Notes

A TRANSCONTINENTAL ALLEY-OOP: ANTITRUST RAMIFICATIONS OF POTENTIAL NATIONAL BASKETBALL ASSOCIATION EXPANSION INTO EUROPE*

I. INTRODUCTION

As the Olympic Games demonstrate, international sporting events have been held for almost a century.[1] In recent years a greater array of sports, led by professional leagues, have expanded onto the international scene.[2] For example, in the fall of 1993, the Canadian Football League (CFL) moved into the United States by establishing a franchise in Sacramento, California.[3] The World League of American Football (WLAF), although in suspension at the present time, introduced Europe to the American version of football.[4] Major League Baseball (MLB) and the National Hockey League (NHL) each consist of teams from both Canada and the United

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1. The first modern Olympiad took place in Athens, Greece in 1896. THE WORLD ALMANAC OF BOOKS AND FACTS 1994 841 (Robert Famighetti ed., 1993).

2. For example, the World Cup of Soccer will be held in the United States for the first time in 1994. *On Wings of Gold*, ECONOMIST, July 25, 1992, at 8. This is particularly notable given the low popularity of professional soccer in the United States. *Id.*

3. Craig Daniels, *CFL Sets the Stage for a Big-Time Labor Dispute*, FIN. POST, Jan. 16, 1993, § 6, at 50. Additionally, American CFL franchises have been awarded to Baltimore, Las Vegas, and Shreveport (LA) with play beginning in 1994. Jim Thomas, *Two Groups Express Interest in Bringing CFL to St. Louis*, ST. LOUIS POST: DISPATCH, Mar. 18, 1994, at 20.

4. The WLAF will resume play in 1995, with all of its six teams located in Europe. Brian Lowry, *Fox & NFL Team Up For World League*, DAILY VARIETY, Mar. 24, 1994, at 1. The league's presence in Europe stems from its greater popularity overseas. *Expansion of NFL, World League Halted*, L.A. TIMES, Sept. 18, 1992, at C3.

States. In addition, the National Basketball Association (NBA) has recently decided to expand into Canada,[5] and many indicators suggest that the NBA's long-term expansion vision is even broader.[6] Specifically, Europe appears to be the NBA's next targeted destination.

The NBA is a joint venture comprised of twenty-seven teams.[7] The individual franchises, as joint venturers, have entered into league-wide agreements on a variety of issues, ranging from mundane matters such as the rules of the game itself to more complicated agreements covering, among other issues, player movement,[8] revenue sharing, the college draft, product licensing, and television rights.[9] These complicated issues are not as essential to the game of basketball as the rules of the game (e.g., how high the rim should be, the length of the court, etc.). Nevertheless, they have proved vital to the NBA's recent success. The NBA acts as a single, integrated economic unit with respect to certain issues, with the league's revenue sharing system as the most obvious example.[10] Simultaneously, the joint venturers maintain significant economic independence from each other, since each team's independent revenues exceed those it receives from shared receipts.[11] In sum, the NBA can be characterized as an entity whose members both cooperate and compete with each other, and, in a sense, cooperate *in order to* compete with each other.

From an antitrust perspective, some of the aforementioned practices are somewhat suspect. However, these otherwise questionable practices are protected by a labor exemption to the antitrust laws, which is encompassed in a collective bargaining agreement

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5. The decision to expand into Canada by 1995 has been finalized. *Toronto Gets Its Team*, FIN. POST, Nov. 6, 1993, § 6, at 58. Furthermore, David Stern, the NBA's commissioner, has recently stated that Mexico City will have an NBA franchise by the year 2000. David Bennett, *NBA Shooting for Mexico City*, RALEIGH NEWS & OBSERVER, Jan. 21, 1994, at 6C.

6. Bennett, *supra* note 5, at 6C; *see also infra* notes 14-30 and accompanying text.

7. Amended and Restated Joint Venture Agreement, Jan. 1, 1989, at 3 [hereinafter Joint Venture Agreement]. For a discussion of the NBA's organizational structure, see Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n, 754 F. Supp. 1336, 1339-41 (N.D. Ill. 1991).

8. Collective Bargaining Agreement between the National Basketball Association and the National Basketball Players' Association, Nov. 1, 1988, arts. V-VI, *reprinted in* 2 MARTIN J. GREENBERG, SPORTS LAW PRACTICE 1-131 (1993) [hereinafter Collective Bargaining Agreement].

9. *Id.* arts. IV, XXV, XXXII.

10. *Id.* art. VII; *see infra* notes 47-58 and accompanying text for a discussion of the revenue sharing system.

11. *See Chicago Prof. Sports Ltd. Partnership*, 754 F. Supp. at 1341.

between the NBA and the Players' Association.[12] The absence of this exemption in Europe, plus uncertainties about the application of foreign antitrust laws, raises many questions about the exportation of the NBA to Europe. Specifically, how would European Community (EC) law treat the NBA's (1) restrictions on player movement,[13] (2) legal existence as a unified entity, and (3) interaction with the existing European leagues which would become its competitors?

The antitrust ramifications of NBA expansion into Europe are the subject of this Note. Part II will examine the likelihood of NBA expansion into Europe. Issues involving the NBA which arise under American antitrust law will be discussed in Part III. Part IV will examine how EC law would treat the antitrust issues surrounding the NBA if expansion occurred. In particular, Part IV will analyze NBA expansion into Europe under EC competition law:[14] first, under a traditional Article 85 analysis;[15] second, as a joint venture; and, finally, as a service/distribution franchise. Part V will compare the issues involved with the recent CFL expansion into the United States with those surrounding NBA expansion into Europe. Finally, Part VI will conclude that EC competition law and, where applicable, certain member states' national laws, would treat European NBA franchises more leniently than United States antitrust law currently treats American NBA teams.[16]

II. THE LIKELIHOOD OF NBA EXPANSION INTO EUROPE

There are many indications that the NBA will expand into Europe in the coming years. First, the NBA's growth has been unparalleled among American sports leagues over the past decade.[17]

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12. *See infra* note 59 and accompanying text for a discussion of the labor exemption.

13. *See infra* notes 41-78 and accompanying text for a discussion of the restrictions on player movement.

14. The EC's competition laws are found in Articles 85 and 86 of the EEC Treaty. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, arts. 85-86 [hereinafter EC Treaty]. Competition law is the EC's counterpart to American antitrust law and is similar to sections 1 and 2 of America's Sherman Act. 15 U.S.C. §§ 1, 2 (1993). The Treaty on European Union (EU) amended the Treaty Establishing the European Economic Community by replacing the term European Economic Community with the term European Community. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247 (1992), art. G(A)(1). Articles 85-90 of the former EEC Treaty are unchanged by the EU Treaty.

15. EC TREATY, *supra* note 14, art. 85.

16. *See infra* notes 274-278 and accompanying text.

17. From 1983 through 1993, NBA gross revenues have increased from $140 million to $1.1 billion. Elizabeth Comte, *How High Can David Stern Jump?* FORBES, June 7, 1993, at 42.

Partly as a result of this development, the NBA has expanded the number of franchises within the United States.[18]

Furthermore, the surge in the NBA's popularity has not been confined to the United States. International interest in the NBA over the past few years has been significant. For example, the enthusiastic response to the 1992 United States Olympic basketball team, the "Dream Team,"[19] revealed the global popularity of the NBA and of basketball in general.[20] In fact, according to some observers, the NBA advocated forming the "Dream Team" in order to lay the foundation for international expansion.[21]

In addition to the Olympics, international interest in the NBA has taken many forms. The Federation Internationale de Basketball Amateur (FIBA), the international basketball association, plans to have the 1994 World Championships in Toronto in order to encourage NBA players to participate.[22] NBA games are currently seen on television in approximately ninety countries around the world.[23] In

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Gross retail sales increased from $44 million in 1983 to $1.528 billion in 1992. Larry Whiteside, *Stern the Point Man in NBA's Team Effort*, BOSTON SUNDAY GLOBE, Dec. 20, 1992, at 84. The NBA's television revenues have also grown over the past decade. The NBA received $88 million for network television rights and $11.5 million for cable television rights in 1983. *Id.* Recently, the NBA agreed to a four-year $750 million dollar network television package to begin in the 1994-95 season. Elizabeth Jensen, *NBA Will Share Risk With NBC In Pact Renewal*, WALL ST. J., April 29, 1993, at B1. In addition the NBA negotiated a four-year $350 million dollar cable television package which will commence in 1994-95. Richard Sandomire, *N.B.A. and Turner in 4-Year Pact*, N.Y. TIMES, Sept. 22, 1993. Furthermore, league attendance has risen from just over eleven million in 1983-84 to over eighteen million for the 1991-1992 season. Whiteside, *supra* at 84. The NBA's plan for growth is considered the "model in pro sports." Herb Zurkowsky, *NHL Strike Very Risky Business*, MONTREAL GAZETTE, Mar. 29, 1992, at C2.

18. Recently, four expansion franchises were added to the NBA: Charlotte and Miami in 1988 and Orlando and Minnesota in 1989. *Toronto Could Join NBA Mix*, CHI. TRIB., Feb. 22, 1993, § 3, at N4.

19. The "Dream Team" was the first American Olympic basketball team composed of professional players. Jan Hubbard, *Delivering the Dream; U.S. Leaves No Doubt Who's Best*, NEWSDAY, Aug. 9, 1992, at 5.

20. *See* Mike Downey, *A Team that Lived up to Its Legend*, L.A. TIMES, Aug. 9, 1992, at C10.

21. Joe Strauss, *Retired Pros May Lead U.S. in '96 Baseball*, ATLANTA J. & CONST., Nov. 5, 1992, at H1; Jack Craig, *Games Offer a Cash Course*, BOSTON SUNDAY GLOBE, Aug. 9, 1992, at 55.

22. Ian Thomsen, *FIBA's Dream May Put Championship in Toronto*, INT'L HERALD TRIB., Oct. 15, 1992, at 18. In fact, FIBA's goal is for basketball to supplant soccer as the world's most popular sport by the year 2000. *Id.* The NBA shares this view. E.M. Swift, *From Corned Beef to Caviar*, SPORTS ILLUSTRATED, June 3, 1991, at 74, 82.

23. *On Wings of Gold*, *supra* note 2, at 8. Additionally, the 1993 NBA All-Star Game was televised in a record 118 countries in 23 languages, translating into a potential viewership of greater than 550 million homes. *All-Star Summary*, HOUSTON CHRON., Feb. 22, 1993, at 4C.

addition, Europeans can watch these games on an ever-growing number of cable channels.[24] The McDonald's Open, a tournament in Europe consisting of three European teams and one from the NBA, was instituted in 1987.[25] Furthermore, league games were played in Japan in 1991 and 1992.[26] One NBA response to such international interest in the league has been to establish offices in Asia, Australia, and Europe.[27] In 1989, there were no NBA employees devoted to broadening the league's international geographic base, while in 1992, there were twenty-five such employees.[28]

A final indication of the NBA's probable expansion into Europe is the league's recent decision to expand into Canada.[29] This expansion can be seen as a precursor to European expansion, for it demonstrates the nascent stage of the NBA's desire to achieve further global prominence.[30]

III. AMERICAN ANTITRUST ISSUES INVOLVING THE NBA

Most antitrust disputes involving sports leagues center on alleged violations of the Sherman Act.[31] For the most part, courts apply the Rule of Reason to such alleged violations by sports leagues.[32] In

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24. Swift, *supra* note 22, at 88.

25. Anthony Baldo, *Secrets of the Front Office: What America's Pro Teams are Worth*, FIN. WORLD, July 9, 1991, at 38. The motivation behind this tournament was to develop new markets in Europe for NBA merchandise and television audiences for NBA broadcasts from the United States. *Id.*

26. Whiteside, *supra* note 17, at 84; *On Wings of Gold*, *supra* note 2, at 8. Additionally, the NBA held exhibition games in Mexico and Canada during the 1993-94 season. Sam Smith, *Pippen, Jordan Skip Media Session, Fined*, CHI. TRIB., Feb. 20, 1993, § 3, at 5.

27. Whiteside, *supra* note 17, at 84.

28. David Moore, *Courting the World*, DALLAS MORNING NEWS, Nov. 6, 1992, at B1.

29. *Toronto Gets Its Team*, *supra* note 5, at 58. The NBA granted Toronto a franchise, and Vancouver is currently hopeful of receiving an NBA team as well. Craig Daniels, *The High Price of Daily Bread*, FIN. POST, Mar. 22, 1994, at 45.

30. Jack McCloskey, Minnesota Timberwolves General Manager, has predicted that the NBA will be the first major sports league to place a franchise in Europe. Sid Hartman, *Zimmerman's Absence Hurts; Lineman Reportedly is Upset by Contract Status*, MINNEAPOLIS STAR TRIB., May 8, 1993, at 3C. Furthermore, McCloskey envisions that the NBA will eventually have its own league in Europe. *Id.*

31. 15 U.S.C. § 1 (1993). Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." *Id.*

32. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); *see infra* notes 33-36 for a discussion of the Rule of Reason.

Chicago Board of Trade v. United States,[33] the Supreme Court defined the Rule of Reason:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.[34]

In addition, the Rule of Reason inquiry "focuses directly on the challenged restraint's impact on competitive conditions."[35] Moreover, although the above passage is a valid definition of the Rule of Reason, courts tend to apply other definitions.[36] As a result, Rule of Reason analysis is often unpredictable.

Generally, American professional sports leagues, fearful of Congress's intimations about antitrust legislation, have accepted some form of free agency rules.[37] Free agency generally describes a process by which players can, upon meeting certain conditions, move freely between teams, thereby choosing for whom they play. Antitrust questions concerning the NBA which arise under American law pertain in large part to restrictions on player movement.

Given that the purpose of the Sherman Act is to promote competition and that competition would suffer absent many of the current restrictions imposed by the NBA,[38] there is an inherent tension between the federal antitrust laws and many of the NBA's current practices. This tension stems largely from the fact that teams

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33. *Chicago Bd. of Trade*, 246 U.S. at 231.

34. *Id.*

35. National Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 688 (1978).

36. *See eg.*, NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984); U.S. v. Brown Univ., 805 F. Supp. 288 (E.D. Pa. 1992).

37. Allan Fotheringham, *NHL - Lindros Battle More Basic than Patriotic*, FIN. POST, July 2, 1992, § 1, at 9. In addition, when the National Football League (NFL) was sued on antitrust grounds by its players to obtain free agency, it was the courts rather than Congress that exerted pressure upon the NFL to adopt free agency. *See* Marvin Powell v. National Football League, 764 F. Supp. 1351 (D. Minn. 1991). Moreover, in late 1992, the jury in Freeman McNeil v. National Football League awarded treble damages to eight named plaintiffs, finding that the NFL's Plan B free agency system was an unlawful restraint on trade. McNeil v. National Football League, 1992-2 Trade Cases (CCH) ¶ 69,982 (D. Minn. 1992). As a consequence, the NFL and its Players' Association subsequently agreed on more liberal free agency rules, which were encompassed in a collective bargaining agreement. Gerald Eskenazi, *Landmark NFL Pact Approved; Contract Includes Free Agency Salary Cap*, HOUS. CHRON., Jan. 7, 1993, at C1.

38. *See infra* notes 41-78 and accompanying text for a discussion of the current restrictions imposed by the NBA.

in a sports league such as the NBA must cooperate in order to compete, because absent some cooperation, certain teams could be driven out of existence to the detriment of the league itself.[39] The permissibility of the NBA's restraints tends to depend on their "reasonableness."[40]

A. History of NBA Player Movement Rules

The beginnings of free agency[41] in the NBA stem from the Oscar Robertson antitrust case, *Oscar Robertson v. National Basketball Ass'n.*[42] A "right of first refusal" system has emerged, allowing a player whose contract expires to sign with another team.[43] The player's original team has the ability to match that offer through the right of first refusal.[44] Player movement within the NBA is further governed by league rules whose validity and strength are supported by a collective bargaining agreement between the Players' Association and the league.[45] Some of these league rules are incorporated in the NBA's Constitution and By-laws.[46]

The present labor agreement is derived from one originally reached on April 1, 1983, which sought to control player movement through free agency rules and a Guaranteed Compensation Plan

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39. Unlike a typical competitive situation, such as between rivals in the computer industry (i.e. Apple and IBM), the competitors in the NBA are hurt when they drive each other out of business. Unlike IBM or Apple, NBA teams rely on one another to supply the competition needed for the league to prosper and do not benefit if other teams dissolve. This serves to distinguish a sports league as a unique entity. *See* Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Antitrust Sec., *in* 12-15 A.B.A. Sec. of ANTITRUST LAW PROCEEDINGS 211, 233 (Apr. 1958-Aug. 1959); *see also* North American Soccer League v. National Football League, 670 F.2d 1249, 1253 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982).

40. *See generally* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, DUKE L.J. 339, 343-351 (1989) (describing effects of restrictions on player movement in antitrust cases).

41. According to Gary Bettman, former NBA Senior Vice President and current Commissioner of the NHL, "You have to look at free agency as part of an overall system that combines a salary cap, revenue-sharing and a college draft." Richard Sandomir, *Free Agency: Fighting the Good Fight*, N.Y. TIMES, Jan. 7, 1993, at B15.

42. Oscar Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd* 556 F.2d 682 (2d Cir. 1977) (settled in 1976 and then approved by the 2d Circuit); Sam Goldaper, *N.B.A. Target of Players' Antitrust Suit*, N.Y. TIMES, Oct. 2, 1987, at B14.

43. Todd Stern, *Antitrust Cases: The Ball Is in the Courts*, N.Y. TIMES, Dec. 27, 1987, § 5, at 8.

44. *See* Collective Bargaining Agreement, *supra* note 8, art. V.

45. *Id.*; Lewis Kurlantzick, *International Sports Law Problems*, NEW YORK L.J. Apr. 16, 1990, at 1, 6 (describing player movement domestically and internationally).

46. Constitution and By-laws of the National Basketball Association, Feb. 12, 1989 [hereinafter Constitution and By-laws] (unpublished document on file with the author).

(salary cap).[47] The original agreement featured a revenue-sharing provision that guaranteed players at least 53 percent of the league's gross revenues.[48] Salary caps and floors, based respectively on 53 percent of league revenues and 90 percent of that number (53 percent of league revenues), were established.[49] The agreement recognized the right of first refusal which gave a team the right to match any offer its player received from rival teams when that player's contract expired.[50] Under this agreement, a pseudo-free agent market formed.[51] Although players were not free to leave their own teams, they could get the most compensation that any team in the league was willing to offer.[52] Interestingly, the NBA's growth over the past decade corresponds with the advent of the salary cap and revenue sharing in 1983.[53]

The current labor agreement,[54] reached in 1988 after prolonged negotiations, retains the existing salary cap but shortens the college draft,[55] limits the application of the right of first refusal,[56] and relaxes the requirements for unrestricted player movement.[57] The rationale behind the salary cap is clear: by simultaneously sharing certain revenues among the teams and limiting every team's expenditures to the same extent, weaker franchises can compete evenly with

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47. JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 205 (1992) [hereinafter PAY DIRT]; *see generally*, Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985) (analyzing the legality of the salary cap).

48. PAY DIRT, *supra* note 47, at 205.

49. *Id.*

50. Stern, *supra* note 43, at 8.

51. *Id.*

52. *Id.*

53. *Id.*

54. For an in-depth history of the 1983 and 1987-88 collective bargaining agreements between the Players' Association and the league, see PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 123-29 (1989).

55. The draft was reduced from seven rounds to three rounds for the 1988 draft and to two rounds thereafter. Collective Bargaining Agreement, *supra* note 8, art. IV(1)(a).

56. *See* Collective Bargaining Agreement, *supra* note 8, art. V. Under the current agreement, the right of first refusal requires a team to offer players, not deemed to be free agent, 125 percent of their old salary. The right of first refusal would only apply to players offered more than $250,000. *Id.* art. V(3)(b).

57. *See id.* art. V. Beginning with the 1988-89 season, the agreement allowed seven-year veterans whose contracts had expired to sign with any team subject to their original team's right of first refusal. *Id.* art. V(1)(a). This provision extended to five-year veterans in 1989-90 and to four-year veterans in 1993-94. *Id.* art. V(1)(a)(1). Currently, four-year veterans may simply sign a one year contract for at least 125 percent of their previous year's salary and thereby become unrestricted free agents after their fifth season. *Id.* art. V(1)-(3).

teams in larger markets and bidding wars are curtailed without obstructing the free agency rights created in *Robertson*.[58]

Because the current rules operate within the context of union contracts, they enjoy immunity from the American antitrust law under a labor exemption.[59] This is crucial since the NBA's salary cap was ruled illegal in an antitrust suit in 1982.[60] In fact, prior to reaching its last labor agreement with the league in 1988, the Players' Association filed suit in federal district court in 1987 alleging that the college draft, right of first refusal, and salary cap all violated the Sherman and Clayton Acts.[61] In addition to filing this suit, the Players' Association began decertification proceedings of its union in February 1988. This action was taken in order to subject the NBA's restrictions on player movement to antitrust scrutiny by lifting the labor exemption from the antitrust laws.[62] Because the suit by the Players' Association and the decertification proceedings were abandoned prematurely,[63] it is uncertain how the courts would have ruled.[64] Nevertheless, the threat of decertification by the Players' Association poses a

58. Joe Gergen, *Commentary; Salary Cap Threatens to Disrupt the Knicks*, L.A. TIMES, July 10, 1991, at C3.

59. Frances Ann Burns, *Basketball Union Considers Decertification*, PROPRIETARY TO THE UPI, Jan. 13, 1988, *available in* LEXIS, News Library, UPI File. For a more detailed discussion of the labor exemption in professional sports, see Junior Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 961-67 (D. N.J. 1987) (discussing policies behind the labor exemption); *see also* Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 279-81 (1993).

60. The issue was resolved when the salary cap was negotiated into the 1983 labor agreement. Goldaper, *supra* note 42, at B13; Bob Sakamoto, *NBA Union Takes League to Court, But at Least Averts a Strike*, CHI. TRIB., Oct. 2, 1987, § 4, at 6.

61. Burns, *supra* note 59. Sakamoto, *supra* note 60, § 4, at 6. The Players' Association later dropped this suit after signing the labor agreement with the league. The suit alleged that the college draft was "one of the longest-running continuing restraints on competition for player services in the NBA," that the right of first refusal was used by teams to prevent player movement, and that the salary cap was a "powerful weapon for destroying competition for players' services." *NBA Players Sue for Free Agency*, CHI. TRIB., Oct. 2, 1987, at C5.

62. Sam Smith & Bob Sakamoto, *NBA Players, Owners Settle on 6-Year Deal*, CHI. TRIB., Apr. 29, 1988, at C1. It appears that decertification was threatened by the Players' Association in order to exert pressure on the league to arrive at a new labor agreement. *Id.*

63. Most likely, the decertification proceedings were abandoned because, despite the players' complaints, the players have prospered financially under the NBA's current system. *See* Mike Terry, *Big Men Get Big Money*, WASH. POST, Nov. 17, 1993, at B1.

64. Presumably, the league would have argued that free agency restrictions are reasonable because they: (1) foster competitive balance and team stability; (2) attract fans to support the league; and (3) do not unreasonably restrain player freedom or bargaining power. The Players's Association would have asserted that regardless of how prosperous the league and players are now, the players would do even better without such restrictions. Stern, *supra* note 43, § 5, at 8.

risk to the player movement rules as they exist today, especially since the current labor agreement expires at the conclusion of the 1993-94 season.[65]

Under the standard outlined in the *Bridgeman* case,[66] the labor exemption would continue after the expiration of the current agreement only if the NBA reasonably believes that the same terms or close variants of such terms will be included in the subsequent agreement.[67] Therefore, there are ways to "bridge the gap" between the expiration of the present agreement and the entrance into the next collective bargaining agreement. Of course, decertification would render this mechanism meaningless by nullifying any reasonable belief that a future agreement would be reached.

B. Player Movement in the Foreseeable Future

The upcoming labor negotiations will center on several controversial issues; foremost amongst these is the salary cap. While the Players' Association wants the cap abolished, the league will not only try to maintain it, but may also try to implement a rookie salary cap in order to control the rapidly escalating salaries for players entering the league.[68] Moreover, in *Bridgeman v. National Basketball Ass'n* (*Dudley*), a federal district court in New Jersey recently upheld the validity of several players' contracts which the NBA claimed circumvented the salary cap.[69] As a result of this ruling, many feel

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65. *See* Collective Bargaining Agreement, *supra* note 8, art. XXV(1). If the Players' Association is decertified and any of the NBA's restraints on trade are subsequently challenged in court, the restraints would most likely be analyzed under the Rule of Reason, a test that is inherently unpredictable. *See Senate Committee Takes Swings at Baseball's Antitrust Exemption*, ANTITRUST & TRADE REG. REP., Dec. 17, 1992, at 743. *See also supra* notes 33-36 and accompanying text for a discussion of the Rule of Reason.

66. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 967 (D. N.J. 1987) (holding that although restrictions in a collective bargaining agreement do not lose antitrust immunity upon expiration of the agreement, the employer may not indefinitely continue the restrictions following expiration).

67. *Id.* at 967.

68. Terry, *supra* note 63, at B7.

69. Bridgeman v. National Basketball Ass'n (*In re* Chris Dudley), 838 F. Supp. 172 (D. N.J. 1993) [hereinafter *Dudley*]. Chris Dudley's contract with the Portland Trail Blazers received the most attention in the case. Dudley, an unrestricted free agent, signed a seven year, $11 million contract with Portland. *Id.* at 175. The first year of the contract entitled Dudley to only $790,000, the amount Portland could offer under the cap. However, the contract contained a controversial "one-year out" clause which allowed Dudley to become an unrestricted free agent after one season, thereby allowing Portland to exceed the salary cap and match any offer that Dudley might receive from another team. *Id.* In effect, Portland indirectly offered Dudley far more money than was available under the salary cap, although at some risk to both Portland,

that the salary cap is presently rendered moot.[70] The court's holding appears to provide the Players' Association with leverage for the upcoming collective bargaining negotiations with the league.[71] The league will have to bargain in order to reestablish a version of the salary cap that cannot be so easily circumvented.

Although there is less player movement in the NBA than in Major League Baseball (MLB), for example, this difference probably stems more from the NBA's revenue sharing system, the salary cap, than from any difference in the two leagues' respective free agency rules.[72] MLB has no salary cap and therefore, does not have to contend with that particular restriction on player movement. However, since the advent of the salary cap the NBA has undergone tremendous growth, suggesting a causal link between the league's prosperity and the advent of the salary cap. The players have benefitted immensely from this growth.[73] Moreover, the salary cap, despite the limits it imposes on player movement, ensures that league salaries are in line with league revenue.

In its prior labor negotiations with the league, the Players' Association has tolerated the salary cap in exchange for implementing more liberal rules on unrestricted free agency, restricting the right of first refusal, and shortening the college draft.[74] Despite the prosperity players have experienced under the salary cap, many commentators feel that, once again, the players will try to abolish it in the next labor agreement,[75] especially since the *Dudley* decision has, at least for

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since Dudley could leave after just one year, and to Dudley, since if he became injured he would have no guaranteed long-term salary. The NBA viewed this as a blatant attempt to circumvent the purpose of the salary cap and contested the contract on three levels: an independent arbitrator, the league's own special master assigned to hear grievances, and a United States District Judge. *Id.* at 175-76. At each stage, the NBA lost its challenge. David Aldridge, *Cap in Hand, NBA Seeks Solutions*, WASH. POST, Nov. 9, 1993, at E1.

70. Even the judge in *Dudley* recognized that his decision "may have a presently unascertainable adverse effect on the very legitimate objectives of the salary cap. . . ." *Dudley*, 838 F. Supp. at 184.

71. David Moore, *Judge's Ruling on Dudley's Contract Gives Players Victory on Two Points*, DALLAS MORNING NEWS, Oct. 31, 1993, at 3B.

72. Eskenazi, *supra* note 37, at 1. The NBA's salary cap prevents the "mad scramble" of players seen in MLB. *Id.*

73. The initial salary cap (for the 1984-85 season) was $3.8 million per team (over $300,000 per player). PAY DIRT, *supra* note 47, at 205. Today, it has risen to well over $15 million (over $1.3 million per player). *Team Payrolls*, DALLAS MORNING NEWS, Jan. 28, 1994, at 10B.

74. *See* Collective Bargaining Agreement, *supra* note 8, arts. IV, V.

75. There are two reasons that the salary cap may be in jeopardy in 1994: (1) the Players' Association is no longer convinced that the cap is necessary, and, therefore, would prefer an open market in a thriving league; and (2) from management's point of view, compliance or

now, rendered the salary cap ineffective. The Players' Association may view any other stance as a step backward. Nevertheless, it is not certain that the players would advocate such a move, given the potential risks they could face in a purely free market system.[76] Many people believe that the Players' Association will accept the cap in exchange for the league's inclusion of merchandising and licensing proceeds in the total revenues from which the salary cap is derived.[77] Many others believe that the NBA will never relinquish the "tripod," composed of the free agency rules, the salary cap, and the college draft, because these have provided the foundation upon which the league's prosperity has been built.[78]

IV. EC COMPETITION LAW APPLIED TO NBA EXPANSION INTO EUROPE

A. Overview of EC Competition Law

EC competition law is governed largely by Article 85 of the European Community Treaty (EC Treaty).[79] The European Com-

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circumvention of the salary cap requires too much effort. Gergen, *supra* note 58, at C3.

76. *See generally* Aldridge, *supra* note 69, at E1 (noting that players like Dudley take risks by signing contracts that pay less than their market value in the initial year, with no guarantees that an injury or poor performance will not diminish their market value when the players become unrestricted free agents). Duke University law professor John Weistart has noted that players "understand it would not be in their long-term interest to observe free-market rules. Sport is in a unique situation as an industry. With unlimited bidding, someone can buy up all the talent, competition suffers, and the industry itself is threatened because the fans lose interest." *The Free-Agency Fandango*, SPORTS ILLUSTRATED, Oct. 12, 1987, at 15 (quoting Professor Weistart). Although dissenters note that the competitive balance has not been destroyed in MLB, the NBA's competitive balance is more sensitive to player movements given the larger impact that any one player can have on a team's success. *See generally* Jeffrey E. Levine, *The Legality and Efficacy of the National Basketball Association Salary Cap*, 11 CARDOZA ARTS AND ENTERTAINMENT L.J. 71, 93-95 (1992) (discussing the positive effect the NBA's salary cap has had on competitive balance in the league).

77. Aldridge, *supra* note 69, at E1. If such merchandising revenues were included, the salary cap could escalate to $29 million, a significant increase compared to the present figure of $15.2 million. Jeffrey Denberg, *The NBA's Money Madness*, ATLANTA J. & CONST., Oct. 28, 1993, at E1.

78. Denberg, *supra* note 77, at E1.

79. This paper focuses on EC law rather than national law, based on the assumption that NBA expansion into Europe "affect[s] trade between Member States," and therefore falls within the scope of the EC's competition laws. *See* EC TREATY art. 85(1). However, despite the supremacy of EC law, the national courts of the member states still play a substantial role in implementing and formulating competition policy. *See* D.G. GOYDER, EC COMPETITION LAW 426, 430-37 (1993).

mission (Commission) enforces the EC competition rules through its Directorate General IV (DG IV), the Commission's competition department.[80] Article 85(1)[81] is the European counterpart to the Sherman Act of the United States.[82] However, unlike the Sherman Act, Article 85(3)[83] contains a built-in statutory exemption to the

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The *Wilhelm* decision is the leading case clarifying the relationship between EC law and national law when both are potentially applicable. Case 14/68, Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1, 8 C.M.L.R. 100 (1969) [hereinafter Wilhelm]. In Wilhelm, the Court of Justice of the European Communities (ECJ) decided that although the EC and German laws viewed cartels from different perspectives, parallel proceedings could be conducted. *Id.* at 121. However, to guarantee that the "general aims" of the EEC Treaty were adhered to, a parallel national level proceeding could only take place if three rules were satisfied:

> (1) "the uniformity rule," providing that "the national application of the law must not prejudice the full and uniform application of Community rules, or of the full effect of the measures adopted in the implementation of those rules;" (2) the "practical effectiveness rule," providing that "so as to ensure in any conflict between Community and national rules the Community law takes precedence (to protect the effectiveness of the Treaty), Member States should not introduce or retain any measures that would prejudice this aim;" and (3) the "parallel proceedings rule," providing that "it was the responsibility of individual Member States to take appropriate measures to avoid any risk that a national decision on an issue of competition law might conflict with Commission proceedings still in progress."

GOYDER, *supra*, at 431.

The Wilhelm rules provide a clear response to a situation in which an agreement is prohibited by Article 85(1). In such a case, both the uniformity and practical effectiveness requirements make it impossible for a national court to exempt the agreement. *Id.* at 432. In response to this situation, the Commission, in its Fourth Annual Report, placed the burden on the "national authorities to avoid the risk of conflict, an obligation that could be complied with so long as the national authorities had early consultations with the Commission or even suspended proceedings whilst the Commission investigation was completed." *Id.* Therefore, while national laws would take a back seat to EC competition law as far as NBA expansion is concerned, they could potentially play a role.

80. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 242 (1990) [hereinafter KORAH I].

81. Article 85(1) prohibits as incompatible with the common market "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. . . ." EC TREATY art. 85(1).

82. JENS FEJO, MONOPOLY LAW AND MARKET: STUDIES OF EC COMPETITION LAW WITH US AMERICAN ANTITRUST LAW AS A FRAME OF REFERENCE AND SUPPORTED BY BASIC MARKET ECONOMICS 105 (1990).

83. Article 85(3) provides that the provisions of Article 85(1) may be deemed inapplicable in the case of any agreement(s), decision(s), or converted practice(s):

> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC TREATY art. 85(3). Subsection (a) above is similar to the Rule of Reason's least restrictive means test used in the United States. *See supra* text accompanying note 35.

mandates of Article 85(1) which can only be exercised by the Commission.[84] Significantly, the national courts of the member states cannot exempt those practices which the Commission interprets as falling within Article 85(1).[85] Moreover, national courts face difficulties in enforcing agreements that do not qualify for an Article 85(3) exemption, but nevertheless promote competition.[86] One drawback of attempting to obtain an Article 85(3) exemption is that, due to the Commission's lack of resources in its Competition Department, few formal decisions are approved by the Commission each year.[87] Therefore, because a formal decision is necessary in order for an individual exemption to be granted, the utility of Article 85(3) is limited.[88] In addition, agreements that are purely national in scope are outside the reach of Article 85, because they do not affect trade between member states.[89] Generally speaking, the prohibition of Article 85(1) has been interpreted broadly by the Commission,[90] yet the Commission has interpreted Article 85 in a variety of ways.

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84. Regulation 17/62 First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-1962 O.J. Spec. Ed. 87. VALENTINE KORAH, FRANCHISING AND THE EEC COMPETITION RULES: REGULATION 4087/88, 5 (1989) [hereinafter KORAH II]. There are several weaknesses which accompany the Commission's exclusive power to grant both individual exemptions under Article 85(3) and general Article 85(3) exemptions. *Id.* at 2. An agreement violative of Article 85(1) is illegal and void until an exemption is actually granted by the Commission. *Id.* The Commission must be notified by the parties seeking an exemption and the Commission may affix conditions or obligations to the exemption itself. *Id.* at 3. Therefore, often the party to an agreement has attained bargaining power over the other party to renegotiate the entire arrangement. *Id.* In addition, individual exemptions under Article 85(3) are for finite periods, providing yet another cause for renegotiation. *Id.* Finally, until the Commission grants an exemption, national courts are unable to enforce those agreements which restrict competition (i.e., violate Article 85(1)). *Id.*

85. KORAH II, *supra* note 84, at 5.

86. *Id.*

87. *Id.* at 6. Since 1988, the Commission has rarely issued more than twenty formal decisions per year under Articles 85. *See id.*

88. *Id.* The Commission informally discharges many of its proceedings by issuing administrative letters. A "comfort letter," which says the agreement is not prohibited by Article 85(1), is useful for a party trying to enforce the agreement in a national court because the national court is likely to agree with the Commission's stance. However, a letter indicating the agreement "merits exemption" can cause problems in a national court, because such a letter intimates that the agreement violates Article 85(1) and national courts are powerless to grant exemptions, since the letter itself is not a valid exemption. *Id.*

89. Jean-Eric de Cockborne, *Franchising and European Community Competition Law*, *in* FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES 281, 286 (Christian Joerges ed., 1991). *See supra* note 79 for a discussion of the interaction of EC Law and the national laws of member states.

90. KORAH II, *supra* note 84, at 5; *see infra* notes 209, 210, 212 and accompanying text (examining the Yves Rocher, Computerland, and Charles Jourdan decisions).

For example, in some circumstances, the Commission and the European Court of Justice (ECJ) have applied Article 85(1) expansively, and have recommended that "any restriction on conduct that is important in the market restricts competition, and that ancillary restraints necessary to make viable a pro-competitive transaction should be exempted under Article 85(3)."[91] More frequently, however, the ECJ has maintained that Article 85(1) is not violated if an ancillary restraint on conduct is essential to make the given transaction possible.[92]

Furthermore, there are indications that the Commission will begin analyzing transactions *ex ante* rather than *ex post*.[93] In effect, this development would encourage agreements which otherwise might have never materialized.

In addition to granting individual exemptions under Article 85(3), the Commission also recognizes "block" exemptions.[94] Block exemptions provide enterprises that conform their activities to the Commission's requirements in a given regulation, with advance clearance from violating Article 85.[95] Through the use of both individual and block exemptions,[96] EC competition law creates a different set of presumptions from American antitrust policy. While the EC exemptions create in many circumstances a presumption against finding a violation, the American antitrust laws presume that a restraint of trade is a violation until proven otherwise.[97] Moreover,

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91. KORAH II, *supra* note 84, at 5.

92. *Id.* at 5-8.

93. In terms of franchise agreements, *ex post* refers to an examinination after the franchisees have already devoted significant investments, while *ex ante* refers to an analysis before many franchisees have committed significant investments. KORAH II, *supra* note 84, at 8.

94. Regulation 4087/88, *infra* note 95, is an example of a block exemption granted by the Commission. *See* KORAH II, *supra* note 84, at 35.

95. *See* KORAH I, *supra* note 80, at 53. Distribution and service franchises, for example, enjoy a block exemption from Article 85(1) under Regulation 4087/88. Commission Regulation 4087/88 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Categories of Franchising Agreements, 1988 O.J. (L 359) 46 [hereinafter Regulation 4087/88]. *See infra* notes 183-252 and accompanying text for discussion of NBA franchises in Europe falling under this block exemption.

96. Enterprises can avoid the prohibitions of Article 85(1) by notifying the European Commission, prior to entering the agreement in question, in order to obtain individual clearance. *EC: How Articles 85 and 86 Affect British Business*, MONEYMAKERS, Oct. 31, 1989, at 63. The Commission has stated that it takes a more lenient view in assessing fines towards parties that have seriously attempted to avoid violating Article 85. *Id.*

97. Rene Joliet, *Trademark Licensing Agreements Under the EEC Law of Competition*, 5 Nw. J. Int'l L. Bus. 755, 815 (1983); *see generally* KORAH II, *supra* note 84, at 10-13 (contrasting

the Rule of Reason is a far less certain counterpart to the Sherman Act than Article 85(3) is to Article 85(1). Although this distinction may appear subtle, it constitutes a fundamental difference between the EC and American attitudes regarding competition/antitrust law.

The following discussion addresses the three central issues raised by the NBA's potential expansion into Europe: first, the treatment of the NBA's restrictive player movement practices under Article 85; second, the legality of the NBA as an entity under EC joint venture principles; and, finally, the interaction and potential competition between the NBA and the existing European leagues under EC franchising law.

B. Treatment of NBA's "Restraints" on Player Movement Under Traditional Article 85 Analysis

1. *NBA's Restraints in an Expanded League.* The college draft is the main process through which the NBA infuses new talent into the league. Because a player's rights are owned by the team that drafts him,[98] the college draft is a restraint on the free movement of players. Without question, the college draft would be the most difficult restraint to administer if the NBA expanded into Europe.[99] In many instances, European players have been drafted by NBA teams.[100] Conversely, many drafted American players have chosen to play in Europe.[101] Nevertheless, given the cultural, linguistic, and economic differences between the United States and Europe, many young players (both American and European) would not be pleased to be drafted by a team on another continent.[102] This could lead to players actually doing what until now they have only threatened: sitting out one season and re-entering the draft, or sitting out two seasons and then becoming free to sign with any team in the league.[103] This could lead to inequities which would necessitate

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the treatment of commercially similar agreements under EC and American antitrust law).

98. *See* Collective Bargaining Agreement, *supra* note 8, art. IV(1).

99. This is due to the reluctance of some players to play in Europe. *See e.g.*, Barry Cooper, *Catledge Refuses to Play in Europe*, ORLANDO SENTINEL, June 27, 1993, at C8.

100. *See* Alexander Wolff, *The Toni Award*, SPORTS ILUSTRATED, June 22, 1992, at 56 (Kukoc has since signed with Chicago and is currently playing for the Bulls).

101. *See* Tim Povtak, *Catledge to Play for Team in France*, ORLANDO SENTINEL, June 17, 1993, at D6.

102. *See* Wolff, *supra* note 100, at 56.

103. Collective Bargaining Agreement, *supra* note 8, art. IV (1)(b) -(c). Although players would not be paid if they sat out, they would be eligible to receive lucrative endorsement

changes in the draft rules. Additionally, the inequities would help and hurt both the American and European NBA teams. Presumably, American players would want to play in the United States, while the European teams would attract European players who do not want to play in the United States.

The salary cap is another restraint which would be difficult to apply since the different countries have different currencies and costs of living. However, these difficulties could be overcome through some basic research into the relative costs of living and strength of currencies of the countries involved.

A final restraint, the right of first refusal as applied to an intercontinental NBA, would not present problems in and of itself. However, the problems arising from the administration of the college draft would also apply to the right of first refusal: players being forced to play in a country which they do not prefer. In a sense, though, this problem is inherent in any restriction on player movement, and a player in such a situation is not forced to sign with that team in the first place.

The problems that would surround the administration of the NBA's restraints upon European expansion would necessitate some adjustments. In fact, the objections to these restrictions would be very similar to those complaints currently voiced in the United States.

2. *NBA Expansion and Violation of Article 85(1).* NBA expansion into Europe would seemingly violate Article 85(1) because the expansion would involve agreements that would "affect trade between Member States."[104] The more difficult question is whether such agreements would "have as their object or effect the prevention, restriction or distortion of competition within the common market."[105] NBA expansion would not intend to restrain trade in the common market. However, it is likely that the effect of such expansion would be to prevent, restrict, or distort competition within the EC. Specifically, one probable effect on competition would be the way the NBA affected existing European leagues. The second effect would be the ways existing NBA practices would affect competition, possibly in violation of Article 85(1).

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contracts which could replace any lost income over the one or two year period. *See* Rick Bonnell, *Hornets Mourning at Odds; Agent Seeks Salary that Team Can't Afford*, ORLANDO SENTINEL, Oct. 27, 1992, at D5.

104. EC TREATY art. 85(1).

105. *Id.*

a. Competition between European NBA teams and existing European leagues. France, Germany, Greece, Italy, and Spain are probably the most attractive countries for potential NBA expansion. In France, Greece, Italy, and Spain there currently exist well-established and successful independent basketball leagues.[106] Moreover, in Germany, basketball is rapidly gaining popularity as its exposure on television increases.[107] The popularity of basketball in these five countries indicates that NBA expansion to Europe is potentially profitable.

The NBA, both in Europe and America, could become the focus of European fans, to the detriment of existing European leagues and their players. NBA teams in Europe could overshadow those leagues and teams that currently exist to such a degree as to prevent or restrict competition both among the existing European leagues and between those leagues and the new NBA teams. Also, competition within the common market could be distorted by NBA entry into the marketplace. The European leagues currently garner the majority of the EC's attention with the NBA serving as a remote alternative; NBA expansion, however, could drastically change this focus. The anticompetitive effects of NBA expansion into Europe on existing European leagues could prove sufficient to violate Article 85(1). This concern is particularly relevant considering the troubles that many European Leagues are currently experiencing, including inflated player salaries, insufficient sponsoring, poor integration among each country's league, and poor marketing.[108] Given the fact that many players have left the European leagues to play in the NBA during the 1993-94 season,[109] it is possible that an NBA presence in Europe would further damage the quality of the existing European leagues.

b. NBA practices that might violate Article 85(1). The NBA practices most likely to violate Article 85(1) are those practices which survive American antitrust scrutiny only because of the labor

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106. *See* Sam Smith, *Players Score Big in Europe*, CHI. TRIB., Oct 24, 1993, § 3, at 13.

107. David Molner, *Germans Embracing American Basketball*, CHI. TRIB., Oct. 17, 1993, § 3, at 13.

108. *See* Ian Thomsen, *Bad Game, Good Time: British Basketball Woos a Family Audience*, INT'L HERALD TRIB., Sept. 30, 1993, at 19; Ian Thomsen, *The Next Kukoc is Alive, Well and Waiting for the NBA*, INT'L HERALD TRIB., Oct. 24, 1993, at 20.

109. The opening night NBA rosters for the 1993-94 season included twenty players who had spent the previous season in Europe. George Shirk, *Foreign Legion Heads to the States*, SAN FRANCISCO CHRON., Nov. 16, 1993, at D3.

exemption afforded to the NBA: the salary cap, the college draft, and the right of first refusal. The salary cap would be a clear violation of Article 85(1) because it limits, although indirectly, the amount of money a player may earn. Many teams are willing to go well beyond the salary cap in order to attain a marquee player. Moreover, in reality many top players are underpaid because the salary cap prevents them from receiving their fair market value.[110] The salary cap would restrain trade in the sense contemplated by Article 85(1).

Similarly, the college draft is a restraint of trade because it limits to one the number of teams for which a player may perform once drafted into the league.[111] This restraint would be magnified by NBA expansion into Europe because of differences in culture, language, geographical location, and cost of living.

Along the same lines, the right of first refusal, although less restrictive in recent years,[112] would violate Article 85(1), albeit to a lesser extent than the salary cap or college draft. Once a player becomes eligible for restricted free agency he can, upon his team's decision to match any long-term offer from another team, choose to sign a one year contract for 125 percent of his existing salary.[113] When the contract expires, the player becomes an unrestricted free agent. Therefore, absent any immunity analogous to the labor exemption the NBA enjoys in America, it appears likely that current NBA practices would violate Article 85(1).

3. *NBA Expansion in Europe and an Exemption under Article 85(3).* In many respects, the Article 85(3) analysis for NBA expansion teams in Europe mirrors the Article 85(1) inquiry. While Article 85(1) focuses on the anticompetitive effects of agreements, Article 85(3) addresses the potential benefits that such agreements confer upon society. Specifically, Article 85(3) would first analyze whether NBA expansion into Europe would contribute either to "improving the production or distribution of goods" or to "promoting

110. However, teams maneuver around the limits set by the salary cap through mechanisms such as deferred payments, annuities, etc. *See* Collective Bargaining Agreement, *supra* note 8, art. VIII(B)(1).

111. Under NBA rules, however, a player may sit out one season and then re-enter the college draft or he may sit out two years and become free to sign with any team he chooses. *See* Collective Bargaining Agreement, *supra* note 8, art. IV(1)(c)(d).

112. The right of first refusal presently applies only to restricted free agents who can solicit offers from other teams in order to have their existing team match those offers. *See supra* notes 43-58 and accompanying text for further discussion of the right of first refusal.

113. Collective Bargaining Agreement, *supra* note 8, art. V(3).

technical or economic progress."[114] Secondly, irrespective of what contribution expansion offers, Article 85(3) considers whether expansion would "[allow] consumers a fair share of the resulting benefit."[115] In addition, Article 85(3) would require that NBA expansion be the least restrictive means to provide these benefits[116] and that it would not, by means of its exemption from Article 85(1), eliminate competition in its particular market.[117] An analysis of an Article 85(3) exemption therefore begins by examining the competition between the NBA and the existing European leagues, and the NBA practices which themselves might violate Article 85(1).

a. Competition between the NBA and existing European leagues. NBA expansion into Europe would improve both the production and distribution of a certain good/service[118]—professional basketball—for the European audience.[119] In addition to providing more exposure to basketball (both in person and on television), NBA teams in Europe would most likely generate even greater interest in both the NBA and basketball in general, especially since the NBA is the most competitive basketball league in the world.[120] Some commentators already believe that the German league, currently uncentralized and underdeveloped, will be improved significantly by the recent contract signed by a private television station to rebroadcast NBA highlights on a weekly basis.[121] If this

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114. EC TREATY art. 85(3).

115. *Id.*

116. *Id.* art. 85(3)(a).

117. *Id.* art 85(3)(b).

118. The Four Freedoms, upon which the EC was established, include distinct rules that distinguish between goods and services. *Id.* arts. 9, 48, 52, 59, 67. In competition law, this distinction is not needed, because "good" as it is used in Article 85(3) can be interpreted broadly so as to cover both goods and services. KORAH I, *supra* note 80, at 52. The NBA can be seen as both a good and a service, the former because its tickets and merchandise will be sold and the latter because it is a form of entertainment. Perhaps, alternatively, the NBA can be characterized as a product, since "product" encompasses both goods and services.

119. For many years aging NBA players have played in Europe during the twilights of their careers, much to the enjoyment of European spectators. Kurlantzick, *supra* note 45, at 1. Recently, the European leagues have attracted young NBA players, most notably Danny Ferry and Brian Shaw, to play abroad for a limited time before returning to the NBA. *Id.* This phenomenon shows the interest that Europeans have in NBA caliber basketball, as well as the money European teams are willing to spend to attract such players. *Id.*

120. Gary Hill, *Basketball—NBA Style Pro League Planned for Asia*, Reuters, Feb. 8, 1994, *available in* LEXIS, News Library, CURNWS File.

121. Molner, *supra* note 107, § 3, at 13.

will assist the German league's development, then the NBA's presence on the continent will have an even greater impact.

Economically, NBA expansion into Europe would create jobs for athletes and businessmen, as well as generate investment in the local communities due to the sale of NBA merchandise, television rights, and season tickets. For example, NBA Commissioner David Stern has suggested that an expansion franchise in Mexico City could inject fifty million dollars into the local economy.[122] Additionally, having the NBA in Europe would promote the European sports broadcasting industry by further exposing it to its more experienced (in terms of basketball broadcasting) American counterparts.[123] It is difficult to imagine a less restrictive means of bringing such progress to Europe.[124] NBA expansion into Europe would promote interest in professional basketball at all levels, not eliminate competition.[125]

b. NBA practices which might violate Article 85(1). The Article 85(3) analysis of the NBA practices themselves is less straightforward. Arguably, the college draft, salary cap, and right of first refusal are all necessary to maintain a competitive balance among the teams.[126] Those restrictions should therefore apply to European NBA teams for the same reason. Furthermore, without these restrictions Europe would not be able to benefit economically, technologically, or socially from the NBA's presence, since it is these restrictions which have

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122. Bennett, *supra* note 5, at 6C.

123. *See generally*, Richard W. Stevenson, *Lights! Camera! Europe!*, N.Y. TIMES, Feb. 6, 1994, § 3, at 1 (discussing the increasingly influential role of American broadcasting companies in Europe and the need for American technology and capital on the continent).

124. Although some might argue that these advances are already present in Europe as a result of the mass televising and merchandizing of the NBA that exists, the actual *presence* of NBA teams would presumably do far more to foster the technological (e.g., the size of arenas, quality of scoreboards and equipment) and economic growth of European basketball. *See generally*, Ori Lewis, *Basketball-Top European Event to Stay in Tel Aviv*, Reuter Library Report, Mar. 21, 1994, *available in* LEXIS, News Library, LBYRPT File (noting that the European championships will be held in a 10,000 seat arena, significantly smaller than NBA arenas).

125. It appears that NBA expansion into Europe would hasten a process that is, at present, slowly emerging: the development of the existing European leagues as minor league feeders for the NBA, in much the same way that college basketball acts as a feeder in the United States. *See generally*, Ed Graney, *Toni Kukoc: Between Two Worlds Europe's Best is Learning to Play NBA-Style*, SAN DIEGO UNION-TRIB., Dec. 11, 1993, at D1 (discussing transition of former European star, Toni Kukoc, to the NBA from the supposedly less refined European leagues). *See generally*, Tim Povtak, *Foreign Players? Mais Oui*, SPORTING NEWS, Nov. 22, 1993, at 48 (discussing current scouting of European players by NBA teams.

126. *See supra* notes 31-67 and accompanying text for a discussion of how the NBA restraints help maintain a competitive balance.

allowed the NBA to grow to such a point that European expansion is a possibility.[127] It is uncertain whether there exists a less restrictive means for maintaining a competitive balance.[128] Thus, as with the competitive balance between the NBA and European leagues, NBA expansion accompanied by the NBA's restrictions would possibly promote, rather than limit, competition within the basketball market.

c. Conclusion: Article 85(3) exemption is likely. Given the relative ease with which the European Commission has granted individual exemptions to Article 85(1),[129] it is likely that the European NBA teams would be exempt from EC competition law. The Commission's tolerance of restraints of trade that accompany technological and economic progress is demonstrated by its proposed treatment of cooperative joint ventures.[130] The Commission's *Draft Guidelines for the Appraisal of Cooperative Joint Ventures* attempts to provide "a more realistic economic" approach towards Article 85[131] by adopting a more "flexible" stance towards restrictions which are ancillary[132] to legal ventures.[133] Ancillary restrictions would be treated and analyzed as a "package" with the entire joint venture, and if the venture as a whole was acceptable, the ancillary restraints would

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127. Before the advent of the current system in its basic form (in 1983), the NBA faced the possibility of several teams folding on numerous occasions. For instance, NBA Commissioner David Stern has stated that without the shared revenue received from the league, twenty of the NBA's twenty-seven teams would have had net operating losses during the 1990-91 season. *Chicago Prof. Sports Ltd. Partnership*, 754 F. Supp. at 1340. Presently, virtually every team is in healthy financial shape and the league is competitive. *See* Bob Ford, *At Owners Meeting, NBA Hopes to Keep Lid on Salary Cap*, WASH. POST, Sept. 11, 1993, at G7.

128. The issue is complicated by the fact that the labor exemption in the United States has prevented the courts from subjecting these restrictions to a Rule of Reason analysis. Although the salary cap was ruled illegal in the United States in 1982 (only to be subsequently included in a collective bargaining agreement), a court's reasoning today may be completely different considering the tremendous growth the NBA has undergone since the advent of the salary cap. This growth would provide a solid basis for maintaining the salary cap in order to continue the league's prosperity. For a more detailed discussion of American legal treatment of these restrictions, see *supra* notes 47-78 and accompanying text.

129. *EC: How Articles 85 and 86 Affect British Business*, *supra* note 96, at 63.

130. This example is particularly insightful because the NBA itself is a joint venture, technically speaking, and its expansion into Europe would be cooperative. *See* Joint Venture Agreement, *supra* note 7, at 1-3.

131. Joseph P. Griffin, *European Regulations Reviewed*, NAT'L L. J., Oct. 19, 1992, at 34.

132. Ancillary restrictions are those "directly related and necessary to the establishment and operation of the joint venture insofar as they cannot be dissociated from it without jeopardizing its existence." *Id.* at 35.

133. *Id.*

also be approved for at least a trial period.[134] The college draft, salary cap, and right of first refusal can be seen as ancillary restraints on an otherwise "legal" expansion of the NBA into Europe. Based on the NBA's shaky performance before implementing the salary cap and right of first refusal, it is valid to conclude that these restraints cannot be "dissociated" from the NBA without jeopardizing the league's stability and thereby its future. Although there is a substantial likelihood that the NBA could attain an individual exemption under Article 85(3), there may exist more certain ways for the NBA to avoid the scrutiny of the EC's competition laws. For example, examining NBA expansion in light of both the EC's treatment of joint ventures and service/distributional franchises provides two additional avenues of analysis.

C. The NBA as a Joint Venture:[135] An Approach Towards Gaining Shelter Under EC Competition Law for the NBA as an Entity

EC law recognizes two main types of joint ventures:[136] concentrative[137] and cooperative.[138] If a joint venture performs "on a lasting basis all the functions of an autonomous economic entity," then it is deemed concentrative.[139] On the other hand, a cooperative joint venture has as its object or effect "the coordination of the

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134. *Id.*

135. The NBA is a joint venture presently comprised of twenty-seven teams. *See* Joint Venture Agreement, *supra* note 7, at 1, 2.

136. A joint venture is defined as a:

> collaboration between two or more firms in one or more areas of activity. This may take any legal form, joint subsidiary, joint committee, etc. It reduces the incentive for the venturers to compete with each other in those activities, and may deter competition between them in others. If more than one party could have operated alone, it may reduce the number of actual or potential competitors, etc. Joint ventures may, however, increase competition by enabling the parties to do what no one of them would have been prepared to undertake independently.

KORAH I, *supra* note 80, at 243.

137. A joint venture is concentrative if it does not have as its purpose or outcome the "coordination of the competitive behavior" of independent firms. Griffin, *supra* note 131, at 34.

138. In a cooperative joint venture, the partners remain actual or potential competitors in the relevant product and geographic markets. While cooperative joint ventures are theoretically subject to both Articles 85 and 86 of the EC Treaty, in practice, Article 86 is rarely at issue. Frank L. Fine, *The Impact of EEC Competition on the Music Industry*, 12 NW. J. INT'L LAW & BUS. 508, 516 (1992).

139. Council Regulation 4064/89 of 12 December 1989 on the Control of Concentrations Between Undertakings, art. 3(2), 1989 O.J. (L 395) 1, 4 [hereinafter Merger Regulation]. A central issue in appraising the autonomy or independence of a joint venture is whether the joint venture can exercise independent commercial policy; that is, whether the joint venture can plan, decide, and perform as an independent unit in business matters. Griffin, *supra* note 131, at 34.

competitive behaviour [sic] of undertakings which remain independent. . . ."[140] A block exemption for joint ventures does not exist at the present time.[141] However, certain concentrative joint ventures fall within the EC's Regulation on Control of Concentrations Between Undertakings (Merger Regulation), implemented in 1990, and containing certain rules which operate as a block exemption.[142] As a result, concentrative and cooperative joint ventures are judged by different legal standards.

The test of legality for concentrative joint ventures is whether the concentration creates or strengthens "a dominant position as a result of which effective competition would be significantly impeded" in the EC or in a substantial part of the EC.[143] The legality of cooperative joint ventures is evaluated according to the more burdensome requirements of Article 85(1), requiring that the entity "affect trade between Member States" and have as its intention or effect "the prevention, restriction or distortion of competition within the common market."[144] Nevertheless, a joint venture that violates Article 85(1) may still be granted an individual exemption under Article 85(3).[145] All cooperative joint ventures are presently analyzed under Articles 85(1) and 85(3) on a case-by-case basis.[146]

The distinction in current EC law between concentrative and cooperative joint ventures has three noteworthy consequences. First, concentrative joint ventures are evaluated under the less strenuous test of substantive legality established in the Merger Regulation.[147] Second, concentrative joint ventures are subject to the mandatory five-month time limit for decisions to be made by the Commission after notification set forth in the Merger Regulation. Decisions under Article 85 often take approximately eighteen months.[148] Finally, while the competition laws of the member states do not apply to concentrative joint ventures, cooperative joint ventures are frequently litigated in national courts.[149]

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140. Merger Regulation, *supra* note 139, at 4.
141. GOYDER, *supra* note 79, at 196.
142. *Id.* at 196-97.
143. Merger Regulation, *supra* note 139, at 3.
144. EC TREATY art. 85(1).
145. *Id.* art. 85(3).
146. GOYDER, *supra* note 79, at 196.
147. Merger Regulation, *supra* note 139, at 4.
148. Griffin, *supra* note 131, at 34.
149. *Id.*

The Commission's August 1990 Joint Venture Notice (Notice) attempted to define and distinguish concentrative and cooperative joint ventures.[150] However, the effect of the Notice, according to one scholar, is to narrow the scope of concentrative joint ventures to the point that the parties to a concentrative joint venture are not permitted to have any control over the venture, but instead must operate "only as shareholders."[151] Because fewer ventures will meet this narrowed definition of concentrative, more joint ventures will be subjected to Article 85 scrutiny.[152]

In response to the advantages of structuring a joint venture as concentrative rather than cooperative, the Commission has suggested publishing the *Draft Guidelines for the Appraisal of Cooperative Joint Ventures* (*Guidelines*).[153] The *Guidelines* seek to provide "a more realistic economic approach to the commission's analysis of cooperative ventures" under Article 85.[154] In order to remove the disparate treatment afforded concentrative and cooperative joint ventures, the *Guidelines* make several suggestions. First, the appraisal of whether a venture is concentrative or cooperative does not depend on the venture's legal structure. Rather, the assessment depends on the restrictiveness of the agreed-upon clauses and the impact of the joint venture's establishment and operation on market conditions.[155] Specifically, the joint venture's impact on competition would depend on several factors, including:

> [t]he market shares of the parent companies and the joint venture, the structure of the relevant market and the degree of concentration in the sector concerned[;] [t]he economic and financial strength of the parent companies, and any technical or commercial edge that they may have[;] [t]he market proximity of the activities carried out by the joint venture[;] [w]hether the fields of activity of the parent companies and the joint venture are identical or interdependent[;] the scale of the joint venture's activities in relation to those of its parents[;] the extent to which the arrangements between the firms concerned are restrictive[;] [and] [t]he extent to which the operation keeps out third parties.[156]

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150. *See* Commission Notice 4064/89 of 21 December 1989 Regarding the Concentrative and Cooperative Operations, 1990 O.J. (C 203) 10.

151. KORAH I, *supra* note 80, at 215.

152. *Id.*

153. Griffin, *supra* note 131, at 34.

154. *Id.*

155. *Id.* at 35.

156. *Id.*

Second, the *Guidelines* propose the adoption of a more flexible attitude towards restraints that are ancillary to legal ventures, thereby treating the ancillary restraints as a package with the joint venture.[157] Finally, the *Guidelines* propose to mirror the five-month timetable for rendering decisions used under the Merger Regulation for concentrative joint ventures.[158] The *Guidelines* demonstrate the Commission's willingness to make the EC as receptive to cooperative joint ventures as it currently is to concentrative ones.[159]

The majority of joint ventures are cooperative, and therefore fall within the jurisdiction of Article 85(1).[160] Because the NBA's joint venturers operate as more than mere shareholders, the NBA would most likely be classified as cooperative.[161] An overview of the Commission's recent treatment of joint ventures under Article 85(1) would shed light on the reception of the NBA by the EC.

The Commission has rarely rejected a joint venture outright as being violative of Article 85(1). Moreover, although the Commission has a history of strictly applying Article 85(1) to joint ventures,[162] there has been a recent trend towards a more lenient approach[163] in which ventures have been permitted subject to the deletion of unsuitable clauses in the venture agreements.[164] The *Odin* decision[165] exemplifies this trend. *Odin* involved a joint venture created by Norwegian and British companies to develop a container that can be used for foods with long shelf lives.[166] This container would compete with existing products like glass jars and metal cans. In concluding that the venture was *outside* of Article 85(1), the Commission focused on the absence of actual or potential competition between the parent companies as well as the fact that neither venturer possessed adequate technical knowledge to produce the product on its own.[167] Furthermore, the Commission took note of the agreement's

157. *Id.*
158. *Id.*
159. *Id.*
160. GOYDER, *supra* note 79, at 210.
161. *See* Joint Venture Agreement, *supra* note 7, at 1-3; Constitution and By-laws, *supra* note 46.
162. GOYDER, *supra* note 79, at 198.
163. *Id.*
164. *Id.* at 204.
165. Commission Decision 90/410 of 13 July 1990 Relating to a Proceeding under Article 85 of the EEC Treaty, 1990 O.J. (L209) 15 [hereinafter *Odin*].
166. *Odin*, *supra* note 165, at 15; GOYDER, *supra* note 79, at 198.
167. *Odin*, *supra* note 165, at 19; GOYDER, *supra* note 79, at 198-99.

restrictions concerning the use of the parents' proprietary know-how and the obligation to keep such know-how secret.[168] The Commission deemed these restrictions to be ancillary and therefore outside of Article 85(1), rather than exemptible under Article 85(3), as was previously the norm.[169]

When compared to *Odin*, it appears possible that the expansion of the NBA's joint venture to include a European joint venturer might likewise fall outside the reach of Article 85(1). Like *Odin*, the product to be distributed (professional basketball of the NBA's caliber) could not be produced in the EC absent a joint venture agreement. Also, the restraints that accompany the NBA's joint venture are, arguably, ancillary, and thus fall outside of Article 85(1).

On the other hand, despite *Odin* and considering several other cases, there is a strong possibility that the NBA's joint venture would be deemed within the scope of Article 85(1). For example, although the parent companies in the *Optical Fibres* case[170] were neither actual nor potential competitors, the possibility that the network of parallel joint ventures throughout the EC could potentially reduce competition between the joint venturers prompted the Commission to consider the joint venture within Article 85(1).[171] Similarly, it is quite possible that the Commission would find that the NBA joint venture would reduce competition between NBA teams and/or between the existing basketball leagues in the EC, despite the fact that the parent companies are not, actually or potentially, competitors.[172] In such a situation, the Commission would next consider the availability of an individual exemption for the joint venture under Article 85(3).

In applying Article 85(3) to joint ventures, the Commission concentrates on two of the article's conditions for an exemption:[173] the first relating to the improvement of production or distribution and promotion of technical or economic progress, and the second to the indispensability of restrictive conditions (i.e., whether the restraints are the least restrictive possible under the circumstances).[174] In the

168. *Odin*, *supra* note 165, at 21.

169. GOYDER, *supra* note 79, at 199.

170. Commission Decision 86/405 of 14 July 1986 Relating to a Proceeding under Article 85 of the EEC Treaty, 1986 O.J. (L 236) 30 [hereinafter *Optical Fibres*].

171. *Id.*; GOYDER, *supra* note 78, at 199.

172. *See supra* notes 126-28 and accompanying text for a discussion of the NBA's need for joint venturers to cooperate in order to make competition possible.

173. EC TREATY art. 85(3).

174. GOYDER, *supra* note 79, at 207.

first category, the NBA would introduce a new competitor into the EC and the member states, thereby possibly promoting economic interest in basketball in the common market. With respect to the second condition, the indispensibility of the NBA's restrictions depends on the latitude which the Commission would afford the NBA in its treatment of its ancillary restraints.[175]

The NBA's joint venture can be distinguished from the *Screensport* case in which the Commission refused to exempt a venture from Article 85(1), therefore providing a further indication that the NBA will need to gain an exemption through Article 85(3).[176] In *Screensport*, the proposed joint venture between Sky Television and a consortium of seventeen national television authorities (members of the European Broadcasting Union)[177] was formed to operate the Eurosport satellite TV channel. The agreement required the joint venturers to supply the Eurosport channel with all the sports programs which they obtained and to offer priority to Eurosport to air such programs for forty-eight hours after the end of each event.[178] A competing satellite company, Screensport, complained that Eurosport's preferred access to the sports programs would unfairly impede its own efforts to compete effectively with Sky Television.[179] Sky Television countered that the venture would enable those with satellite dishes to have a greater number of sports programs to watch.[180] The Commission's main reason for refusing to exempt this venture was the "effect it would have on competition not only between Screensport and Sky but also between Sky and the members of the consortium itself who were also actual or potential competitors in broadcasting sports events."[181]

Unlike the *Screensport* case, the NBA's joint venture would arguably not stifle another competitor's ability to compete. Although the NBA teams would potentially overshadow the existing European leagues, they would also promote competition between the NBA and the existing European leagues, as well as between the American and European NBA teams. In addition, like *Screensport*, the NBA's

175. *Id.* at 208; J. Faull, *Joint Ventures Under the EEC Competition Rules*, 5 ECLR 358, 364 (1984).

176. Commission Decision 91/130 of 19 February 1991 Relating to a Proceeding Pursuant to Article 85 of the EEC Treaty, 1991 O.J. (L 63) 32 [hereinafter *Screensport*].

177. *Id.*

178. *Id.* at 32-33.

179. *Id.*

180. *Id.*

181. GOYDER, *supra* note 79, at 206; *see Screensport*, *supra* note 176, at 43-44.

venture would provide basketball fans with the opportunity to watch a greater amount of quality NBA basketball.[182]

It is possible that treating the NBA as a joint venture under EC law could mean the difference between falling within or outside of Article 85(1). Generally, the EC's attitude toward joint ventures indicates an apparent willingness to broaden the European Community's economic and cultural horizons. The NBA could seemingly fulfill this goal.

D. The NBA Under EC Franchising Law: A Means to Allow the NBA to Coexist with the Existing European Leagues

1. *Franchising in the EC.* Franchising is an expanding phenomenon in Europe, frequently occurring on an international basis.[183] The Commission has defined a franchise as a "package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, [including] . . . [t]he communication by the franchisor to the franchisee of [substantial] know-how" conferring a competitive advantage on the latter.[184] There are three types of basic franchise agreements: industrial, service, and distribution.[185] Under an industrial franchise, "the franchisee manufactures products according to the franchisor's instructions and under the franchisor's trademark."[186] The franchisee under a service franchise "offers a service under the business name or trademark of the franchisor according to the franchisor's instructions."[187] Finally, under a distribution franchise, "the franchisee sells certain products in a shop bearing the franchisor's business name, observing commercial methods developed

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182. Presumably, the NBA's presence in the EC would further heighten the common market's interest in basketball, thereby improving the level of competition in the existing European leagues. As mentioned above, however, there is a possibility that the NBA could harm the leagues.

183. *EC: Franchising and 1992*, Reuter Textline Euromoney International Financial Law, Apr. 18, 1989, *available in* LEXIS, Nexis Library, ALLEUR file. Many American companies, including McDonald's, Pizza Hut, and Holiday Inn, have taken part in the international franchising that has spread throughout the EC. *Id.*

184. Regulation 4087/88, *supra* note 95, at 48; *Block Exemption for Franchising Agreements*, BUSINESS GUIDE TO EC INITIATIVES § V, at 50 (Spring 1991).

185. Nicole Van Ranst, *Drafting a Franchise Agreement, in* DISTRIBUTORSHIPS, AGENCY AND FRANCHISING IN AN INTERNATIONAL ARENA: EUROPE, THE UNITED STATES, JAPAN AND LATIN AMERICA 175, 175-76 (1990).

186. *Id.*

187. *Id.*

by the franchisor. The products may be manufactured by the franchisor . . . and sold under his trademark or selected according to criteria defined by the franchisor and sold under the original trademark."[188] As the Commission noted in *ServiceMaster*,[189] there is a blurred distinction between service and distribution franchises. Therefore, the fact that the NBA possesses characteristics of both a service and distribution franchise system would be considered by the Commission.[190]

While franchises are regulated closely in the United States by "extensive and often draconian . . . federal laws,"[191] the EC has regulated franchises through the more general antitrust provisions of Article 85.[192] One of the aims of the EC antitrust laws is to regulate franchises in order to protect the financial investment of the franchisee and consumer interests, while also permitting the franchisor to enlarge its network.[193]

EC law thus adopts a stance which is favorable to franchising from a competition law standpoint: controls on franchising are generally considered to be inappropriate.[194] Under a franchising model, the NBA would serve as franchisor and the expansion teams in Europe would serve as franchisees. The European expansion teams would use the NBA's intangible property rights and substantial know-how in order to operate an NBA franchise. The arrangement would combine aspects of both service and distribution franchises.

The EC's relevant treatment of franchising begins with the European Court of Justice's *Pronuptia* decision.[195] In *Pronuptia*, defendant Shillgalis had been granted an exclusive franchise to sell

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188. *Id.*

189. Commission Decision 88/604 of 14 November 1988 Relating to a Proceeding Under Article 85 of the EEC Treaty, 1988 O.J. (L 332) 38 [hereinafter *ServiceMaster*] (franchises throughout Europe for supply of housekeeping, cleaning and maintenance services held exempt under Article 85(3)). *ServiceMaster* was the first Commission decision to deal with service franchises. KORAH II, *supra* note 84, at 34.

190. *See Service Master*, *supra* note 189, at 39.

191. *EC: Franchising and 1992*, *supra* note 183.

192. *Id.*

193. *Id.*

194. Christian Joerges, *Contract and Status in Franchising Law*, *in* FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES 11, 60 (Christian Joerges ed., 1991).

195. Case 161/84, Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis, 1986 E.C.R. 353, 1 C.M.L.R. 414 (1986) [hereinafter *Pronuptia*]. For a detailed discussion of the *Pronuptia* judgment, see KORAH II, *supra* note 84, at 19-23; de Cockborne, *supra* note 89, at 290-94.

Pronuptia wedding gowns and party attire in three West German cities.[196] Shillgalis refused to pay the agreed royalties, and upon being sued, asserted that the exclusive territories agreement violated Article 85(1) and was invalid.[197] The Court limited its comments to what it termed "distributional franchising," excluding production and service franchising. The Court noted several competitive aspects of distribution franchising:

> 15 . . . . [distribution franchising] is a way for an undertaking [franchisor] to derive financial benefit from its expertise without investing its own capital. . . . [T]he system gives traders [franchisees] who do not have the necessary experience access to methods which they could not have learned without considerable effort and allows them to benefit from the reputation of the franchisor's business name. . . . Such a system, which allows the franchisor to profit from his success, does not in itself interfere with competition. . . .[198]

Thus, according to the *Pronuptia* court, ancillary restraints which are essential to preventing the know-how and assistance needed by the franchisee from benefitting competitors, are not restraints of trade under Article 85(1).[199] The Court unconditionally stated that several other arrangements are outside of Article 85(1).[200] These include the franchisee's duty to have the franchisee's shop arranged in accordance with franchisor's instructions; to locate his or her shop at an agreed upon location; and, not to either relocate it to another address or to assign franchisee's rights and duties absent consent of the franchisor.[201] Significantly, instead of holding the aforementioned restrictions to be exempt under Article 85(3), the Court held that they do not even infringe upon Article 85(1) in the first

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196. KORAH II, *supra* note 84, at 19.

197. *Id.*

198. *Pronuptia, supra* note 195, at 1986 E.C.R. 381, 1 C.M.L.R. 442. The system in premised upon two conditions being met:

> 16. First, the franchisor must be able to communicate his know-how to the franchisees and provide them with the necessary assistance in order to enable them to apply his methods, without running the risk that know-how and assistance might benefit competitors, even indirectly.
> 17. Secondly, the franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol. It follows that provisions which establish the means of control necessary for that purpose do not constitute restrictions on competition for purposes of Article 85(1).

Id. at 1986 E.C.R. 381-82, 1 C.M.L.R. 442.

199. *Id.* at 1986 E.C.R. 385, 1 C.M.L.R. 414.

200. KORAH II, *supra* note 84, at 20.

201. *Id.*

place.[202] The Court's approach is clear-cut and lacks the unpredictability of the balancing technique characteristic of the Rule of Reason in the United States.[203]

The *Pronuptia* court also held that the appropriation of an exclusive territory required an exemption once the franchising network became widespread.[204] Concerned that franchisors would encounter problems in collecting royalties based on the granting of such exclusivity, the European Commission vigorously sought out individual cases to exempt.[205] In order to adopt a group exemption under the power vested in it by Regulation 19/65,[206] the Commission needed to approve several individual exemptions for franchise agreements under Article 85(3).[207] Following the *Pronuptia* judgment, the Commission did in fact exempt exclusive and partially exclusive territory agreements in numerous service and distribution franchise arrangements: *Pronuptia*[208] and *Yves Rocher*[209] in December 1986, *Computerland*[210] in July 1987, and *ServiceMaster*[211] and *Charles Jourdan*[212] in December 1988.[213] The *German Films*

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202. *Id.* at 21.

203. *Id.*; *see also supra* notes 34-36 and accompanying text for discussion of the Rule of Reason and the balancing approach.

204. KORAH II, *supra* note 84, at 23.

205. *Id.* at 23-24.

206. Council Regulation 19/65 of 2 March 1965 on the Application of Article 85(3), 1965 O.J. 533. Recital 4 of the empowering regulation, number 19/65, states that the Commission may exercise the power after sufficient experience has been gained in light of the individual decisions. KORAH II, *supra* note 84, at 129.

207. KORAH II, *supra* note 84, at 24-25.

208. *Pronuptia*, supra note 195, at 39 (holding sale of bridal wear and accessories in franchises throughout Europe, Canada, United States, and Japan are exempt under Article 85(3)). The agreement exempted by the Commission was not identical to the one exempted by the Court of Justice, although it was similar. KORAH II, *supra* note 84, at 26.

209. Commission Decision 87/14 of 17 December 1986 Relating to a Proceeding Under Article 85 of the EEC Treaty, 1987 O.J. (L 8) 49 [hereinafter *Yves Rocher*] (holding that Yves Rocher's selection of only one franchisee for a given territory, its commitment not to establish a shop itself in the territory of each of its franchisees, and its prohibition on the opening of a second shop in the franchisee's territory restricted competition within the distribution network).

210. Commission Decision 87/407 of 13 July 1987 Relating to a Proceeding under Article 85 of the EEC Treaty, 1987 O.J (L 222) 12 [hereinafter *Computerland*] (holding United States corporation with franchises in France, Spain, the United Kingdom, Italy, and Luxembourg exempt under Article 85(3)).

211. *ServiceMaster, supra* note 188.

212. Commission Decision 89/94 of 2 December 1988 Relating to a Proceeding Under Article 85 of the EEC Treaty, 1989 O.J. (L 35) 31 [hereinafter *Charles Jourdan*] (holding sale of shoes and handbags by company through franchises outside of France exempt under Article 85(3)).

213. From a factual standpoint, several of these decisions shed light on NBA expansion into Europe. Specifically, *Computerland* and *ServiceMaster* are of particular relevance: the former

case, also reflects the Commission's stance toward international agreements bringing technology into the EC, although the case did not involve a franchise.[214] The *German Films* case involved an agreement in which a German television company purchased the exclusive rights to American films in order to present them in Germany and sublicense them to other broadcasting organizations.[215] The Commission granted an individual exemption under Article 85(3) because the agreements in question resulted in improvements in the distribution of goods (films available to be seen) in the relevant market, benefitted consumers, and involved indispensable restrictions which were incapable of eliminating competition.[216] Likewise, the NBA would possibly argue, the expansion of its league into Europe would have a similar effect on the market.

2. *The Requirements of Regulation 4087/88.* The Commission's decisions laid the foundation for the formation of a block exemption from Article 85(1) for service and distribution franchises in the EC.[217] This block exemption, issued on November 30, 1988, and in force from February 1, 1989, until December 1, 1999, attempts to maintain a fragile balance between the interests of consumers and franchisors.[218] Compliance with the terms of the Regulation allows franchisors to gain automatic exemptions from Article 85,[219] demonstrating the Commission's willingness to relax its enforcement of the competition laws with respect to franchise agreements. Moreover, under this block exemption, a franchisor may grant a franchisee the right to exploit a franchise for purposes of marketing specified goods and services.[220] It is believed that the block exemption will encour-

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because it involved an American corporation franchising in Europe, and the latter because it consisted of a provider of a service (housecleaning) roughly analogous to the NBA (as a supplier of a good/service). *Computerland*, *supra* note 210; *ServiceMaster*, *supra* note 188. For a discussion of the NBA as a good/service, see *supra* notes 118-25. In each case, the Commission granted an Article 85(3) exemption.

214. Commission Decision 89/536 of 15 September 1989 Relating to a Proceeding Under Article 85 of the EEC Treaty, 1989 O.J. (L 284) 36 [hereinafter *German Films Case*] (holding film purchases by German television station of rights to several movies from Turner Broadcasting exempt under 85(3)).

215. *Id.*

216. *Id.*

217. Regulation 4087/88, *supra* note 95. The difficulty encountered in enforcing franchise agreements after the *Pronuptia* judgment pressured the Commission to create this block exemption. KORAH II, *supra* note 84, at 35.

218. *EC: Franchising and 1992*, *supra* note 183.

219. *Id.*

220. Regulation 4087/88, *supra* note 95, at 49.

age more investment in the EC by franchisors both from Member States and abroad, especially from the United States and Canada.[221] Arguably, NBA expansion into Europe would exemplify one type of foreign investment that the block exemption seeks to promote. Nevertheless, the NBA would have to conform to the requirements of Regulation 4087/88, which might require some adaptation to the Constitution and By-laws of the NBA in the United States.

Regulation 4087/88[222] applies to service and distribution franchises. Article 1(3) defines two key terms, "franchise"[223] and "franchise agreement."[224] Article 1(1) exempts franchise agreements which include at least one of the restrictions listed under Article 2.[225] Article 2 contains restrictions on, among other things, both the franchisor and franchisee's ability to exploit the franchise, conclude agreements with third parties, and sell the goods that are the subject of the franchise agreement outside of the contract territory.[226] Article 3, the White List, outlines two lists of provisions to which Article 1 of the Regulation shall apply: those provisions that "are necessary to protect the franchisor's industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network,"[227] and those that are unconditional and thereby fall under Article 1.[228] Furthermore, Article 3(3) exempts the provisions in Article 3(2) from Article 85(1) of the EC Treaty, even if they are "not accompanied by any of the obligations exempted by Article 1."[229] Therefore, the provisions in Article 3(1) are exempted

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221. *EC: Franchising and 1992*, *supra* note 183.

222. Of course, the requirements of this regulation need not be met if an agreement does not violate Article 85(1). KORAH II, *supra* note 84, at 129.

223. Regulation 4087/88, *supra* note 95, at 48.

224. *Id.* The Commission Regulation defines franchise agreements as follows:

> "[F]ranchise agreement" means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to:
>
> —the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport,
> —the communication by the franchisor to the franchisee of know-how,
> —the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement.

Id.

225. *Id.*

226. *Id.* at 49.

227. *Id.* Article 3(1) mirrors the ECJ's statement in *Pronuptia*. *See supra* note 195 and accompanying text.

228. Regulation 4087/88, *supra* note 95, at 49-50.

229. *Id.* at 50.

under Article 2 of the Regulation, but nevertheless are voidable in the unlikely case that they violate Article 85(1).[230]

Article 4 contains three conditions associated with cross-frontier trade and independence which must be satisfied to gain shelter under Regulation 4087/88.[231] While Article 3 provides provisions which are permissible, Article 5 contains the blacklisted clauses which, if included, destroy the exemption.[232] Articles 6 and 7 comprise the "opposition procedure," whereby the parties to an agreement may announce an agreement covered by the block exemption which (1) contains no blacklisted clauses, (2) satisfies all of the conditions listed in Article 4, but which (3) also includes a provision in restraint of trade that is not explicitly exempted.[233] Such an agreement will be exempted under Regulation 4087/88 if the Commission fails to oppose it within six months.[234] The "opposition procedure" was instituted as a means of providing legal certainty and simplifying the Regulation's administration.[235] Finally, Article 8 of the Regulation provides the Commission with the power to withdraw the exemption by an individual decision when it determines that the agreement has effects which are inconsistent with Article 85(3).[236]

Given this overview, questions exist as to the utility of Regulation 4087/88.[237] Specifically, the definition of "franchise agreement" has been deemed imprecise, making it unclear as to which agreements the regulation applies.[238] For instance, as discussed below, the NBA's practices would probably not violate the substantive provisions of Regulation 4087/88. Arguably, therefore, the largest hurdle facing the NBA is satisfying the Regulation's definition of "franchise agreement."

3. *Regulation 4087/88 Applied to NBA's Constitution and Bylaws.* Instead of entering into a conventional franchise agreement

230. KORAH II, *supra* note 84, at 76.

231. Regulation 4087/88, *supra* note 95, at 50. The franchisee may obtain goods that are the subject matter of the franchise from other franchises. An obligation of the franchisee to honor guarantees applies to any goods supplied by the franchised network. The franchisee must indicate its status as an independent undertaking. *Id.*

232. Regulation 4087/88, *supra* note 95, at 50.

233. KORAH II, *supra* note 84, at 90.

234. *Id.* at 90.

235. *Id.*

236. *Id.* at 111. The Commission is required by Article 7 of Regulation 19/65 to withdraw the exemption under such circumstances. *Id.*

237. *See generally* KORAH II, *supra* note 84, at 133-34.

238. *Id.* at 133.

with each member of the league, each NBA team simply agrees to abide by the Constitution and By-laws of the National Basketball Association.[239] The Constitution and By-laws operate as the functional equivalent of a centralized franchise agreement between the NBA and each team. Therefore, the Constitution and By-laws can be treated as the franchise agreement for purposes of evaluating whether the NBA could gain a block exemption under Regulation 4087/88.

Although the NBA is technically a joint venture, it nevertheless possesses the characteristics of a franchising network with the NBA as the franchisor and each team as a franchisee. The NBA, as a combination of a distribution and service franchise, appears to fall within the Regulation's general scope. First, the NBA satisfies the Regulation's definition of "franchise:" an NBA franchise carries with it the intellectual property rights belonging to the NBA, gains the NBA's significant know-how and assistance in the operation of a professional basketball team, and participates in a league of teams. The overall result of the franchise is to allow individual teams to "exploit" the "provision of services to end users (basketball fans)."[240] Second, by analogy the Constitution and By-laws operate as a franchise agreement under Regulation 4087/88. Specifically, the right to "exploit a franchise for the purposes of marketing specified . . . services" is granted to each team in exchange for an entrance fee (determined by the NBA), and the Constitution and By-laws contain obligations relating to the use of a common name, know-how, and continuing assistance provided by the NBA to each member throughout the life of the agreement.[241]

The Constitution and By-laws also provide restrictions that come within Article 2 of the Regulation, thereby triggering the exemption. Among the restrictions are the obligations of NBA teams not to assign the rights of the franchise to third parties without league approval,[242] not to relocate the franchise without the NBA's approval,[243] and to refrain from seeking fans outside of specified territories through cable broadcasts.[244]

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239. Constitution and By-laws, *supra* note 46.

240. *See* Regulation 4087/88, *supra* note 95, at 48.

241. *Id.*

242. Constitution and By-laws, *supra* note 46, at 4-6; Regulation 4087/88 *supra* note 95, at 49.

243. Constitution and By-laws, *supra* note 46, at 7-10; Regulation 4087/88, *supra* note 95, at 49.

244. Constitution and By-laws, *supra* note 46, at 61; Regulation 4087/88, *supra* note 95, at 149. Although this restriction is not identical to that in Article 2(d), it is similar enough to

The NBA would benefit from the White Listed provisions, either conditionally or unconditionally, under Article 3 of the Regulation. Specifically, Article 3(1) would permit the NBA's territorial restrictions on franchise relocation and the requirement to share with the league a portion of television and gate receipts.[245] More significantly, Article 3(2) would unconditionally authorize the NBA to prevent franchises from: disclosing confidential know-how about the league to third parties; taking advantage of the NBA's know-how for any other purpose than to run a basketball franchise; using the NBA's commercial methods and intellectual property rights; not complying with the NBA's guidelines for the presentation of arenas,[246] etc.; relocating the franchise without the NBA's consent; and assigning the rights of the franchise without the approval of the NBA's Board of Governors.[247]

In order for Regulation 4087/88 to apply to the NBA, Article 4's conditions must be satisfied. While the first two conditions of Article 4 are not applicable to the NBA,[248] the third is easily satisfied since the franchisees, individual teams, maintain their formal status of independent undertakings.[249] Therefore, the NBA does not violate any of Article 4's conditions, making the league eligible to comply with Regulation 4087/88.

Lastly, and perhaps most significantly, the NBA, through its Constitution, does not utilize any of the Black Listed clauses found in Article 5 of Regulation 4087/88.[250] Most of the prohibited clauses are not applicable to the NBA, and with respect to those that are relevant, the NBA's current procedures are acceptable.[251]

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deserve consideration.

245. Constitution and By-laws, *supra* note 46, at 59; Regulation 4087/88, *supra* note 95, at 49.

246. "Presentation of arenas" is a term of art referring to the physical set-up of the sport arenas.

247. Constitution and By-laws, *supra* note 46, at 4-10; Regulation 4087/88, *supra* note 95, at 49-50.

248. The first two conditions consider goods that are easily marketable and tangible as products, while in this instance, the NBA is more of a service. Constitution and By-laws, *supra* note 46, at 41; Regulation 4087/88, *supra* note 95, at 50.

249. The NBA can indicate its status as an independent undertaking.

250. *See* Regulation 4087/88, *supra* note 95, at 50.

251. For example, under Article 5(e) the NBA allows each team to set its own ticket, merchandise, and concession prices. Under Article 5(f) the franchisees are allowed to challenge the intellectual property rights of the NBA as franchisor. Regulation 4087/88, supra note 95, art. 5); *See* Constitution and By-laws, *supra* note 45, at 30. The ongoing battle between the NBA and the Chicago Bulls evinces this ability to challenge the league. *See infra* note 253 for a discussion of the Chicago Prof. Sports Ltd. Partnership case.

Based on the above analysis, the NBA could qualify for a block exemption under Regulation 4087/88. Of course, such an exemption is contingent upon the NBA's practices remaining consistent with the policies of Article 85(3). This last condition is an essential characteristic of any exemption, individual or block, that the NBA could enjoy.

4. *Effects of Deeming the NBA's Practices Outside of or Exempt from Article 85(1).* The policies behind granting individual and block exemptions to service and distribution franchises suggest a possibility of NBA expansion into Europe under an exemption to Article 85(1). The NBA would be, in a sense, nothing more than a franchisor attempting to establish new franchises that could sell its goods and service, basketball, as both a product and as entertainment, to people in the EC.

On the other hand, the individual and block exemptions granted to franchises can be revoked if the practices committed under the respective exemptions are contrary to the objectives of Article 85.[252] Nevertheless, the benefits that the NBA would confer on consumers in the EC, including exposure to higher quality basketball, would, presumably, outweigh any restraints on trade that accompany expansion, and would therefore satisfy the central objective of the regulation.

E. Potential Conflicts Between EC and American Antitrust Law

Although the antitrust laws of the EC and the United States are generally similar, it appears that EC competition policy would be less threatening toward NBA teams in Europe than American antitrust policies are to sports leagues in the United States.[253] Upon expansion into Europe, the NBA would probably receive an Article 85(3)

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252. Regulation 4087/88, *supra* note 95, at 51.

253. For an example of strict antitrust enforcement against the NBA in the American courts, see Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992) (holding that limiting the number of games a team may broadcast on a cable superstation to twenty violated the Sherman Act, despite the antitrust exemption the NBA enjoys under the Sports Broadcasting Act).

The Sports Broadcasting Act, passed in 1961, states that:

> The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, *baseball*, basketball, or hockey, by which any league of clubs . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of games . . . engaged in or conducted by such clubs . . . .

15 U.S.C. § 1291 (1961) (italics added). Why then, if baseball's antitrust exemption is secure, did Congress include baseball among the sports exempted under this statute?

exemption, thereby providing the NBA's European expansion teams with substantial leeway to operate free from antitrust scrutiny. The situation in the United States, although similar, is more tenuous. As discussed above, the exemption from antitrust scrutiny which the NBA currently enjoys stems not from an antitrust analysis, but from a labor exemption included in the collective bargaining agreement between the NBA and the Players' Association. Decertification of the Players' Association, a move threatened in 1987-88 and possible in 1994, would destroy this labor exemption.[254] If the NBA were to gain an exemption from EC antitrust laws and the Players' Association was then decertified, the NBA would be subject to antitrust scrutiny in the United States but exempt from such attacks in Europe.[255] The result could be the recognition in the EC of the college draft, salary cap, and right of first refusal, while these same restraints could be open to attack and possible antitrust sanctions[256] in the United States. With this "worst case scenario" lurking in the background, the future of NBA expansion into Europe, from an antitrust standpoint, is uncertain.

V. THE CANADIAN FOOTBALL LEAGUE (CFL) COUNTEREXAMPLE: EXPANSION INTO THE UNITED STATES

The CFL's recent expansion into the United States provides an interesting comparison to potential NBA expansion into Europe. In addition to raising antitrust issues, CFL expansion demonstrates the crucial role played by economic considerations.

A. Background of the Canadian Content Rule

The CFL expanded into the United States for the first time when it awarded an expansion franchise to Sacramento, California on January 12, 1993.[257] Recently, the CFL awarded American franchises to Baltimore, Las Vegas, and Shreveport (LA) with play to begin in the fall of 1994.[258] The purpose of the expansion was to broaden

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254. *See supra* notes 59-67 and accompanying text.

255. For purposes of this analysis, issues of comity, extraterritoriality, and choice of law will not be discussed.

256. *See supra* notes 68-78 and accompanying text.

257. Rick Matsumoto, *Expansion: CFL's Recipe for Success or Disaster*, TORONTO STAR, Jan. 11, 1993, at A1.

258. Archie McDonald, *Canadian Players Will be Left Out as CFL Expands to U.S.*, VANCOUVER SUN, Mar. 7, 1994, at D1. Four more American teams are expected to join the

the CFL's "financial and competitive horizons."[259] One major concern with expansion into the United States has been the plight of Canadian-born players in the CFL. The CFL has a longstanding rule that every team must have at least twenty native-born Canadians on its thirty-seven-player roster. This rule, the Canadian Content Rule, ensures that Canadians have the opportunity to participate in the league.[260] Additionally, the Canadian Content Rule preserves amateur and university football in Canada by allowing young football players to have legitimate dreams of playing in the CFL.[261] Without the rule, young Canadian football players, seeing no "specific place for them in their own game," might switch to another sport.[262]

Legally, however, the CFL could not enforce the Canadian Content Rule against either the Sacramento franchise, or its other American teams.[263] The rule potentially violates American labor,[264] immigration,[265] and antitrust laws.[266] Specifically, the rule would presumably be an unlawful restraint of trade under the Sherman Act. Under American antitrust law, football players compete for their jobs based on their skills rather than their nationality.[267] Therefore, the rule applies only to the eight existing Canadian teams; Sacramento, the only American CFL team to complete its roster, faced no restrictions on nationality.[268] Similarly, the three new American teams will be allowed to disregard the Canadian

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CFL in the near future. *Id.*

259. Matsumoto, *supra* note 257, at A1.

260. Because Americans receive more extensive college football coaching than Canadians, the Canadian Content Rule allows those Canadians who have talent, but lack coaching, to develop. Paul Hunter, *Pass-Catching Greats Immortalized by CFL*, TORONTO STAR, Feb. 25, 1993, at H5.

261. Matsumoto, *supra* note 257, at A1.

262. *Johnson, Surin Both Confident*, MONTREAL GAZETTE, Jan. 15, 1993, at D2.

263. McDonald, *supra* note 258, at D1. Ken Warren, *CFL Football: Gold Miners Don't Need To Go With Canadians*, OTTAWA CITIZEN, Feb. 27, 1993, at G6; *Ruling Says Miners Don't Need Canadians*, FIN'L POST, Feb. 27, 1993, §5, at 46.

264. Mark Zwolinski, *Foray Into U.S. to Cost Canadians Jobs*, CALGARY HERALD, Jan. 9, 1993, at C6.

265. *Id.*

266. Daniels, *supra* note 3, § 6, at 50. For purposes of this discussion, the focus will be on the antitrust aspects of the rule.

267. *See id.*

268. *See* McDonald, *supra* note 258, at D1.

Content Rule.[269] As a result, the CFL has not held an expansion draft for any of its American teams.[270]

Many feel that not applying the Canadian Content Rule will provide the American CFL teams with a competitive advantage, since Americans are generally considered to be more experienced at football than Canadians.[271] In addition, the Canadian Content Rule could quickly disappear if the teams in the United States dominate the CFL with predominantly American rosters.[272]

B. CFL Example Compared to NBA Expansion Into Europe

The CFL was forced to adjust its Canadian Content Rule in order to comply with American antitrust law when it expanded into the United States. Presumably, the NBA would not be willing to adjust its restraints so drastically in order to expand into Europe. The difference between the two situations, aside from the fact that the NBA's restraints would presumably be legal under EC law, centers on economic leverage. Simply put, the CFL had no leverage when it expanded. The CFL contended that "if U.S. expansion doesn't happen, if the rosters aren't changed to suit the U.S. laws, the league dies [;] . . . if not for U.S. ownership in Toronto and Ottawa, the league would already be dead."[273] The NBA on the other hand, is financially prosperous and has the luxury of expanding on its own terms and subject to more of its own objectives. If, for example, one of its rules violated another country's laws, the NBA could afford to create pressure for an exemption under those laws, or expand somewhere else.[274] The lesson to be learned from the CFL counterexample is simple: economic leverage does play a role in

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269. *See id.*

270. *See* Paul Hunter, *CFL's Governors Going Head to Head to Smash Gridlock*, TORONTO STAR, Feb. 23, 1993, at D22. Because of the discrepancy between the number of Canadian-born players on the Canadian rosters and the American CFL rosters, the CFL did not allow any of the American teams to partcipate in the league's college draft. *See* McDonald, *supra* note 258, at D1; Allan Maki, *Rift Brewing Over Draft*, CALGARY HERALD, Feb. 16, 1993, at D1.

271. Pat Hickey, *CFL's Latest Blunder Might Create Powerhouse in Sacramento*, MONTREAL GAZETTE, Feb. 14, 1993, at D2.

272. Frank Orr, *NBA Insider Claims Toronto's a Sure Bet*, TORONTO STAR, Feb. 28, 1993, at E8.

273. Daniels, *supra* note 3, § 6, at 50.

274. For example, as a condition for expansion into Toronto, the NBA required that Ontario eliminate legalized gambling on NBA games. Doug Smith, *Hoops: Here It Comes: Toronto has a Deal, Vancouver Removes Big Hurdle*, FIN. POST, Feb. 11, 1994, at 39. Faced with the possibility of losing the Toronto franchise, the Ontario government complied with the NBA's demand. *Id.*

international sports league expansion, and that role should not be lost behind the legalese that surrounds the process.

VI. CONCLUSION

As it presently stands, antitrust exemptions for professional sports leagues are interpreted narrowly in the United States.[275] There is currently a trend towards more vigorous antitrust scrutiny of American sports leagues, as seen by both the *Dudley*[276] and *Chicago Prof. Sports* cases.[277] This may stem from a perception of sports leagues as being mainly profit-seeking entities, rather than organizations whose main priority is to provide a competitive and exciting product for the fans. Ironically, of all the American sports leagues, this perception appears to be least applicable to the NBA, because the NBA offers such a popular and well-balanced league. Nevertheless, the NBA may find itself subject to increased antitrust scrutiny in the coming years, which could jeopardize the foundation of the financial growth it has enjoyed over the past decade.[278]

In contrast, EC competition laws appear to be less intrusive than American antitrust policies. Moreover, the EC laws are more definite and provide more certainty through their statutory and regulatory framework: Article 85(3) signifies a more stable approach to antitrust relief than its rather amorphous counterpart in the United States, the Rule of Reason. In addition to possibly qualifying for a standard Article 85(3) individual exemption, it is possible that the NBA could enjoy either a block exemption for service and distributional

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275. *See supra* note 253, discussing the Seventh Circuit Court of Appeal's decision in Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n. In interpreting the Sports Broadcasting Act, which exempts from antitrust review all agreements and joint transfers of rights from leagues to networks, the *Chicago Prof. Sports Ltd. Partnership* court took a narrow view. *Chicago Prof. Sports Ltd. Partnership*, 961 F.2d 667.

276. *Dudley*, 838 F. Supp. 172. *See supra* notes 69-71 for a discussion of *Dudley*.

277. *Chicago Prof. Sports Ltd. Partnership*, 961 F.2d 667. *See supra* note 253 for a discussion of *Chicago Prof. Sports Ltd. Partnership*.

278. The increased antitrust scrutiny currently focused upon the NBA can be viewed as part of a broader trend toward stricter antitrust enforcement against American professional sports leagues. In the NFL, the recent decision in the *McNeil* case instituted a more liberal free agency system. McNeil, 1992-2 Trade Cases (CCH) ¶ 69,982; *See supra* note 37 for a further discussion of McNeil. With respect to Major League Baseball (MLB), Congress has recently held hearings examining the league's antitrust exemption, which MLB has enjoyed since 1922. Mike Dodd, *Lawmakers to Owners: Straighten Up*, USA TODAY, Feb. 25, 1993, at 4C. Potentially, other leagues, including the NBA, could face more antitrust scrutiny if MLB's exemption is repealed because then the variation in treatment between MLB and other sports leagues would be lessened. Moreover, even though repeal of MLB's antitrust exemption is unlikely, the fact that Congress is willing to examine it closely evinces a mood of stricter antitrust enforcement.

franchises, or an individual exemption under the relaxed standards imposed upon cooperative joint ventures in the EC. A final difference between antitrust scrutiny in the EC and in the United States stems from the EC's overarching policy favoring the elimination of internal and external trade frontiers. It is this very policy that favors NBA expansion into the EC. Therefore, the only thing preventing the NBA from expanding into Europe is the NBA itself.

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