.<sup>163</sup> The court noted: "Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins."<sup>164</sup>

Once again in *Boris v. United States Football League*,<sup>165</sup> the District Court for the Central District of California struck down an age/education

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<sup>156</sup> *Id.* at 1066–67; Edelman & Harrison, *supra* note 59, ¶ 45.

<sup>157</sup> *Denver Rockets v. All-Pro Mgmt., Inc.*, No. 71-1089, 1971 WL 3015, at \* 1 (9th Cir. Feb. 16, 1971) *rev'd sub nom. Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1206–07 (1971); Edelman & Harrison, *supra* note 59, at ¶ 45.

<sup>158</sup> *Denver Rockets*, 325 F. Supp. at 1061, 1066; Edelman & Harrison, *supra* note 59, ¶ 47.

<sup>159</sup> *Denver Rockets*, 325 F. Supp. at 1061.

<sup>160</sup> 439 F. Supp. 1315 (D. Conn. 1977).

<sup>161</sup> *Id.* at 1326.

<sup>162</sup> *Id.* at 1317; Edelman & Harrison, *supra* note 59, ¶ 49.

<sup>163</sup> See *Linseman*, 439 F. Supp. at 1321–26; Edelman & Harrison, *supra* note 59, ¶ 49.

<sup>164</sup> *Linseman*, 439 F. Supp. at 1322 (quoting *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)).

<sup>165</sup> No. Cv. 83-4980 LEW (Kx), 1984 WL 894 (C.D. Cal. Feb. 28, 1984).

requirement, this time involving the United States Football League—a league that sought to compete against the NFL.<sup>166</sup> In *Boris*, plaintiff football player Robert Boris challenged an age/education requirement of the United States Football League, which mandated that all prospective players exhaust their college eligibility before entering the draft.<sup>167</sup> Ultimately, the parties reached a settlement and dismissed the case with prejudice.<sup>168</sup> In the opinion approving the proposed terms of settlement, the court overturned the age/education requirement, which it found per se illegal.<sup>169</sup>

Recently, courts have shifted away from using the per se test to review age/education requirements and have moved toward applying either a quick look test or the full Rule of Reason test.<sup>170</sup> This change in the applicable standard has not, so far, led any court to find that age/education requirements do not generally present *prima facie* violations of Section 1 of the Sherman Act.<sup>171</sup>

## *2. Collectively Bargained Age/Education Requirements*

Where an age/education requirement is collectively bargained, the non-statutory labor exemption nevertheless might insulate the requirement from antitrust liability.<sup>172</sup> In the most recent challenge to an age/education requirement in professional sports, *Clarett v. National Football League*,<sup>173</sup> the U.S. Court of Appeals for the Second Circuit upheld an age/education requirement under the non-statutory labor exemption.<sup>174</sup> In *Clarett*, the Second Circuit explained that the NFL's age/education requirement involved a mandatory term of bargaining (wages),<sup>175</sup> and that subjecting the

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<sup>166</sup> *Id.* at \*1.

<sup>167</sup> *Id.* at \*1–2; Edelman & Harrison, *supra* note 59, ¶ 50.

<sup>168</sup> *Boris*, 1984 WL 894, at \*4; Edelman & Harrison, *supra* note 59, ¶ 50.

<sup>169</sup> *Boris*, 1984 WL 894, at \*1; Edelman & Harrison, *supra* note 59, ¶ 50.

<sup>170</sup> See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 408 (S.D.N.Y. 2004), *rev'd on other grounds* 369 F.3d 124 (2d Cir. 2004) (“The [NFL age/education requirement] is the perfect example of a policy that is appropriately analyzed under the “quick look” standard because its anticompetitive effects are so obvious.”); *see also id.* at 405 (“[T]he parties agree that the rule of reason applies because the challenged restraint arises in the context of a sports league.”).

<sup>171</sup> See *Clarett*, 306 F. Supp. 2d at 405, n.164 (finding the NFL's age/education requirement presented a *prima facie* violation of the Sherman Act even when reviewed under either a quick look or full Rule of Reason review).

<sup>172</sup> See *supra* Part II.B.2.b; *see also Clarett*, 369 F.3d at 125 (finding the NFL age/education requirement insulated from antitrust scrutiny by the non-statutory labor exemption).

<sup>173</sup> 369 F.3d 124.

<sup>174</sup> *Id.* at 125.

<sup>175</sup> *Id.* at 139–41 (explaining that “the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject. . . . [M]oreover, the eligibility rules constitute a mandatory bargaining

requirement to antitrust review “would subvert fundamental principles of our federal labor policy.”<sup>176</sup> Therefore, the court found the non-statutory labor exemption applied against finding antitrust liability.<sup>177</sup>

Most other U.S. courts have taken a far more narrow view of the non-statutory labor exemption, applying instead the more traditional *Mackey* Test, which exempts from antitrust liability only collective bargaining agreements that (1) involve mandatory subjects of bargaining, (2) primarily affect the parties involved, and (3) are reached through bona fide, arm’s-length bargaining.<sup>178</sup> Under the *Mackey* Test, there is little question that both the NBA and NFL age/education requirements involve mandatory subjects of bargaining, reached through bona fide arm’s-length bargaining.<sup>179</sup> However, it is not clear whether the requirements “primarily affect[] only the parties to the collective bargaining relationship.”<sup>180</sup>

Looking specifically at the “primarily affect[] only the parties to the collective bargaining relationship” prong, even applying the *Mackey* Test, courts may find that the NBA and NFL age/education requirements primarily affect the parties to the CBA because both of the parties involved (the member clubs and the boycotted player) are within the scope of the collective bargaining process and not “economic actors completely removed from the bargaining relationship.”<sup>181</sup> Yet, the fact that a prospective league entrant is not a union member creates some possibility that certain courts might find this prong unmet.<sup>182</sup> To date, no court applying the *Mackey* Test

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subject because they have tangible effects on the wages and working conditions of current NFL players.”).

<sup>176</sup> *Clarett*, 369 F.3d at 138.

<sup>177</sup> *See id.* at 125.

<sup>178</sup> *Mackey*, 543 F.2d at 614.

<sup>179</sup> *See Clarett*, 369 F.3d at 139-41; *Mackey*, 543 F.2d at 615; Edelman & Harrison, *supra* note 59, ¶ 67.

<sup>180</sup> *Mackey*, 543 F.2d at 614. *See supra*, notes 88–95 and accompanying text.

<sup>181</sup> *Zimmerman*, 632 F. Supp. at 405. *See also* Edelman & Harrison, *supra* note 59, ¶ 69. As explained by the Second Circuit Court of Appeals in *Clarett* (although it is not exactly clear if that court is incorporating the second prong of *Mackey* into its own test), a prospective professional athlete that is excluded from a sports league based on an age/education policy is “no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set.” *Id.* (quoting *Clarett*, 369 F.3d at 141).

<sup>182</sup> *See Michael A. McCann & Joseph S. Rosen, Legality of Age Restrictions in the NBA and NFL*, 56 CASE W. RES. L. REV. 731, 747 (2006) (“[P]layers not within the labor organization have no one at the bargaining table. Obviously, existing players have an interest in keeping top amateur players out of the NFL because doing so preserves existing jobs that would otherwise go to better, younger players.”) (quoting Michael A. McCann); *id.* at 762 (“Age eligibility should not be covered by the labor exemption because it primarily affects workers outside of the bargaining unit. It is an exemption to the antitrust laws and is supposed to be narrowly construed.”) (quoting Alan Milstein); *see also* Edelman & Harrison, *supra* note 59, ¶¶ 68–69.

has addressed whether a professional sports labor union represents, for collective bargaining purposes, players that are not allowed to enter the league in that year's draft.<sup>183</sup> Therefore, a court outside of the Second Circuit might find that a collectively bargained age/education requirement affects non-parties to the bargaining process.<sup>184</sup>

## B. Analysis Under the EC Treaty

It is clearer that the NBA and NFL age/education requirements would be found illegal under Article 81 of the EC Treaty.

### *1. Prima Facie Case Under EC Treaty*

Although the ECJ has never addressed the issue of age/education requirements in the context of professional sports leagues (this is because European sports leagues allow players to join at any age), the ECJ would most likely find that both the NBA and NFL age/education requirements violate Article 81 of the EC Treaty by preventing, restricting, and distorting competition by “limit[ing] or control[ing] production [and] markets.”<sup>185</sup> Specifically, both the NBA and NFL age/education requirements limit production by denying individual clubs access to labor inputs of younger and less educated players.<sup>186</sup> In doing so, both the NBA and NFL deprive individual clubs of the opportunity to hire what may be the highest caliber potential labor source. In addition, the NBA and NFL requirements deprive consumers of the choice to watch what they may perceive as a superior product—professional basketball and football games that include the highest possible caliber players.

The NBA and NFL age/education requirements clearly fall within the scope of Article 81(1).<sup>187</sup> The NFL and NBA clubs do not qualify for a de minimis exception to Article 81(1) because both the NBA and NFL have more than five percent of the total relevant market, irrespective of whether the highest European professional leagues are considered part of the same market as the NBA clubs.<sup>188</sup> In addition, the ECJ would not deem the NBA

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<sup>183</sup> See Marc Edelman, *Sports and the Law: NBA Age/Education Requirement Pushes Jennings Overseas*, ABOVE THE LAW, July 14, 2008, [http://www.abovethelaw.com/2008/07/sports\\_and\\_the\\_law\\_nba\\_ageeduc.php](http://www.abovethelaw.com/2008/07/sports_and_the_law_nba_ageeduc.php).

<sup>184</sup> See McCann & Rosen, *supra* note 182, at 747, 762.

<sup>185</sup> EC Treaty, *supra* note 8, art. 81(1)(b). See also *id.* art. 81(1).

<sup>186</sup> See *id.* at art. 81; see generally *Denver Rockets*, 325 F. Supp. at 1061 (explaining the effect of age/education requirements on market competition in the context of U.S. antitrust review).

<sup>187</sup> See *supra* Part II.C.1.

<sup>188</sup> See Commission Notice, Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101/81) para. 46; see also Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition

and NFL age/education requirements "necessary in order to make that competition possible in the first place."<sup>189</sup> There is no bona fide argument that without these requirements clubs would play fewer games or go out of business entirely. For example, the NBA did not enforce any age/education requirement from 1971 until 2006.<sup>190</sup> Yet, during this period, club profitability soared and the league significantly expanded its total number of clubs.<sup>191</sup>

Additionally, age/education requirements are unlikely to merit a special exemption under Article 81(3).<sup>192</sup> The age/education requirements do not improve distribution.<sup>193</sup> They do not promote technical progress.<sup>194</sup> They also do not promote economic progress.<sup>195</sup>

At the same time, consumers do not gain any of the financial benefits from the NBA and NFL age/education requirements.<sup>196</sup> To date, neither the NBA nor NFL has presented any evidence to indicate that ticket prices have become more affordable directly because of their age/education requirements.

To the extent the European Commission is willing to consider social policy in support of an Article 81(3) exemption (and that issue, in itself, is somewhat unsettled),<sup>197</sup> there is no strong argument that the NBA and NFL's age/education requirements meet an important European Community goal.<sup>198</sup> The European Commission has not expressed concern over the mere fact that minors are working as athletes, and while the age/education requirements of both the NBA and the NFL are not primarily geared toward

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Under Article 81(1) of the Treaty, 2001 O.J. (C 368/13) para. 8 (stating that horizontal agreements between commercial actors with aggregate market power of less than 5 percent of the relevant market are simply exempt from Article 81(1)).

<sup>189</sup> *Bosman*, 1995 ECR I-4921, para. 265. See also PARRISH & MIETTINEN, *supra* note 12, at 119 (citing same); *supra* note 12 and accompanying text.

<sup>190</sup> Compare Jack N.E. Pitts Jr., Note, *Why Wait: An Antitrust Analysis of the National Football League and National Basketball Association's Draft Rules*, 51 HOW. L.J. 433, 435 (2008) ("Up until 2005, to join the ranks of the NBA, student-athletes only needed a high school diploma. Under this condition, the NBA experienced a steady flow of high school players entering the draft."), with Brian Shaffer, Comment, *The NBA's Age/Education Requirement Shoots and Misses: How the Non-Statutory Labor Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 684 (2008) ("The 1990s, however, saw an explosion of high school talent entering the NBA.").

<sup>191</sup> See 20 Years Under Stern, USA TODAY, Oct. 28, 2003 at 1-E; see also David L. Andrews, *Whither the NBA, Whither America?*, PEACE REVIEW 505, 505 (1999).

<sup>192</sup> See EC Treaty, *supra* note 8, art. 81(3).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See JONES & SUFRIN, *supra* note 8, at 144 ("The Role of Article 81(3)").

<sup>198</sup> See *infra* notes 239–241 and accompanying text; *supra* Part II.A.

protecting minors, all of the potential NBA and NFL entrants that have thus far been excluded by the leagues' age/education rules have been high school graduates over age eighteen.<sup>199</sup>

## *2. Applying the European Non-Statutory Labor Exemption*

Presuming that a plaintiff is able to make a *prima facie* case under Article 81, the NBA and NFL further are unlikely to be able to defend their age/education requirements under the EC's version of the non-statutory labor exemption.<sup>200</sup> As explained by the *Albany* and *Van der Woude* cases, the EC test for applying the non-statutory labor exemption requires a defendant to show the following four factors: (1) a collective agreement between management and labor; (2) conducted in good faith; (3) on core subjects of collective bargaining; (4) that do not directly affect third markets and third parties.<sup>201</sup>

Both the NBA and NFL age/education requirements clearly meet the "collective agreement" prong of the *Albany/Van der Woude* test, as both age/education requirements are written into their respective collective bargaining agreements, signed between management and labor.<sup>202</sup> The NBA age/education requirement appears as Article 10, Section 1(b) of the collective bargaining agreement, signed by the NBA teams and the National Basketball Players Association (NBPA).<sup>203</sup> Meanwhile, the NFL age/education requirement appears as Article 16, Section 2(b) of the collective bargaining agreement, signed by the NFL teams and the National Football League Players Association (NFLPA).<sup>204</sup>

The NBA and NFL age/education requirements also meet the "good faith" prong of the *Albany/Van der Woude* test. Although relevant case law does not explicitly define "good faith" in the context of the European exemption, the term is most often held to mean "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."<sup>205</sup> In this context, it seems the "good

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<sup>199</sup> See Ian Thomson, *Older but Not Wiser*, SPORTS ILLUSTRATED, Mar. 10, 2003 at 76; see also Phil Taylor & Mark Bechtel, *Wait Class*, SPORTS ILLUSTRATED, Nov. 1, 2004, at 22.

<sup>200</sup> See *infra* Part IV.B.1.

<sup>201</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296; Case C-22/98.

<sup>202</sup> See *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>203</sup> NAT'L BASKETBALL ASS'N, *supra* note 16, at Art. 10 § 1(b)(i).

<sup>204</sup> NAT'L FOOTBALL LEAGUE, *supra* note 17, at Art. 16, § 2(b).

<sup>205</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

faith” requirement in the *Albany/Van der Woude* test is identical to the “bona fide arm’s length bargaining” prong of the *Mackey* Test.<sup>206</sup> Again, there is little reason to believe either party lacked sufficient bargaining power to allow for a fair opportunity to obtain a quid pro quo.<sup>207</sup>

The NBA and NFL age/requirements also most likely meet the third prong of the European non-statutory labor exemption test, as related to “core subjects of collective bargaining.”<sup>208</sup> The ECJ has never addressed the issue of what beyond “wages and working conditions” qualify as “core subjects of bargaining.”<sup>209</sup> However, this language again seems to come almost directly from the *Mackey* Test’s “mandatory subject of bargaining” language.<sup>210</sup> If anything, a “core subject of bargaining” is even broader than a “mandatory subject.”<sup>211</sup> Therefore, initial entry restrictions such as age/education requirements are more likely than not covered by the exemption.

Nonetheless, the NBA and NFL age/education requirements fail to meet the final prong of the *Albany/Van der Woude* test. This is because the age/education requirements seem to “directly affect third parties.”<sup>212</sup> Although there is minimal case law defining what constitutes “directly affect[ing] third parties,” this language seems at absolute broadest to shield the same exact conduct as insulated by the *Mackey* Test’s prong that requires the questioned agreement to “primarily affect the parties involved.”<sup>213</sup> More likely, however, the *Albany/Van der Woude* test, by its clear wording, is even narrower. Here, “third parties” seems to include players that are not yet eligible for union membership, who are seeking to enter either the NBA or NFL drafts. These players are considered “third parties” because they are not represented by the clubs’ liaisons to collective bargaining, and they are ineligible for representation by the union.

#### IV. LEGALITY OF NFL AND NBA DRAFTS AND RESERVE SYSTEMS

The legal status of league drafts and reserve systems also might be

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<sup>206</sup> See *Mackey*, 543 F.2d at 614.

<sup>207</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27.

<sup>208</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>209</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>210</sup> See *Mackey*, 543 F.2d at 615.

<sup>211</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>212</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>213</sup> *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

more favorable to professional sports leagues under U.S. law than under EC law. In the United States, both the NBA and NFL drafts and reserve systems are legal—insulated from liability under Section 1 of the Sherman Act by the non-statutory labor exemption.<sup>214</sup> However, in Europe, even if the NBA and NFL drafts and reserve systems are insulated from liability under Article 81 of the EC Treaty, these drafts and reserve systems still might violate Article 39 of the EC Treaty, which pertains to the rights to free movement of workers throughout the European Community.<sup>215</sup>

#### A. Analysis Under Section 1 of the Sherman Act

##### *1. Prima Facie Case of Antitrust Violation*

Under Section 1 of the Sherman Act, both the NBA and NFL's unilaterally-implemented league drafts and reserve systems present a *prima facie* case of an antitrust violation; however, both sets of rules are probably exempt from antitrust liability under the non-statutory labor exemption.<sup>216</sup> The issue of whether league drafts present a *prima facie* case on an antitrust violation was first tested by former NFL defensive back James "Yazoo" Smith in the case *Smith v. NFL*.<sup>217</sup> In that case, Smith filed suit against the NFL clubs, contending that the NFL draft constituted a "group boycott" because the NFL clubs concertedly refused to deal with any player before he has been drafted or after he has been drafted by another team.<sup>218</sup> The U.S. Court of Appeals for the District of Columbia, applying the Rule of Reason, ruled in Smith's favor, finding that the draft was "undeniably anticompetitive both in its purpose and in its effect."<sup>219</sup> This was because the NFL draft, as it existed in 1968 "inescapably force[d] each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."<sup>220</sup>

Similarly, league-wide reserve systems have also been found to

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<sup>214</sup> See *infra* Part IV.A.2.

<sup>215</sup> See EC Treaty, *supra* note 8, art. 39.

<sup>216</sup> See *infra* Part IV.A.2; see also *McCourt*, 600 F.2d at 1196–97 ("Thus, we conclude that plaintiff has sufficiently established that [the NFL reserve system] as applied, unreasonably restrains trade and commerce and is violative [sic] of Section 1 of the Sherman Act.").

<sup>217</sup> 593 F.2d 1173 (1978).

<sup>218</sup> *Id.* at 1178.

<sup>219</sup> *Id.* at 1185.

<sup>220</sup> *Id.* at 1185. Although the court left open "the possibility that some type of player selection system might be defended as serving to regulate and promote competition," the court found that this particular draft, that applied to all players seeking to enter the league "leaves no room whatever for competition among the teams for the services of college players, and utterly strips them of any measure of control over the marketing of their talents." *Id.* at 1185, 1187.

constitute prima facie violations under Section 1 of the Sherman Act.<sup>221</sup> For example, in the 1976 case *Mackey v. NFL*, several NFL players led by Hall of Fame tight end John Mackey brought suit in the U.S. District Court of Minnesota against each of the individual NFL clubs,<sup>222</sup> arguing that an NFL bylaw known as the "Rozelle Rule" violated Section 1 of the Sherman Act because it awarded the NFL commissioner power to compensate clubs that lost free agent players and penalized clubs that signed them.<sup>223</sup> Both the District Court of Minnesota and the U.S. Court of Appeals for the Eighth Circuit agreed with Mackey, finding that the Rozelle Rule, when unilaterally implemented, violated Section 1.<sup>224</sup> Although the Eighth Circuit Court of Appeals disagreed with the district court's finding that these restraints were illegal per se,<sup>225</sup> both courts agreed with the district court's alternate conclusion that under the Rule of Reason the anti-

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<sup>221</sup> See *infra* Part IV.A.2; see also *McCourt*, 600 F.2d at 1196–97; *Mackey*, 543 F.2d at 618–19.

<sup>222</sup> See *Mackey*, 543 F.2d at 609, n.2; see also *Mackey v. Nat'l Football League*, 407 F. Supp. 1000, 1002 (D. Minn. 1975) (rev'd in part by *Mackey*, 543 F.2d 606) (stating names of plaintiffs).

<sup>223</sup> *Mackey*, 407 F. Supp. 1000. The court explained:

Plaintiffs claim that Section 12.1(H) of the NFL Constitution and By-Laws (hereinafter referred to as the 'Rozelle Rule') constitutes a per se violation of the antitrust laws. Plaintiffs claim that if the Rozelle Rule does not constitute a per se violation of the antitrust laws, it violates the Rule of Reason standard. Plaintiffs further claim that they are entitled to damages and injunctive relief.

*Id.* at 1002. See also WEILER & ROBERTS, *supra* note 83, at 206 (the Rozelle Rule was "the NFL's practice of requiring the team that signed a veteran free agent to provide what the commissioner judged to be 'fair and equitable' compensation (by way of players, draft choices, or both) to the team that had lost the player off its roster.").

<sup>224</sup> See *Mackey*, 543 F.2d at 618–19 (finding the per se test inappropriate in the context of the NFL's Rozelle Rule, but still finding the prima facie test met based on the Rule of Reason); *Mackey*, 407 F. Supp. at 1007–08 (finding the prima facie test is met both based on the per se standard and the Rule of Reason).

<sup>225</sup> *Mackey*, 543 F.2d at 619. The court went on to explain:

Here, however, as the owners and Commissioner urge, the NFL assumes some of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League fails, no one team can survive. Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules here, fashioned in a different context.

*Id.* at 619 (citing *United States v. Nat'l Football League*, 116 F. Supp. 319 (E.D. Pa 1953); *Timken Co. v. United States*, 341 U.S. 593 (1951)).

competitive effects of the Rozelle Rule outweighed the rule's pro-competitive benefits.<sup>226</sup>

Additionally, in the case *McCourt v. Cal. Sports Inc.*,<sup>227</sup> the U.S. Court of Appeals for the Sixth Circuit held that plaintiff hockey player Dale McCourt "sufficiently established that [the NHL reserve system], as applied, unreasonably restrain[ed] trade and commerce" in a manner that led to a *prima facie* showing of an antitrust violation.<sup>228</sup> Although the NHL ultimately escaped liability in *McCourt* based on the non-statutory labor exemption, the *prima facie* cases in *Mackey* and *McCourt* were similar.<sup>229</sup>

## *2. Analysis Under the Non-Statutory Labor Exemption*

The NBA and NFL's drafts and reserve systems are probably exempt from antitrust liability under the non-statutory labor exemption, regardless of whether a court applies the *Clarett* Test or the *Mackey* Test. Applying the *Clarett* Test, league drafts and reserve systems are mandatory subjects of bargaining because "they have tangible effects on the wages and working conditions of current NFL players."<sup>230</sup> In addition, courts would "subvert fundamental principles of our federal labor policy" were they to fail to insulate league drafts and reserve systems from antitrust review; league drafts and reserve systems are the kind of issues over which one might expect an employer and union to bargain in the professional sports collective bargaining context.<sup>231</sup>

The drafts and reserve systems implemented by the NBA and NFL also very likely meet the three-prong test established in *Mackey* because

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<sup>226</sup> *Mackey*, 543 F.2d at 619 (explaining that the Rozelle Rule was anti-competitive for the following reasons: (1) the Rozelle Rule significantly deters clubs from negotiating with and signing free agents; (2) it acts as a substantial deterrent to players playing out their options and becoming free agents; (3) it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; (4) that, as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and (5) that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another).

<sup>227</sup> 600 F.2d 1193.

<sup>228</sup> *Id.* at 1196–97.

<sup>229</sup> Compare *Mackey*, 543 F.2d at 616–18 (stating that the Rozelle Rule "imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions . . . do not in and of themselves inure to the benefit of the players or their union."), with *McCourt*, 600 F.2d at 1197, 1203 (stating that the reserve system "inhibits and deters teams from signing free agents, decreases a player's bargaining power in negotiations, denies players the right to sell their services in a free and open market, and it depresses salaries more than if competitive bidding were allowed.").

<sup>230</sup> *Clarett*, 369 F.3d at 139.

<sup>231</sup> *Id.* at 138 (citing *Wood v. Nat'l Basketball Ass'n*, 809 F.2d, 954, 956–58 (2d Cir. 2004)).

they are (1) mandatory subjects of bargaining, (2) primarily affecting the parties involved, and (3) reached at arms’ length bargaining.<sup>232</sup> The league drafts and reserve systems are mandatory subjects of bargaining because each “operates to restrict a player’s ability to move from one team to another and [each] depresses player salaries.”<sup>233</sup> Both also primarily affect the parties involved because both relate primarily to the status of teams and players.<sup>234</sup> Finally, both were reached through bona fide arm’s-length bargaining, given that the NBA and NFL drafts and reserve systems are written directly into the collective bargaining agreement as the result of real negotiations between the league and the players association.<sup>235</sup>

## B. Analysis Under the EC Treaty

Applying Article 81 of the EC Treaty, the NBA and NFL drafts and reserve systems also are likely insulated from liability. However, these drafts and reserve systems might separately violate Article 39 of the Treaty.

### *1. Article 81 Analysis of League Drafts and Reserve Systems*

The NBA and NFL drafts and reserve systems are likely insulated from liability under Article 81 of the EC Treaty. With respect to the EC version of the *prima facie* test, the NBA and NFL drafts and reserve systems seem to fall within the scope of Article 81(1) because both “limit or control production [and] markets” for labor inputs.<sup>236</sup> In addition, neither qualifies for the *de minimus* exception because both the NBA and NFL control more than five percent of the relevant labor market.<sup>237</sup> Moreover, neither the NBA or NFL drafts nor the reserve systems likely qualify as “necessary to make that competition possible in the first place.”<sup>238</sup>

With respect to Article 81(3), it is difficult to tell whether the Commission would exempt the NBA and NFL drafts and reserve systems based on the kind of social policy grounds that are irrelevant under U.S.

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<sup>232</sup> *Mackey*, 543 F.2d at 614.

<sup>233</sup> *Id.* at 615. *See also McCourt*, 600 F.2d at 1198 (stating that federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining or is the product of bona fide arm’s-length bargaining).

<sup>234</sup> *See McCourt*, 600 F.2d at 1198 (“Clearly here the restraint on trade primarily affects the parties to the bargaining relationship. It is the hockey players themselves who are primarily affected by any restraint, reasonable or not.”); *Zimmerman*, 632 F. Supp. at 405.

<sup>235</sup> *See McCourt*, 600 F.2d at 1199–203; *Mackey*, 543 F.2d at 616; *Zimmerman*, 632 F. Supp. at 406–08; *see also Edelman & Harrison*, *supra* note 59, at 23.

<sup>236</sup> EC Treaty, *supra* note 8, art. 81(1)(a).

<sup>237</sup> *See* Commission Notice, Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101/81) para. 46.

<sup>238</sup> *Bosman*, 1995 E.C.R. I-4921, para. 265. *See also Pitts*, *supra* note 190, at 435; *Shaffer*, *supra* note 190, at 684.

antitrust law but sometimes make their way into EC competition law analysis.<sup>239</sup> It is possible, albeit unlikely, that the Commission would exempt U.S.-style sports leagues' drafts and reserve systems on social policy grounds because they play an important role in the sports' structure and existence.<sup>240</sup> Nonetheless, the drafts and reserve systems do not benefit consumers in an economic sense because consumers do not enjoy their "fair share of the resulting benefit" from league drafts and reserve systems.<sup>241</sup>

Nonetheless, all this debate is relatively moot given that both the NBA and NFL drafts and reserve systems are likely insulated from Article 81 liability by the European version of the non-statutory labor exemption. This is because both the NBA and NFL reserve systems emerge from collective agreements between management and labor conducted in good faith on core subjects of collective bargaining, and do not directly affect third markets and third parties.<sup>242</sup> The only real question with respect to applying the EC non-statutory labor exemption is whether recently drafted players constitute "third parties" under the *Albany/Van der Woude* test. Although these players, once drafted, become subject to union membership, they are unable to technically join the union prior to the draft.<sup>243</sup> While this remains an issue of first impression for EC courts, there is a strong argument that players eligible for the NBA or NFL drafts are not "third parties" because these players are eligible for league entry and will gain union membership upon being selected by a club.<sup>244</sup>

## *2. Article 39 Analysis of League Drafts and Reserve Systems*

Article 39 of the EC Treaty, however, presents an alternate route by which the ECJ might find NBA and NFL clubs liable for imposing drafts and reserve systems, at least with respect to their implication on citizens of EC Member States.<sup>245</sup> Under Article 39, the main problem with the NBA

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<sup>239</sup> Compare JONES & SUFRIN, *supra* note 8, at 144 (mentioning that social policy is a factor that the Commission might consider in granting an Article 81(3) exemption), with *Nat'l Soc'y of Prof'l Eng'rs* 435 U.S. at 688 ("Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.").

<sup>240</sup> Pons, *supra* note 111, at 6.

<sup>241</sup> EC Treaty, *supra* note 8, at art. 81(3).

<sup>242</sup> See *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>243</sup> See *Van der Woude*, 2000 E.C.R. I-7111, paras. 22–27; *Albany*, 1999 E.C.R. I-5751, para. 296.

<sup>244</sup> See generally *Zimmerman*, 632 F. Supp. at 405 (finding that players preparing to enter league draft were adequately protected under Mackey's "primarily affects the parties involved" prong).

<sup>245</sup> See EC Treaty, *supra* note 8, at Art. 39.

and NFL drafts and reserve systems is that both seem to limit the “free movement of workers.”<sup>246</sup> As explained by the ECJ in *Walrave*, it makes no difference that the league drafts and reserve systems do not discriminate on the basis of nationality.<sup>247</sup> Both still inhibit fluid, free markets transacting across Member States’ boundaries, which is a major concern of EC competition policy.<sup>248</sup>

The fact that the NBA and NFL drafts and reserve systems are collectively bargained is irrelevant to an Article 39 claim because the EC’s non-statutory labor exemption does not apply with respect to Article 39 claims.<sup>249</sup> In fact, the ECJ recently held that:

[T]he fact that an agreement or activity is excluded from the scope of the competition rules does not necessarily mean that it is also excluded from the scope of freedom of movement rules. On the contrary, an agreement or activity may fall under one set of rules while simultaneously being excluded from the other.<sup>250</sup>

## CONCLUSION

Expanding U.S. professional sports leagues into Europe is an exciting opportunity for both club owners and fans; however, expanding into Europe also exposes U.S. sports leagues to potential new sources of liability. These new sources of liability emerge primarily under Articles 81 and 39 of the EC Treaty.

Because U.S. professional sports leagues are structured differently from their European counterparts, the ECJ has never needed to determine whether league-wide age/education requirements, or league drafts and reserve systems, would violate the EC Treaty. Upon preliminary review, however, it seems that the NBA and NFL age/education requirements likely violate Article 81 of the Treaty, while the NBA and the NFL drafts and reserve systems might violate Article 39 (at least with respect to European nationals).

These conclusions do not mean that expanding the NBA and NFL into Europe would be impossible. However, both leagues would need to make some modifications to their league rules to minimize their risk of liability.

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<sup>246</sup> *Id.* at art. 39(1). See also *id.* at art. 39(2)–(3).

<sup>247</sup> *Walrave*, 1974 ECR 1405, para. 4 (“Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.”). See also PARRISH, *supra* note 12, at 86–88; SZYMANSKI & ZIMBALIST, *supra* note 9, at 114.

<sup>248</sup> See EC Treaty, *supra* note 8, art. 39.

<sup>249</sup> See PARRISH AND MIETTINEN, *supra* note 12 at 69–70 (citing Case C-519/04, David Meca-Medina & Igor Majcen v. Comm’n 2006 ECR I-4929 at para. 31–33).

<sup>250</sup> *Int’l Transp.* 2007 ECR I-10779, para. 26.

With respect to their age/education requirements, the easiest solution for both the NBA and NFL would be to drop these requirements altogether. Not only do age/education requirements present a likely source of liability under the EC Treaty, but even in the United States, the legality of age/education requirements remains questionable under Section 1 of the Sherman Act.

Meanwhile, with respect to their league drafts and reserve systems, the NBA and NFL probably should reach out to the European Commission and seek a consent agreement, protecting both systems. Ultimately, the NBA and NFL may need to change their draft and reserve rules slightly to provide European nationals with certain special exemptions. However, because most NBA and NFL players are not from Europe, any required changes to either league's rules would likely have a minimal impact on the league's overall business structure.