**Antitrust challenges to sports governance: EU and US perspectives**

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## 1. Introduction

As professional sports became increasingly commercialized, antitrust law (also known as competition law or anti-monopoly law)[1] emerged as a unique instrument to put a check on the private power of sports governing bodies and leagues (collectively referred to as sports organizations). The application of antitrust rules and principles to various business activities connected to sport, such as the sale of tickets or the licensing of merchandising or media rights, is generally uncontroversial. By contrast, antitrust enforcement vis-à-vis organizational (regulatory) aspects of sport - most, if not all, sporting rules and practices have considerable economic implications, which may also bring them within the realm of antitrust law - has always been met with fierce opposition. Sports organizations consider matters of "internal" sports governance to be part of their autonomous preserve. And, more importantly, there is an often-voiced concern that antitrust enforcers would not pay due regard to the distinctive features of sport and its structures. The application of the antitrust rules to a sector whose essential features can all too easily be misunderstood as regulatory "monopolies" and "collusion between competitors", would be equivalent to fitting a square peg into a round hole.[2]

When the European Union (EU) courts made clear that the rule-making activities of sports organizations are generally subject to antitrust scrutiny (refusing to draw an elusive dividing line between activities of an economic and purely sporting nature), many of those engaged in sports governance reacted with dismay.[3] Fifteen years later, similar criticisms are still levelled. For instance, Thomas Bach, president of the International Olympic Committee (IOC), identified a recent EU antitrust investigation into the eligibility rules of the International Skating Union (ISU) as "a major risk for the European model of sport". He accused the European Commission, who found those rules to be anti-competitive, of "treating a social movement like a car manufacturer" and taking a "neoliberal and deregulated approach to sport" that fails to consider its specific nature.[4]

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[1] In the EU, the term of "antitrust" is used to refer specifically to (the enforcement of) the competition law provisions targeting anti-competitive agreements and other collusive practices (Article 101) and abuse of dominance (Article 102 TFEU). In the US, the term is broader as it also encompasses merger control. This chapter uses the term "antitrust law" in the narrow sense.
[2] Marc Edelman, "In Defense of Sports Antitrust Law: A Response to Law Review Articles Calling for the Administrative Regulation of Commercial Sports" (2015) 72 72 Washington and Lee Law Review Online 1, 216 (noting that it has long been argued that applying antitrust law to the sports industry resembles fitting a square peg into a round hole).
[3] See e.g. Gianni Infantino, "Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?", UEFA paper, available at https://www.uefa.com/multimediafiles/download/uefa/keytopics/480391_download.pdf (pointing out "the obvious dangers that result from applying the law to sport as though it was simply just some other form of business").
[4] European Council, Newsroom. Preliminary remarks by Thomas Bach, President of the International Olympic Committee, at the Education, Youth, Culture, and Sport Council (Culture and Sports), 21 November 2017. See also IOC, "IOC President Thomas Bach calls for protection of European Sport Model at European Evening of Sports", press release of 22 June 2017.

This chapter will address such criticisms by exploring the way in which EU and US antitrust law actually applies to organizational sporting rules and practices. It will be argued that in both jurisdictions, the analytical framework governing the application of the antitrust rules offers sufficient flexibility to fully take into account the specific characteristics of sport. When applied in such a sensible way, antitrust law essentially imposes but one constraint on sports organizations: they should be able to demonstrate that their rules and practices are genuinely designed to achieve, in manner that is not manifestly disproportionate, legitimate objectives in the interest of sport. As such, antitrust challenges to sports governance can function as a meaningful accountability mechanism that in fact strengthens the legitimacy of how sports organizations exercise their private regulatory power.

I will mainly focus on EU antitrust enforcement, which has particular relevance given that it may result in EU-wide, which in practice will often mean global,[5] remedial action vis-à-vis international sports organizations. The two key antitrust provisions are Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). They target, respectfully, anti-competitive agreements (and other collusive behavior) between businesses and abuses of a dominant position. I will, however, compare and contrast the scope of application of the antitrust rules and the principles for the assessment of sporting rules and practices with the situation in the United States (US). Whereas the substantive US antitrust law provisions, Section 1 and Section 2 of the Sherman Act, are broadly equivalent to Articles 101 and 102 TFEU, the institutional setting for their enforcement is sharply different. With few exceptions,[6] all federal sports-related antitrust cases in the US have been brought as private actions.[7] Most of these cases involved the four major Northern American professional sports leagues,[8] so also the transatlantic differences in the organizational structure of sports must be acknowledged.[9] Nevertheless, the comparative perspective is useful in particular because the US has the longest and most extensive experience with antitrust enforcement in the sports sector. Furthermore, the EU and US are the two leading antitrust law jurisdictions from which newer antitrust regimes

[5] See Anu Bradford, The Brussels Effect: How the European Union Rules the World (OUP Oxford 2020).
[6] Federal Trade Commission, In the Matter of the Professional Skaters Association, Inc., File No. 131-0168 (2015)
[7] ABA Section of Antitrust Law, Sports and Antitrust Law (2014) ABA Publishing; OECD, Roundtable on competition and sports: Note by the United States (June 2010), available at https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter
[8] The National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL), and Major League Baseball (MLB).
[9] See Chapter Nafziger in this volume.

constantly draw inspiration. Both EU and US antitrust principles and practices are thus a valuable reference point.

This chapter is structured as follows. Section 2 starts with a brief introduction to the institutional framework of EU antitrust enforcement and then explores the scope of application of Articles 101 and 102 TFEU and the principles for the assessment of sporting rules and practices under these provisions. To practically illustrate the nature and function of EU antitrust enforcement in this area, the section also discusses two decisions that were recently adopted by the European Commission and the German competition authority. Section 3 will, following a similar structure, comparatively discuss the application of US antitrust law to sporting rules and practices. Section 4 offers some concluding thoughts.

## 2. EU antitrust law and sport: principles and practices

Before turning to the substantive application of Articles 101 and 102 TFEU, it is important to briefly introduce the institutional structure of EU antitrust enforcement. The main players are the European Commission, the national competition authorities (NCAs) and national courts, and the EU courts.

Since its inception in 1962, the EU antitrust enforcement system, which is mainly based on administrative decision-making, has undergone significant reform. Initially the enforcement of Articles 101 and 102 TFEU was highly centralized in the hands of the EU's executive body, the European Commission. Undertakings had to notify restrictive agreements to the Commission, which had the exclusive competence to declare the prohibition laid down in Article 101(1) TFEU inapplicable pursuant to the exception contained in Article 101(3) TFEU. Regulation 1/2003, which took effect in May 2004, abolished that system of prior notification and authorization and replaced it with a decentralized enforcement system based on the direct applicability of the exception rule. Undertakings now had to self-assess their compliance with the antitrust rules. And national competition authorities and courts of the EU Member States were empowered to apply those rules in their entirety.[10] As a result, EU antitrust enforcement, also in the area of sport, has largely shifted to the national level. The European Commission,

[10] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

however, continues to play a central role in defining EU antitrust policy – either through its enforcement action in high-profile cases or through the formulation of substantive rules and principles by means of legislation or soft law instruments. The Commission also monitors and coordinates the activities of the national competition authorities and retains the possibility to intervene in national cases. Furthermore, the national competition authorities and courts cannot take decisions that run counter to those adopted by the Commission.[11]

In 2014, the EU legislator adopted the Damages Directive to encourage and facilitate private antitrust actions before the national courts.[12] While the use of private antitrust enforcement throughout the EU has increased in recent years, private actions typically concern claims for damages following on from cartel decisions by the European Commission and the national competition authorities. Public enforcement by these administrative authorities thus continues to be predominant, also in respect of sports-related antitrust cases.

The European Commission's antitrust decisions are subject to review by the EU courts, which are the ultimate arbiters on matters of EU (antitrust) law. The General Court has jurisdiction to hear at first instance applications by legal and natural persons for annulment of Commission decisions or for annulment or reduction of fines imposed by the Commission.[13] A further appeal can be made to the Court of Justice, but only on points of law. Another important function of the Court of Justice is to ensure the uniform application of EU (antitrust) law within the EU. To that end, all national courts may – and sometimes must – ask questions of interpretation to the Court of Justice for a binding determination.[14] It is by way of this preliminary reference procedure that most of the sports-related cases have reached the Court of Justice.

Already in the 1970s the Court of Justice established, in response to questions referred to it by a Dutch and an Italian court, that sport is subject to EU law insofar as it constitutes an economic activity.[15] The issue of the application of the EU antitrust rules to the sports sector gathered

[11] Idem, Articles 11-16.
[12] The Directive sought to harmonize the existing national rules and procedures governing actions for damages for infringements of the EU antitrust rules (and insofar as they are applied in parallel, the national antitrust rules, insofar as applied in parallel) and to "fine-tune" the interplay between private damages actions and public antitrust enforcement by the European Commission and the national competition authorities. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.
[13] Articles 263 and 261 TFEU.
[14] Article 267 TFEU.
[15] Case 36/74 Walrave and Koch v UCI, ECLI:EU:C:1974:140, para. 4; Case 13/76 Gaetano Donà v Mario Mantero, ECLI:EU:C:1976:115, para. 12.

momentum only in the late 1990s, however. The interplay between two developments secured this change. Firstly, the growing commercialization of professional sport, in itself closely related to the progressive liberalization of European broadcasting markets and the rise of pay-television, prompted the European Commission to investigate commercial practices that were not considered contentious in the past, such as the joint selling of sports media rights and ticketing arrangements. Secondly, the Court of Justice's landmark ruling in *Bosman* (1995) cast a shadow on the idea that organizational sporting rules and practices, particularly given the commercial context in which they operate, could escape assessment under EU law.[16]

In *Bosman*, the Court of Justice provided answers to preliminary questions on the compatibility of transfer rules and nationality clauses in professional football with the Treaty provisions concerning the internal market, in particular the free movement of workers (now laid down in Article 45 TFEU), and competition. Because the Court found violations of the football players' right to free movement, it did not consider the application of the antitrust rules. Nevertheless, the *Bosman* ruling did establish a general framework for the assessment of sporting rules and practices under EU (antitrust) law to which the Court has adhered ever since.

The key to the ruling, as Stephen Weatherill puts it, is the conditional autonomy that is afforded to sports bodies under EU law:

> "This means that EU law does not permit sport to escape its reach – there is no absolute or unconditional autonomy. But nor does EU law expose sport to an insensitive application of the rules of the internal market. Instead, it takes into account the context, and allows sport to make its case for special treatment within EU law".[17]

The following section will explain that it took another decade before the Court of Justice would translate this approach — granting sporting rules and practices not the benefit of a blanket exemption, but rather that of a framework of analysis that is receptive to sport-specific justifications — to an antitrust context. Yet the *Bosman* judgment showed the way forward. And it was within this context that the European Commission initiated antitrust enforcement *vis-à-vis* regulatory aspects of sport.

[16] On the importance of the *Bosman* judgment, see e.g. Stephen Weatherill, Principles and Practice in EU Sports Law (Oxford University Press 2017) 85; Antoine Duval and Ben Van Rompuy, The Legacy of Bosman (T.M.C. Asser Press 2016).
[17] Stephen Weatherill, Principles and Practice in EU Sports Law (Oxford University Press 2017) 85.

## 2.1 Scope of application

In *Walrave and Koch v Union Cycliste Internationale* (*Walrave*) (1974) and *Donà v Mantero* (1976) the Court of Justice was faced with the prospect that the prohibition to discriminate on the basis of nationality, now contained in Article 18 TFEU, would condemn the selection of athletes for national representative teams or the exclusion of foreign players from championship matches. The Court, however, explained that EU law does not affect a practice "of purely sporting interest" that has "nothing to do with economic activity".[18] This is because the scope of the EU rules on free movement and competition, which serve to achieve the Treaty's (then exclusively) economic objectives, including the establishment of the internal market, is limited to practices that hinder cross-border economic activity. Rules about the composition of national teams, the Court reasoned, only exclude foreign athletes for sporting reasons and therefore fall outside the scope of EU economic law.

When the next sports-related case reached the Court of Justice, almost 20 years later, it gave a restrictive interpretation of the sporting exemption that it had seemingly established. In its *Bosman* judgment (1995) the Court reiterated that the EU free movement provisions "do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches", but it made clear that the exemption "cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty".[19] The Court's position that participation in international competitions between national teams could be disassociated from economic activity was already contentious.[20] But in any event, the same could not be said about nationality discrimination in professional club football. The Court also found no other basis to exclude the dispute from the application of EU economic law.[21]

[18] Case 36/74 Walrave and Koch v UCI, ECLI:EU:C:1974:140; Case 13/76 Gaetano Donà v Mario Mantero, ECLI:EU:C:1976:115.
[19] Case C-415/93 Union royale belge des sociétés de football association and Others v Bosman and Others, ECLI:EU:C:1995:463, para. 76.
[20] Stephen Weatherill, Principles and Practice in EU Sports Law (Oxford University Press 2017) 2017: 75-76; Stefaan Van den Bogaert and An Vermeersch, "Sport and the EC Treaty: a tale of uneasy bedfellows?" (2006) 31 European Law Review 6, pp. 826-827.
[21] Case C-415/93 Union royale belge des sociétés de football association and Others v Bosman and Others, ECLI:EU:C:1995:463, paras.69-83.

As already mentioned, and despite the guidance from Advocate-General Lenz in his opinion, the Court of Justice confined itself to the application of the free movement rules in *Bosman*.[22] The European Commission based its application of the antitrust rules on the general principles set out by the Court, but the exact scope of the sporting exemption remained unclear. In a first attempt to give guidance, the Commission sought to draw a dividing line between practices of sporting associations that fall outside the reach of the antitrust rules ("the sporting activity strictly speaking") and commercial activities generated by that sporting activity, to which the antitrust rules apply, with due regard to the specific characteristics of sport.[23] Yet the increasing interdependence between those two levels of activity made it ever more difficult to locate that line of separation. Apart from a small category of rules, such as the rules of the game, all sporting practices have considerable economic implications.

In its judgment in *Meca-Medina* (2006), the first case in which it applied one of the antitrust provisions to a sporting rule, the Court of Justice rejected the applicability of the sporting exemption. Two professional swimmers, who had been banned for two years for failing a drug test, had complained to the European Commission alleging that the anti-doping regulations of the International Olympic Committee (IOC) violated the EU antitrust rules. The General Court dismissed an appeal against the Commission's decision rejecting their complaint. It considered, citing *Walrave*, that the anti-doping rules escape the application of the antitrust rules on the sole ground that they are based on purely sporting considerations.[24] On further appeal, the Court of Justice invalidated that reasoning and held that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down".[25] It thus became clear that sporting rules and practices are subject to scrutiny under the EU antitrust rules. The Court explained that even when a sporting rule falls outside the scope of the free movement provisions because it has nothing to do with economic activity, this still does not

[22] In two subsequent preliminary rulings, dealing with transfer windows and selection rules limiting the number of participants in a tournament, the Court of Justice also examined the sporting rules under the free movement rules rather than the competition rules. It indicated that the referring national court had provided insufficient information about the structure of the market to answer the questions on the application of the competition rules. Joined Cases C-51/96 and C-191/97 Christelle Deliège v LFJ, LBJ and EJU and François Pacquée, ECLI:EU:C:2000:199; Case C-176/96 Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v FRBSB, ECLI:EU:C:2000:201.

[23] Commission Preliminary Guidelines on the application of the competition rules to sport (internal memo to the Commission), SEC(1999) 249; Commission Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework – The Helsinki Report on Sport, COM(1999) 644 final; European Commission, press release of 24 February 1999, "Commission debates application of its competition rules to sport", IP/99/133; European Commission, press release of 9 December 1999, "Limits to the application of Treaty competition rules to sport: Commission gives clear signal", IP/99/965.

[24] Case T-313/22 David Meca-Medina and Igor Majcen v Commission, ECLI:EU:T:2004:282.

[25] Case C-519/04 P David Meca-Medina and Igor Majcen v Commission, ECLI:EU:C:2006:492, para. 27.

mean — as the General Court erroneously assumed — that it is also excluded straightaway from the scope of the EU antitrust rules. Instead, it must be determined, on a case-by-case basis, whether a particular sporting rule or practice fulfills the specific requirements of Articles 101 and 102 TFEU.[26]

The Court of Justice's refusal to give antitrust immunity to a category of "purely sporting" practices attracted heavy criticism from those engaged in sports governance,[27] but was in fact hardly revolutionary. The Court has consistently held that where the Treaty intended to remove certain activities from the ambit of the EU antitrust rules, it made an express derogation to that effect.[28] The analytical framework that governs the application of Articles 101 and 102 TFEU leaves sufficient flexibility to take into account the special features of the sectors concerned. On that account, the Court of Justice has similarly confirmed the applicability of the antitrust provisions to a number of other "special" sectors (that are exempted from the competition rules in various jurisdictions).[29]

One notable exception to that pattern is the labor exemption that the Court of Justice developed to *a priori* exclude collective bargaining agreements from the scope of the antitrust rules. Collective bargaining is not a common feature of the professional sports sector in the EU. Nevertheless, it does have (potential) practical relevance for labor agreements reached between a national league, players' association, and federation.[30]

In *Albany*, the Court of Justice held that agreements concluded in the context of collective bargaining between employers and workers are exempt from the application of Article 101 TFEU in so far as they are aimed at improving conditions of work and employment.[31] The Treaty's activities not only include the preservation of a system of undistorted competition, but

[26] Idem, paras. 30-33.
[27] See e.g. Gianni Infantino, "Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?", UEFA paper, 2 October 2006; Julien Zylberstein, "Collision entre idéaux sportifs et contigences économiques dans l'arrêt Meca- Medina", 43 Cahiers de droit européen (2007), pp. 213–237.
[28] See e.g. Joined Cases 209 to 213/84 Ministère public v Asjes, ECLI:EU:C:1986:188, para. 40. For example, pursuant to Article 42 TFEU the competition rules apply to the production of, and trade in, agricultural products only to the extent determined by the EU legislator.
[29] Opinion of Advocate General Jacobs in Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:28, paras. 125-126. See e.g. Joined Cases 209 to 213/84 Ministère public v Asjes, ECLI:EU:C:1986:188, pars. 27-45 (in relation to the transport sector); Case 172/80 Vincent Grogan v Commission, ECLI:EU:C:1982:86, paras. 6-9 (in relation to the banking sector); Case 45/85 Verband der Sachversicherer e.V. v Commission, ECLI:EU:C:1987:34, paras. 7-15 (in relation to the insurance sector).
[30] See e.g. Leanne O'Learry, Employment and Labour Relations Law in the Premier League, NBA and International Rugby Union (2017 TMC Asser Press, The Hague), chapter 6.
[31] Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:430, para. 60.

also the adoption of a social policy that promotes social dialogue and collective bargaining.[32] The Court reasoned that the attainment of these social objectives would be "seriously undermined" if collective bargaining agreements would be prohibited by reason of their inherent restrictions of competition. It therefore concluded that the nature and the purpose of such agreements justify their exclusion from the scope of Article 101(1) TFEU.[33]

It should be noted that the *Albany* exemption does not apply to an agreement that is negotiated by an organization representing self-employed service providers.[34] While in most EU Member States professional team sport athletes, such as football players, are considered to be employees or workers of their clubs, in some other Member States they are deemed to be self-employed.[35] However, if these athletes are "false self-employed", because they find themselves in a situation comparable to that of employees, a collective labor agreement negotiated on their behalf would still escape the reach of Article 101 TFEU. This is because a person's legal status under national law would not preclude a finding that, for the purpose of EU law, that person should be classified as an employee or worker.[36]

## 2.2 Principles for assessment under Articles 101 and 102 TFEU

The mere fact that the regulatory activities of sports organizations are generally subject to antitrust scrutiny does not necessarily imply that they are condemned by the prohibitions contained in Articles 101 and 102 TFEU. In the following subsections, I will discuss the principles that govern the application of these provisions to sporting rules and practices.

### 2.2.1 Undertakings, associations of undertakings, and dominance

[32] See Articles 151-161 TFEU.
[33] Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:430, paras. 53-60. The Court of Justice confirmed this conclusion in subsequent case law. See e.g. C-219/97 Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven, ECLI:EU:C:1999:437; Joined Cases C-115/97 to C-117/07 Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen, ECLI:EU:C:1999:434; Case C-222/98, Hendrik van der Woude v Stichting Beatrixoord, ECLI:EU:C:2000:475; Joined Cases C-180/98 to C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, ECLI:EU:C:2000:428; Case C-437/09 AG2R Prévoyance v Beaudout Père et Fils SARL, ECLI:EU:C:2011:112.
[34] C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden, ECLI:EU:C:2014:2411, para. 30.
[35] See e.g. Antoine Duval and Oskar van Maren, "The Labour Status of Professional Football Players in the European Union: Unity in/and/or diversity?" (2017) 8 European Labor Law Journal 3, 258-278.
[36] C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, ECLI:EU:C:2014:2411, para. 31-36.

Article 101 TFEU applies to "undertakings" or "associations of undertakings", while Article 102 TFEU applies to "undertakings" holding a dominant position. According to settled case law of the Court of Justice, the concept of an undertaking covers "any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed".[37] The function of the requirement that the entity carries out economic activity, broadly defined as "any activity consisting in offering goods or services on a given market",[38] was already touched upon when discussing the sporting exemption.

It is undisputed that economic activity takes place at various levels in the sports sector. With respect to the commercial activities in which they are involved (such as the sale of tickets, media rights, and merchandising, the transferring of players or the conclusion of sponsorship contracts) sports organizations, clubs (or teams), and even individual athletes constitute undertakings. The concept of an undertaking does not presuppose a profit-making intention. The fact that sports organizations or clubs are non-profit making bodies is therefore insufficient to alter the finding that they are undertakings.[39] For the same reason, the fact that in addition to professional clubs a large number of amateur clubs belong to a sports organization does not call into question that they engage in economic activities.[40] While the economic success obtained by the clubs may certainly be different, their activities are not different in character.[41]

The question whether sports organizations also constitute undertakings when they act in a purely regulatory capacity is less straightforward. Although regulatory activities are not generally excluded from the scope of the EU antitrust provisions, as the Court of Justice made clear in *Meca-Medina*, this does not necessarily mean that those activities satisfy all the requirements of those provisions.[42] Article 101 TFEU would, however, still capture rule-making activity through the notion of "association of undertakings". To ensure its

[37] Case C-41/90 Höfner and Elser, ECLI:EU:C:1991:161, para. 21.
[38] Case 118/85 Commission v Italy, ECLI:EU:C:1987:283, para, 7; Case C-35/96 Commission v Italy, ECLI:EU:C:1998:303, para. 36; Joined Cases C-180/98 to C-184/98 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten, ECLI:EU:C:2000:428, para. 75.
[39] See e.g. Case C-244/94 FFSA and Others v Ministère de l'Agriculture and de la Pêche, ECLI:EU:C:1995:392, para. 21; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck v. Commission, ECLI:EU:C:1980:248, para. 88.
[40] The mere fact that certain members are not undertakings is not sufficient to remove an association from the scope of the EU antitrust rules. See e.g. Case T-23/09 CNOP and CCG v. Commission, ECLI:EU:T:2010:452, para. 74; Case T-217/03 FNCBV and Others v. Commission, ECLI:EU:T:2010:452, para. 55.
[41] Opinion of Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association and others v. Bosman and others, ECLI:EU:C:1995:293, para. 255–256. See also e.g. Joined Cases C-51/96 and C-191/97 Christelle Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL and others, ECLI:EU:C:2000:199, para. 46; Case T-193/02 Laurent Piau v. Commission, ECLI:EU:T:2005:22, para. 70.
[42] In France, for instance, the regulatory activity of sports federations is to some extent subject to control and supervision of the Minister of Sport. See e.g. Ben Van Rompuy, "The role of EU competition law in tackling abuse of regulatory power by sports associations" (2015) 22 Maastricht Journal of European and Comparative Law 2, 183-192.

effectiveness, the prohibition contained in Article 101(1) TFEU applies not only to agreements and concerted practices between undertakings, but also to "institutionalized forms of cooperation, that is to say, situations in which economic operators act through a collective structure or common body".[43] Sports organizations that group together clubs and athletes for which the practice of sport constitutes an economic activity thus qualify as associations of undertakings. It follows that regulatory measures that coordinate the conduct of a sports association's members inevitably come within the ambit of Article 101(1) TFEU, and this is regardless of the rule-making process from which they emerge.[44]

The situation is different as regards Article 102 TFEU, which only applies to one or more undertakings of a dominant position (within the internal market or in a substantial part of it). A dominant position relates to:

> "a position of economic strength held by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers".[45]

Such a position can be held either by one undertaking (single dominance) or multiple undertakings (collective dominance) in one or more relevant markets. Sports governing bodies usually have practical monopolies in a given sport and therefore can normally be considered dominant in markets in which they are active, such as the markets for the organisation and commercial exploitation of sports events.[46]

If sports organizations exercise regulatory power affecting a market in which only their members are active, Article 102 TFEU can only capture that rule-making activity through the notion of collective dominance. In *Laurent Piau*, the General Court found that the European Commission erred in law by taking the view that FIFA cannot hold a dominant position on the market for football players' agents' services simply because FIFA is not an actor on that

[43] Opinion of AG Leger in Case C-309/99 *Wouters and Others*, ECLI:EU:C:2001:390, para. 62. See also e.g. Case T-111/08, *MasterCard, Inc. and Others v* Commission, ECLI:EU:T:2012:260, para. 244.
[44] Unless of course the labor exemption applies and when the members do not engage in economic activities. Yet even then, one must consider that Article 101 TFEU applies in the same way to agreements between undertakings and to decisions of associations of undertakings. See e.g. Opinion of Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association and others v. Bosman and others, ECLI:EU:C:1995:293, para. 258; Opinion of Advocate General Jacobs in Case 67/96 Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:28, para. 223.
[45] Case 27/76 United Brands and United Brands Continentaal v. Commission, EU:C:1978:22, para. 65.
[46] European Commission, White Paper on Sport, COM(2007) 391 final, Annex I, p. 68.

market. According to the Court, FIFA, as "the emanation of the national associations and the clubs", effectively operates — through its members — on any market that it regulates. In other words, FIFA's involvement stems from its rule-making activity. Based on this premise, the Court considered that FIFA and the clubs (that is, the undertakings operating on the players' agents market), "being so linked in the long term as to their conduct" by binding rules, present themselves on that market as a collective entity.[47]

Commentators have criticized the General Court's use of the notion of collective dominance to justify the application of Article 102 TFEU in *Laurent Piau*. In particular, the Court's finding that FIFA acts jointly with its members (as an association of undertakings) seems difficult to reconcile with the finding that FIFA at the same time acts unilaterally as an undertaking.[48] Yet without recourse to the notion of collective dominance, one would need to accept that sports organizations escape liability under Article 102 TFEU when they regulate (access to) markets on which they themselves are not active.

### 2.2.2 Effect on trade between EU Member States

Articles 101 and 102 TFEU only apply to agreements, decisions or practices that appreciably affect trade between Member States. This jurisdictional requirement defines the boundary of the areas respectively covered by these provisions and the national antitrust rules.[49] It is not required that the agreement, decision or conduct will actually have or has had cross-border effects within the internal market. It is sufficient that they are "capable" of having such an effect.[50]

Sporting rules and practices of international sports associations, which coordinate the conduct of their members worldwide, are generally liable to affect trade between Member States.[51] The same is true for most of the activities in relation to the transfer of players or the commercial exploitation of (participation in) international and even national sports events. Since national

[47] Case T-193/02 Laurent Piau v. Commission, paras. 112–116.
[48] A. Jones and B. Sufrin, EU Competition Law: Text, Cases and Materials (6th edition, Oxford University Press 2016) 138-139. See also e.g. D. Waelbroeck and P. Ibanez Colomo, 'Case C-171/05 P, Laurent Piau, Order of the Court of Justice (Third Chamber) of 23 February 2006, [2006] ECR I-37', 43 Common Market Law Review (2006), p. 1743–1756.
[49] Joined Cases 56 and 58/64 Consten and Grundig v. Commission, EU:C:1966:41, p. 341.
[50] European Commission, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Notice) [2004] C 101/81, paras. 24–32.
[51] See e.g. European Commission Decision of 8 December 2017 in Case AT.40208 - International Skating Union's eligibility rules, paras. 310-313.

sporting rules and practices often apply to the whole territory of a Member State, they may also have an impact on cross-border economic activity, in particular when they have potential foreclosure effects.[52]

### 2.2.3 Restriction of competition

Article 101(1) TFEU is only applicable to agreements (or decisions or concerted practices) that have *"as their object or effect the prevention, restriction or distortion of competition within the internal market"*. The significance of the distinction between restrictions "by object" and "by effect" is evidential. Restrictions of competition by object are those that by their very nature reveal a sufficient degree of harm to competition, so that there is no need to examine their effects. Only where an agreement cannot be said to have an anti-competitive object, a fully-fledged analysis of the effects of that agreement on the market becomes necessary. It then needs to be established that actual or potential competition has in fact been prevented, restricted or distorted to an appreciable extent.[53]

Reliable and robust experience tells us that certain types of naked cartel activity, such as agreements between competitors leading to horizontal price-fixing, market-sharing or collective exclusive dealing, are detrimental to competition.[54] The extent to which the "by object" category can be used more broadly is controversial, however. In more recent case law, the Court of Justice has emphasized that the concept of restriction of competition "by object" must be interpreted restrictively.[55] It has also stressed the need to look beyond the formal aspects of the collusive behavior and check, albeit at a rather general level,[56] whether there are no specific circumstances that may cast doubt on its presumed harmful nature.[57] In particular, to determine whether an agreement (or decision or concerted practice) must be considered a restriction of competition "by object", regard must be had to the content of its provisions, its objectives, and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services

[52] European Commission, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Notice) [2004] C 101/81, paras. 77–99.
[53] See e.g. Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, EU:C:2014:2204, para. 52.
[54] See e.g. Case C-228/18 *Budapest Bank and Others*, ECLI:EU:C:2020:265, para. 36 (price-fixing); Case C-373/14 P *Toshiba Corporation v Commission*, ECLI:EU:C:2016:26, paras. 26-28 (market-sharing); Case C-68/12 *Slovenská sporiteľňa*, ECLI:EU:C:2013:71, para. 19 (collective exclusive dealing).
[55] Case C-67/13 P *CB v Commission*, ECLI:EU:C:2014:2204, para. 58.
[56] Case C-373 14 P Toshiba Corporation v Commission, ECLI:EU:C:2016:26, para. 29.
[57] For a detailed discussion, see Opinion of Advocate General Bobek in Case C 228/18 *Budapest Bank and Others*, ECLI:EU:C:2019:678.

affected, as well as the real conditions of the functioning and structure of the market or markets in question.[58] Although the parties' intention is not a necessary factor, there is nothing prohibiting the competition authority or court from taking that aspect into account.[59]

When a restriction of competition within the meaning of Article 101(1) TFEU has been proven, Article 101(3) TFEU can, in all circumstances,[60] be invoked as a defense. The latter provision provides for an exception to the prohibition of otherwise anti-competitive collusive behavior. Those claiming the benefit of Article 101(3) TFEU have the burden of establishing, by means of convincing arguments and evidence,[61] that four cumulative conditions are satisfied. The agreement, decision or concerted practice must: (1) improve the production or distribution of goods or promote technical or economic progress; (2) allow consumers a fair share of the resulting benefits; (3) do not impose restrictions that are not indispensable to the achievement of the benefits; and (4) do not eliminate competition in a substantial part of the internal market.

Given the bifurcated structure of Article 101 TFEU, the General Court and the European Commission have rejected the suggestion that a US-style "rule of reason" analysis should be conducted at the Article 101(1) stage. It is Article 101(3) that provides the appropriate forum for weighing the pro-competitive benefits and anti-competitive effects of collusive behavior.[62] Nonetheless, in a line of case law dealing with professional bodies, the Court of Justice did apply a rule of reason type of analysis to determine the applicability of Article 101(1), allowing public interest benefits raised by the defendant to offset competition concerns. In the primary case *Wouters* (2002), the Court had to assess whether a regulation adopted by the Netherlands Bar, prohibiting partnerships between lawyers and accountants, violated Article 101 TFEU. The Court considered that the rule was liable to distort competition. It stressed, however, that Article 101(1) does not necessarily catch every decision taken by an association of undertakings (or agreement between undertakings) that restricts the freedom of action of the parties or one of them. To determine whether the decision constitutes a restriction of competition within the meaning of Article 101, the overall context in which the decision was

[58] See e.g. Case C-67/13 P *CB v Commission*, ECLI:EU:C:2014:2204, para. 53.
[59] See e.g. Case C-67/13 P *CB v Commission*, ECLI:EU:C:2014:2204, para. 54.
[60] See e.g. Case C-439/09 *Pierre Fabre Dermo-Cosmétique*, ECLI:EU:C:2011:649, para. 57. Contrary to US antitrust law, EU antitrust law does not recognize "per se" unlawful collusive practices. Even restrictions by object are, in principle, capable of satisfying the conditions under Article 101(3) TFEU.
[61] European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/105, para. 235.
[62] The balancing of overall effects under Article 101(1) TFEU would not only render the substantive analysis under Article 101(3) TFEU redundant, but it would also impact the allocation of the burden of proof. Idem, para. 11; Case T-112/99 *Métropole télévision and Others v Commission*, ECLI:EU:T:2001:215.

taken or produces its effect must be taken into account. More particularly, "account must be taken of its objectives" and it "has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives".[63] According to the Court, the restrictive effects of the regulation at issue could reasonably be regarded as appropriate and necessary to ensure the proper practice of the legal profession. Consequently, Article 101(1) was not infringed.[64]

Throughout this chapter I refer to this analytical framework as the *Wouters* proportionality test, but it should be stressed that it does not include a requirement of proportionality in the narrow sense (stricto sensu). It only looks at whether the measure is appropriate for attaining its purported legitimate objective (the suitability subtest) and does not go beyond what is necessary (the necessity or least-restrictive-means subtest). In practice, the same holds true for the rule of reason analysis employed by US courts.[65]

The Court of Justice's reliance on the *Wouters* proportionality test in subsequent case law suggests that its application is limited to the rules and practices of associations carrying out a regulatory function. The consideration of public interest justifications that it requires under Article 101(1) TFEU thus remains an oddity in EU antitrust law. It is, however, of great importance in the antitrust scrutiny of organizational sporting rules and practices. When asked whether the anti-doping regulations of the IOC constitute a restriction of competition within the meaning of Article 101(1) TFEU in *Meca-Medina* (2006), the Court of Justice chose to apply the *Wouters* proportionality test. The Court first recognized that the rules, which are capable of restricting competition by banning athletes from sporting events following a positive doping test,[66] had legitimate objectives; namely *"to combat doping in order for competitive sport to be conducted fairly"* and *"the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport, and ethical values in sport"*.[67] Then, the Court examined whether the restrictions caused by the rules are suitable and necessary to achieve these objectives. Considering that the penal nature of the rules did not appear to go beyond what is necessary to ensure enforcement of the doping ban — the swimmers had neither demonstrated that the permitted dosage threshold were set unjustifiably low nor argued that the

[63] Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, EU:C:2002:98, para. 97
[64] Idem, paras. 98-110.
[65] See Section 3.2.3.2.
[66] Case C-519/04 P David Meca-Medina and Igor Majcen v Commission, ECLI:EU:C:2006:492, para. 47.
[67] Idem, para. 43.

penalties imposed were excessive — it found the limitations on the athlete's freedom of action to be inherent in the proper conduct of competitive sport and proportionate.[68] The Court therefore concluded that the anti-doping rules did not constitute a restriction of competition and, subsequently, fell outside the prohibition in Article 101(1) TFEU.

So, while the Court of Justice in *Meca-Medina* denied antitrust immunity for sporting rules and practices,[69] it at the same time put forward an analytical framework that provides sufficient flexibility to fully take into account the specific characteristics of sport. For instance, using this framework, the European Commission found that the Union of European Football Associations (UEFA)'s rule on multiple ownership of football clubs could not be qualified as a restriction of competition. That the rule, according to which no individual or legal entity may have control or influence over more than one club participating in a UEFA club competition, limits investments in these clubs is apparent. This would normally be considered a restriction "by object".[70] Yet the Commission concluded that these restrictive effects are reasonably necessary to protect the integrity of the competition and to avoid conflicts of interests. As a result, and provided that it is applied in an objective and non-discriminatory manner, the sporting rule escapes the prohibition contained in Article 101(1) TFEU.

The choice to allow sports-specific justifications to offset a prima facie case of competitive harm under Article 101(1) TFEU is not neutral. For at least two reasons, such justifications will have a far lesser impact, if any, under Article 101(3) TFEU. First, the European Commission advocates a narrow interpretation of Article 101(3) TFEU, which only allows improvements in economic efficiencies that sufficiently compensate the consumers affected by the restriction.[71] Second, Article 101(3) TFEU additionally requires that the agreement (or decision or concerted practice) must not lead to an elimination of competition.

Contrary to organizational sporting rules and practices, commercial activities connected to sport are generally subject to an orthodox analysis without the *Wouters* proportionality test at the Article 101(1) stage. Most of these commercial practices, such as the licensing of

[68] Idem, paras. 44-55.
[69] See above section 2.1.
[70] Article 101(1) TFEU specifically identifies as restrictions of competition agreements between undertakings "that limit or control … investment". See also European Commission Decision of 29 September 2004 in Case COMP/C.37.750/B2 - Brasseries Kronenbourg, Brasseries Heineken, paras. 66-67.
[71] For a detailed discussion, see Ben Van Rompuy, Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU (Wolters Kluwer, Alphen aan den Rijn 2012).

sponsorship or merchandise rights or the sale of tickets, cannot reasonably be considered necessary to achieve legitimate objectives relating to the organization and proper conduct of competitive sport.[72] To the extent that sports-specific justifications would be relevant, they can only be accepted under Article 101(3) TFEU.

The dividing line between regulatory and commercial aspects can of course only be found on a case-by-case basis. For example, in three major cases involving the joint selling of exclusive football media rights, the European Commission established the conditions under which it considered that practice permissible under Article 101 TFEU.[73] The parties involved — UEFA, the German League Association, and the English Football Association Premier League — invoked a financial solidarity argument as the main justification for their joint selling arrangements. The aim of maintaining a financial and competitive balance between clubs participating in the same competition has been accepted by the Court of Justice as a legitimate regulatory objective,[74] justifying in theory the application of the *Wouters* proportionality test. Joint selling arrangements have been shown to facilitate horizontal financial solidarity.[75] Yet the joint selling of media rights is not an indispensable prerequisite for a fair distribution of revenues between the clubs. This can be achieved through other mechanisms (that do not restrict competition on the market for the acquisition of the media rights). In its *UEFA Champions League* decision (2003) the Commission therefore stressed that the solidarity justification could only be considered under Article 101(3) TFEU.[76]

### 2.2.4 Abuse

[72] The protection of economic and/or financial interests does not constitute a legitimate objective that can justify a restriction of competition. European Commission Decision of 8 December 2017 in Case AT.40208 - International Skating Union's eligibility rules, para. 220.
[73] European Commission Decision of 23 July 2003 in Case COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League; Decision of 19 January 2005 in Case COMP/C-2/37.214 - Joint selling of the media rights to the German Bundesliga; and Decision of 22 March 2006 in Case COMP/38.173 - Joint selling of the media rights to the FA Premier League.
[74] Case C-415/93 Union Royale Belge des Sociétés de Football Association and others v. Bosman and others, ECLI:EU:C:1995:293, para. 106.
[75] T.M.C. Asser Institute, Study on Sports Organisers' Rights, Study commissioned by the European Commission (2014) 74-91. See also e.g. Opinion of Advocate General Lenz in Case C-415/93 Union Royale Belge des Sociétés de Football Association and others v. Bosman and others, ECLI:EU:C:1995:293, paras. 226-234.
[76] The Commission, however, avoided addressing the merits of the argument that a joint selling arrangement ensures a fairer distribution of revenue. Because UEFA's amended joint selling arrangement could be justified on other economic efficiency grounds (the creation of a single point of sale, the creation of a packaged league product, and the branding of content by a single entity) the Commission concluded that "it is not necessary for the purpose of this procedure to consider the solidarity argument any further". European Commission Decision of 23 July 2003 in Case COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League, paras. 131, pp. 164-167.

Article 102 TFEU only prohibits the "abuse" of a dominant position within the internal market or a substantial part of it. The mere holding of such a position is not unlawful. According to established case law of the EU courts, dominant undertakings do have a "special responsibility" not to allow their conduct to impair undistorted competition on the internal market.[77] This is, however, simply shorthand for saying that they may be prohibited from conduct that is legitimate where it is carried out by non-dominant undertakings.[78]

Article 102 TFEU lists certain types of conduct that may be abusive (such as tying and bundling and the imposition of unfair trading conditions) but this list is not exhaustive.[79] The EU courts have generally defined abuse as conduct that cannot be regarded as "normal competition" or "competition on the merits".[80] This may include exploitative practices, exclusionary practices, discriminatory practices, and practices that are harmful to the internal market. While a number of basic principles underlie the approach to the different categories of abuses,[81] there is no general test to distinguish between anti-competitive practices and competition on the merits. In order to establish the abusive nature of a certain conduct, specific conditions must be met (that do not necessarily apply when assessing other types of conduct).[82]

The wording of Article 102 TFEU does not provide for an exception to the prohibition it lays down. The EU courts have accepted, however, that a dominant undertaking may seek to justify its presumptively abusive behavior by arguing that (1) it is objectively necessary because of external factors (for instance, health or safety reasons) or (2) that any harm to competition is outweighed by advantages in efficiency that benefit consumers.[83] The requirements for these defenses are stringent and there are virtually no reported cases where they have been successful. Nevertheless, the possibility of justification implies that there are, at least in principle, no "per se" abuses.[84] And although the Court of Justice has so far only applied the *Wouters*

[77] Case 322/81, NV Nederlandsche Banden Industrie Michelin v Commission, EU:C:1983:313, para. 57.
[78] Jonathan Faull and Ali Nikpay, The EU Law of Competition (3rd edition, Oxford University Press 2014) 394.
[79] See e.g. Case 6/72, Europemballage and Continental Can v Commission, EU:C:1973:22, para. 26; Case C-457/10 P, AstraZeneca v Commission, EU:C:2012:770, para. 134.
[80] See e.g. Case 85/76, Hoffmann-La Roche v Commission, EU:C:1979:36, para. 6; Case C-280/08 P, Deutsche Telekom v Commission, EU:C:2010:603, para. 175.
[81] For a detailed discussion, see Robert O'Donoghue QC and Jorge Padilla, The Law and Economics of Article 102 TFEU (3rd edition, Hart Publishing 2020); Renato Nazzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102 (Oxford University Press 2011). See also European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.
[82] Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB, EU:C:2011:83, para. 55.
[83] Case C-209/10 Post Danmark A/S v Konkurrencerådet, ECLI:EU:C:2012:172, paras. 40-41; Case C-413/14 Intel Corp. v Commission, ECLI:EU:C:2017:632, para. 140.
[84] Alison Jones, Brenda Sufrin, and Niamh Dunne, EU Competition Law: Text, Cases and Materials (7th edition, Oxford University Press 2019) 382.

proportionality test in the context of Article 101 TFEU, this supports the view that the same analytical framework could be used to assess sporting rules and practices under Article 102 TFEU.[85]

### 2.3 Recent decisional practice

Since the conclusion of several antitrust investigations of FIFA and the International Automobile Federation (FIA) in 2001 and 2002,[86] the European Commission has long refrained from intervening in regulatory aspects of sport.[87] It was only in 2015 that the Commission opened another formal investigation into sporting rules and practices. This investigation into the eligibility rules of the ISU eventually resulted in a decision finding an infringement of Article 101 TFEU – the Commission's first ever antitrust prohibition decision in this area. The case concerned a familiar issue, however. It followed a series of national cases that similarly dealt with the rules and practices of sports organizations governing the authorization or "sanctioning" of sports events and the participation of their members in non-sanctioned events.[88] The inherent potential for a conflict of interest between a sports organization's regulatory responsibilities and its commercial motivations has indeed attracted most attention by competition authorities in the EU in recent years (Section 2.3.1). In another recent high-profile antitrust investigation, the German NCA scrutinized, under Article 102 TFEU (and the equivalent national provision), the IOC's controversial rules restricting athlete's individual advertising and sponsorship opportunities when competing at the Olympic Games (Section 2.3.2).

[85] The European Commission takes the view that the Wouters proportionality test is also applicable in the context of Article 102 TFEU. European Commission, White Paper on Sport, COM(2007) 391 final, Annex I, pp. 64-69. The German NCA for the first time used the analytical framework to assess sporting rules and practices under Article 102 TFEU, see Section 2.3.2.

[86] European Commission Press release of 5 June 2002, "Commission closes investigations into FIFA regulations on international football transfers", IP/02/824; Press release of 18 April 2002, "Commission closes investigations into FIFA rules on players' agents", IP/02/585; Press release of 30 October 2001, "Commission closes its investigation into Formula One and other four-wheel motor sports", IP/01/1523.

[87] A preliminary antitrust investigation into the rules of the European Handball Federation and the International Handball Federation on the release of players for matches of the national teams playing in international competitions was closed in June 2010 after the parties reached an amicable solution. European Commission, Annex to the staff working paper accompanying the Report from the Commission on Competition Policy 2010, SEC(2011) 609 final, para. 263.

[88] For a discussion and analysis of these national cases, see Ben Van Rompuy, "The role of EU competition law in tackling abuse of regulatory power by sports associations" (2015) 22 Maastricht Journal of European and Comparative Law 2, 179-208.

The discussion of both cases will practically illustrate how the principles discussed above, and in particular the analytical framework to assess sporting rules and practices under Articles 101 and 102 TFEU, translate into practice.

### 2.3.1 Rules on the sanctioning of sports events and restrictions on the participation in non-sanctioned events

The rules and statutes of many international and national sports governing bodies include provisions on the sanctioning of (third-party) sports competitions. This in itself is justifiable. In their function as the governing body for a particular sport, sports organizations have a legitimate role in, for instance, ensuring compliance with uniform rules for their discipline and maintaining a properly structured calendar.[89] Yet it is clear that where the regulator also organizes and commercially exploits events, a conflict of interest may arise. There is significant potential for anti-competitive effects. Sanctioning rules may be enforced to entrench market power in the markets for the organization and marketing of sports events. Rules prohibiting members from participating in events not sanctioned by their sports governing bodies may raise further barriers to entry for potential competitors.

In its preliminary ruling in *MOTOE* (2008) the Court of Justice addressed the question of how the dual roles of sports organizations must be measured against the demands of EU antitrust law.[90] The reference was made in the course of national proceedings between the Greek State and MOTOE, the Greek Motorcycling Federation. Greek legislation requires authorization from the minister for public order for the organization of motorcycling events on public and private roads, which can only be given following the consent of the national association that is recognized by FIA — at that time the Automobile and Touring Club (ELPA). When ELPA rejected its application to organize a series of races, MOTOE sought financial compensation for the damage it claimed to have suffered.

The Court of Justice did not object to the fact that ELPA, which itself organizes and commercially exploits events, was entrusted with the power to decide which events may take place. The Court did consider, however, that this leads to a conflict of interest: ELPA not only has the means to prevent competitors from entering the Greek market, but also an economic

[89] See Opinion of Advocate General Kokott in Case C-49/07 *MOTOE*, ECLI:EU:C:2008:142, paras. 91-96.
[90] Case C-49/07 *MOTOE*, ECLI:EU:C:2008:376.

interest in limiting market access and favoring its own events. A system of undistorted competition, the Court noted, "can be guaranteed only if equality of opportunity is secured as between the various economic operators".[91] To ensure equal conditions of competition, the exercise of ELPA's power to authorize events should therefore be made subject to restrictions, obligations, and review.[92] The Court of Justice left it to the national court to assess whether the Greek legislation sufficiently ensured that applications for authorisation would be dealt with in an objective, transparent, and non-discriminatory way. If it did not do so, the legislation risked leading to an abuse of a dominant position and should therefore be considered incompatible with Article 102 TFEU.[93] The Court of Justice later confirmed that the case law arising from *MOTOE* also applies in cases concerning the application of Article 101 TFEU to the authorisation rules and practices of associations of undertakings that are both an operator in and a regulator of a relevant market.[94]

It is against this background that the European Commission's decision in the *ISU's Eligibility Rules* case should be seen. The case originated from a complaint lodged by two Dutch professional speed skaters Mark Tuitert and Niels Kerstholst, alleging that the Eligibility rules included in the (then applicable) ISU General Regulations 2014 were incompatible with EU antitrust law. According to those rules, any person participating in a competition not sanctioned by the ISU or its member federations would become permanently ineligible to participate in ISU activities and competitions. Skaters would not be able to apply for reinstatement.[95] Hence, participation in a non-sanctioned event would for them result in a lifetime ban. The Eligibility rules imposed this penalty at least since 1998. The effect of the rules on market access by third parties, however, manifested itself only when the Korean company Icederby International Co., Ltd. (Icederby) attempted to set up alternative speed skating events based on a new format.[96] The first series of events was to take place in Dubai for six consecutive years from 2014 to 2020. Yet because Icederby envisaged to allow on-site betting on its future races where this would be legal — in Dubai all forms of gambling are prohibited — the ISU was unwilling to sanction the Dubai events.[97] In a Communication, the ISU reminded its members that their

[91] Idem, para. 51.
[92] Idem, para. 52.
[93] Pursuant to Article 106(1) TFEU the Member States shall, in respect of undertakings to which they confer exclusive rights, neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular the antitrust rules.
[94] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127, paras. 88-92.
[95] ISU, Constitution and General Regulations 2014, Rule 102 and 103.
[96] Long-track and short-track would compete with each other in mass start races on a special ice track.
[97] In January 2011, after Icederby contacted the ISU to enter into a partnership agreement, the ISU updated its Code of Ethics which included the obligation to refrain from participating in all forms of betting.

participation in the Dubai events would be penalized according to the Eligibility rules. Due to the threat posed to skaters' careers by these rules, Icederby could not secure their participation and had to cancel the Dubai events.[98] This is what prompted the antitrust complaint and the Commission's investigation.

In December 2017, following a two-year long investigation, the Commission adopted a decision finding that the ISU infringed Article 101 TFEU by adopting the Eligibility rules and enforcing them in the case at hand. In December 2020, the General Court largely dismissed the ISU's appeal to overturn the Commission decision.[99]

The Commission found that the Eligibility rules have an anti-competitive purpose. It considered, in essence, that the general prohibition on participating in non-sanctioned events and the severe penalty for breaching the rules effectively prevented speed skaters from providing their services to third parties. This created "a quasi-insurmountable entry barrier" for potential competitors on the worldwide market for the organization and commercial exploitation of international speed skating events.[100] The coordinated exclusion of an actual or potential competitor by a group of competitors (a "group boycott") generally constitutes a restriction "by object" within the meaning of Article 101(1) TFEU.[101] Nonetheless, in accordance with more recent case law of the Court of Justice,[102] the Commission examined in detail the content and objectives of the Eligibility rules in their legal and economic context.[103] The ISU had revised its Eligibility rules in 2016, but this did not alter the Commission's assessment. First, the 2016 ISU General Regulations introduced a scale of penalties, ranging from a simple warning to periods of ineligibility of, still, up to a lifetime for skaters that

[98] European Commission Decision of 8 December 2017 in Case AT.40208 - International Skating Union's eligibility rules, paras. 62-68

[99] The General Court did find that the Commission was not entitled to consider that the ISU's arbitration rules reinforce the restrictions of competition that are caused by the Eligibility rules (because they impose legal and practical hurdles on athletes in obtaining effective judicial protection against potential anti-competitive ineligibility decisions of the ISU). The Court therefore annulled the corrective measures that the Commission imposed on the ISU in this regard, i.e. the requirement to amend the arbitration rules. See Case T-93/18, International Skating Union v Commission, ECLI:EU:T:2020:610.

[100] Idem, para. 197.

[101] Commission Decision in Case AT.40208 - International Skating Union's Eligibility rules (2017), para. 170; Commission Decision in Case 39.150 – ONP, paras. 667-676 and 755. See also Case T-90/11 Ordre national des pharmaciens (ONP) and Others v Commission, ECLI:EU:T:2014:1049, para. 58; Case C-68/12 Slovenská sporiteľňa, ECLI:EU:C:2013:71, para. 19; Case C-73/74 Groupement des fabricants de papiers peints de Belgique and others v Commission, para. 21.

[102] See Section 2.2.3.

[103] European Commission Decision of 8 December 2017 in Case AT.40208 - International Skating Union's eligibility rules, paras. 161-187.

knowingly participate in a non-sanctioned event.[104] The Commission observed that the penalties remained disproportionate. Second, the 2016 ISU General Regulations clarified that the Eligibility rules seek to protect "the ethical values, jurisdiction(al) objectives and other legitimate objectives of the ISU".[105] While an earlier reference to the aim of protecting the ISU's economic interest was now removed, the Commission considered that this did not call into question their actual anti-competitive purpose. The Eligibility rules were still not directly linked to the ISU's legitimate interests: penalties could be imposed regardless of whether the non-sanctioned event endangered these interests.[106]

When considering whether the Eligibility rules may nevertheless fall outside the scope of Article 101(1) TFEU because they satisfy the *Wouters* proportionality test, the Commission mainly focused on the ISU's criteria for sanctioning third-party events. It stressed that it was only in 2015, after the Commission had opened proceedings against the ISU, that the ISU for the first time formulated such criteria.[107]

The ISU had argued that the Eligibility rules have the following legitimate sporting objectives: the protection of the integrity, health and safety, and the good functioning of the sport.[108] The Commission accepted that all these objectives may justify a restriction of competition. It found, however, that the adverse effects on competition of the rules in question — i.e., the restriction of the commercial freedom of the athletes and the foreclosure of potential competitors — were in part not inherent in the pursuit of those objectives and, in any event, not proportionate to them.

As regards the protection of integrity, the Commission observed that the ISU's policy on betting did not effectively protect skaters against the risks associated with betting-related match-fixing, but was rather used to prevent Icederby from organising its planned events in Dubai.[109] It further noted that the prescriptions laid down in the ISU's Code of Ethics were not applied according to objective, transparent, and non-discriminatory criteria.[110] As regards the

[104] Article 103(2) of the 2016 ISU General Regulations did, however, provide for the possibility to apply for reinstatement after serving half of the period of ineligibility determined. In case of a lifetime ban, a request for reinstatement could be submitted after 15 years. Idem, para. 53
[105] Idem, para. 53.
[106] Idem, paras. 180-187.
[107] Idem, paras. 3, 218, 254, 296.
[108] Idem, para. 213.
[109] Idem, para. 235.
[110] Idem, para. 228-238.

protection of athlete's health and safety, the Commission observed that an outright prohibition for athletes to participate in any non-sanctioned event, not conditioned on health and safety risks, could not be considered inherent in or proportionate to this objective.[111] As regards the protection of the organization and proper conduct of sport, the Commission observed that the ISU did not apply objective, transparent, and non-discriminatory criteria that could justify the non-sanctioning of an event for the purpose of the good functioning of the calendar or the uniform rules of the game. The Commission did not take a position on the rather fundamental question whether a system of *ex ante* control over third-party events is inherent in the pursuit of legitimate objectives. It deemed the ISU's sanctioning system in any event to be disproportionate — not only because of the severe penalties (going up to a lifetime ban), but more fundamentally because it was not based on objective, transparent, and non-discriminatory criteria. The ISU's sanctioning power did not comply with the obligations arising from *MOTOE* and therefore could not be justified. Consequently, the Commission concluded that the ISU Eligibility rules, which serve to enforce the ISU's sanctioning system, were incompatible with Article 101 TFEU.

The Commission's careful scrutiny of all the sports-specific justifications put forward by the ISU demonstrates that there is no presumption of legality of sporting rules and practices.[112] While the Commission has the burden of proving the existence of an infringement of Article 101(1) or 102 TFEU, it is for those claiming the benefit of a defence against such a finding to demonstrate that the conditions for applying such defence are satisfied.[113] The exceptional use of the *Wouters* proportionality test at the Article 101(1) stage does not alter this allocation of the legal burden.[114] It follows that it was for the ISU to demonstrate, "by means of convincing arguments and evidence", that the restrictive effects of the Eligibility rules are suitable and necessary for achieving the aims pursued.[115] The Commission refuted all those arguments — e.g., by pointing out that they were inconsistent,[116] unsubstantiated,[117] and/or clearly incapable

[111] Idem, para. 239.
[112] The Commission rejected the ISU's argument that the case law of the Union courts would create such a presumption. Idem, fn. 329.
[113] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, recital 5.
[114] An assessment under Article 102 TFEU, which does not have a bifurcated structure like Article 101 TFEU, also considers justifications put forward by the defendant before finding an infringement. This does not affect the allocation of the burden of proof. See e.g. Case C-209/10, Post Danmark A/S v Konkurrencerådet, ECLI:EU:C:2012:172, para. 42.
[115] Joined Cases 43/82 and 63/82, VBVB and VBBB v Commission, ECLI:EU:C:1984:9, para. 52. See also section 2.2.3.
[116] European Commission Decision of 8 December 2017 in Case AT.40208 - International Skating Union's eligibility rules, paras. 229-234, 237.
[117] Idem, paras. 238, 245, 257.

of justifying "manifestly disproportionate" restrictions.[118] Importantly, this scrutiny did not result in micromanagement. The Commission decision required the ISU to either (1) abolish the Eligibility rules (and therefore its sanctioning system) or (2) to substantially modify those rules so as to ensure that they only provide for objective, transparent, and non-discriminatory sanctioning criteria, penalties, and procedures that do not go beyond what is necessary to achieve legitimate sporting objectives. So, the only constraint that EU antitrust law imposed on the ISU was that it had to operate within these reasonable parameters. The Commission did not consider it appropriate to impose any fine.[119]

### 2.3.2 Restrictions on athlete's individual advertising and sponsorship opportunities

In November 2019, the German NCA closed an antitrust investigation against the German Olympic Sports Confederation (*Deutscher Olympischer Sportbund*, DOSB) and the IOC after they committed to enhance advertising opportunities for German athletes and their sponsors during the Olympic Games. The NCA concluded that, in light of the binding commitments, there was no longer ground for action. It therefore did not take a final position on whether there has been an infringement.[120] The commitment decision, however, does contain a detailed preliminary assessment of the practices under Article 102 TFEU and the equivalent national provision, Section 19 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB).[121]

Bye-law 3 to Rule 40 of the Olympic Charter (Rule 40) prevents athletes and other participants in the Olympic Games from allowing their name, image or sports performance to be used for commercial purposes without prior consent of the IOC.[122] The restriction applies during the so-called advertising "blackout period", starting nine days before the opening of the Olympic Games until three days after the closing ceremony. It encompasses all forms of commercial

[118] Idem, paras. 245-258, 260-265.
[119] Idem, para. 348.
[120] Commitment decisions are roughly analogous to consent decrees or consent orders through which antitrust investigations by the US Department of Justice or the Federal Trade Commission can be settled, albeit without any need for judicial approval.
[121] Bundeskartellamt, Decision pursuant to Section 32b GWB Public version, B-226/17 (25 February 2019).
[122] When the German NCA opened its investigation, Bye-law 3 to Rule 40 of the Olympic Charter read as follows: "*Except as permitted by the IOC Executive Board, no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games*". The rule, which was introduced in the Olympic Charter in 1991, was amended by the IOC in June 2019. See footnote 135 below.

promotion, including social media activities. A Rule 40 violation could result in sanctions for the athlete that range from fines to potential disqualification from the Games.

In response to mounting pressure from athletes, the IOC decided for the first time to allow generic (non-Olympic) advertising during the 2016 Olympic Games. This exception to the general prohibition was subject to restrictions and it required prior authorization from either the IOC (for international advertising activities) or the National Olympic Committees (for advertising activities limited to their respective territory). The German NCA's antitrust investigation focused on the DOSB Guidelines 2016 stipulating the conditions under which the members of the German Olympic team and their sponsors could carry out advertising activities in Germany. The NCA was particularly concerned about the following "problematic" restrictions. First, the DOSB would only authorize pre-existing advertising activities that were notified to it at least three months in advance of the beginning of the blackout period — before the DOSB had nominated any athletes for the Games. Second, the guidelines prohibited the use of a non-exhaustive list of Olympic-related terms, including "2016" and words used in everyday language such as "summer", "gold", "performance" or "victory". Third, for individual advertising activities with their own sponsors, athletes could not use pictures or videos of themselves taken during the Games, regardless of whether Olympic symbols were shown. Fourth, athletes were not allowed to use their social media accounts for advertising purposes.

On the basis of its preliminary assessment, the NCA took the view that the members of the Olympic Movement — the IOC, the National Olympic Committees, the international sports federations, and the organizing committees for each specific Olympic Games — hold a collective dominant position on the worldwide market for the organization and commercial exploitation of the Olympic Games.[123] None of the members are individually dominant. Yet because they organize and market the Olympic Games under the auspices of the IOC and according to the tasks and competences set out in the Olympic Charter, the NCA considered that they act as a collective entity on the assumed relevant market.[124] The investigation of course focused on the conduct of the DOSB and the IOC. These are the only two members of the Olympic Movement that can enforce Rule 40 in relation to German athletes. The NCA,

[123] The Olympic Movement also encompasses the all the members of the National Olympic Committees and the international sports federations. IOC, Olympic Charter, Rule 1(1).
[124] Bundeskartellamt, Decision pursuant to Section 32b GWB Public version, B-226/17 (25 February 2019), para. 63.

however, following the reasoning developed by the General Court in *Piau*,[125] identified the individual conduct of the DOSB and the IOC as a manifestation of the collective dominant position, which is sufficient for the application of Article 102 TFEU.[126]

Having established dominance, the NCA then assessed the rules provided in the DOSB Guidelines 2016 and their application by the DOSB and the IOC. It found that the aforementioned "problematic" restrictions, which made it very difficult for German athletes to market their participation in the Olympic Games with their individual sponsors, impeded effective competition on the sports sponsorship market.[127] The DOSB and the IOC imposed those restrictions to strengthen the market position of the Olympic Sponsors on that market, which in turn puts themselves in a stronger (negotiating) position for these sponsorship deals. The NCA preliminary concluded that this constitutes an abuse of "their" collective dominant position.

The DOSB and the IOC invoked various regulatory objectives that, in their view, justified the advertising restrictions imposed by Rule 40 and guidelines implementing that rule, such as the DOSB Guidelines 2016. The NCA considered that only one of those could be taken into account as a legitimate objective for the purpose of the application of the *Wouters* proportionality test.[128] It generally accepted that limiting the advertising opportunities of athletes and their sponsors is appropriate to prevent so-called ambush marketing during the blackout period. This safeguards the funding of the Olympic Games, facilitated in part by the Olympic Sponsors, and therefore ensures that the Games can be held on a regular basis. The NCA preliminarily concluded, however, that all of the "problematic" restrictions go beyond what is necessary to achieve that objective.[129] The NCA also found that the far-reaching sanctions that could be imposed on athletes for (minor) violations of Rule 40 reinforced the adverse effects on competition.[130]

To address the NCA's competition concerns, the DOSB and the IOC committed to adopt new DOSB Guidelines, applicable until the conclusion of the 2026 Olympic Games to advertising

[125] See above Section 2.2.1.
[126] Idem, paras. 89-90. Undertakings occupying a collective dominant position may engage in joint or individual abusive conduct. See Case T-228/97 Irish Sugar plc v Commission, ECLI:EU:T:1999:246, para. 66.
[127] Bundeskartellamt, Decision pursuant to Section 32b GWB Public version, B-226/17 (25 February 2019), paras. 77-88.
[128] Idem, para. 96.
[129] Idem, paras. 106-120.
[130] Idem, paras. 121-126.

activities targeting Germany, with restrictions that are inherent in and proportional to the aim of preventing ambush marketing. It was on the basis of a so-called market test — that involved the questioning of 500 German athletes and 200 (potential) sponsors — that the NCA was able to determine the adequateness of the commitments. In practical terms, this means that members of the German Olympic Team are no longer under the obligation to obtain prior authorization from the DOSB for advertising campaigns with their sponsors. These campaigns also no longer need to be pre-existing and may make use of pictures or videos of the athletes, taken during the Games, that do not show any Olympic Symbols. The catalogue of Olympic terminology that cannot be used is no longer open-ended and strictly limited to words that are protected under the German Olympic Protection Act (such as "Olympic" and "Team Deutschland", but not "gold" or "winter games"). Athletes now have more options to use their social media accounts during the blackout period. And finally, violations of Rule 40 by advertising activities falling under the DOSB Guidelines can no longer lead to sporting sanctions; these are predominantly commercial disputes for which recourse to the civil courts, and not only the Court of Arbitration for Sport, should remain available.

The commitments offered by the DOSB and IOC, which the NCA's decision rendered legally binding, only enhance the individual advertising opportunities of German Olympic athletes and their sponsors on the German market. The decision does not cover national campaigns by non-German athletes in their respective countries or international campaigns, which are subject to authorization by the IOC. This follows from the fact that NCAs are only empowered to apply the EU antitrust rules within the limits of their jurisdiction. The German NCA's analysis also relied on a narrow definition of ambush marketing that is supported by national case law on the protection of Olympic intellectual property in Germany.[131] The German NCA did, however, coordinate its investigation with the European Commission, which stressed that the decision can serve as a blueprint for similar enforcement action in other EU Member States.[132] In June 2019, the IOC decided to amend Rule 40, which now reads more permissively,[133] and this has prompted several National Olympic Committees to somewhat relax their athlete marketing guidelines for Tokyo 2020.

[131] Idem, paras. 97-99 and 109-112.
[132] European Parliament, Answer given by Ms Vestager on behalf of the European Commission to written question E-002118/2019, 27 June 2019.
[133] See IOC, Olympic Charter, Bye-law 3 to Rule 40 (*"Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board"*).

It should be reiterated that the need to preserve a solidarity model — either horizontally (i.e., between richer and poorer participants in a given competition) or vertically (i.e., between the professional and grassroots level) — has generally been accepted as a legitimate objective.[134] Restrictions on the athlete's freedom to enter into personal sponsorship contracts may be considered inherent in and proportional to the pursuit of sustaining solidarity within a sports pyramid. Yet this would then presuppose (1) that a substantial part of the revenue generated by the centralized exploitation of the marketing rights is in fact used for solidarity purposes and (2) that the disadvantaged athletes receive a fair share of the revenue (so as to ensure a fair balance between the different interests involved).[135] Because these conditions were not satisfied, the German NCA rejected the DOSB and IOC's argument that Rule 40 was necessary to preserve the Olympic solidarity model.[136]

## 3. US antitrust law and sport: principles and practices

In the remainder of this chapter, I will comparatively explore the application of US antitrust law to sporting rules and practices. While the US antitrust enforcement system relies on a combination of public (at federal and state level) and private enforcement, the vast majority of cases are based on private enforcement. This also holds true for sports-related antitrust cases. And contrary to the EU, where private antitrust litigation is largely confined to claims for damages following on from an investigation and decision by a competition authority, antitrust claims in the US are brought on a stand-alone basis. This means that most cases are pursued according to private calculations of costs and benefits.[137] Antitrust litigation — either individually or on behalf of a class — is expensive and plaintiffs face substantial hurdles to reach a trial on merits: in addition to showing standing and antitrust injury, a plaintiff must also put forward sufficient facts to support a plausible claim.[138] The fact that most antitrust actions are dismissed or settled during the pre-trial phase exemplifies both the significance of these hurdles and the high costs and risks of litigation (that parties wish to avoid).

[134] See e.g. Commission Decision in Case AT.40208 - International Skating Union's Eligibility rules (2017), para. 222.
[135] Judgment of the Court of Justice of the European Free Trade Association States (EFTA) in Case E-8/17 *Henrik Kristoffersen v Norwegian Ski Federation* [OJ] OJ C 107/9, paras. 118-128 (following the European Commission's submissions on this point).
[136] Bundeskartellamt, Decision pursuant to Section 32b GWB Public version, B-226/17 (25 February 2019), para. 103.
[137] David J Gerber, Competition Law and Antitrust: A Global Guide (OUP 2020) 96-97.
[138] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

There are three principal federal antitrust laws. The Sherman Act, enacted in 1890, provides the basic antitrust provisions condemning anticompetitive agreements (Section 1) and unilateral conduct that monopolizes or attempts to monopolize (Section 2).[139] The Clayton Act (1914), which addresses specific practices that the Sherman Act does not clearly prohibit, also entitles successful antitrust plaintiffs to treble damages for violations of the Sherman Act.[140] And the FTC Act (1914) generally bans unfair methods of competition.[141]

As indicated, litigation in the courts is the core institutional context for the enforcement of these antitrust laws. Public enforcement at the federal level is in the hands of two agencies with largely overlapping jurisdiction: the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The DOJ can enforce the antitrust laws only by commencing litigation before the courts. It has exclusive power to bring criminal antitrust cases under the Sherman Act (leading to fines and jail sentences) and it can bring civil actions seeking injunction under the Sherman Act and the Clayton Act. The FTC has no criminal jurisdiction and is limited to bringing administrative proceedings for cease and desist orders or to seek injunctions in federal court. It shares enforcement of the Clayton Act with the DOJ and it exclusively enforces the FTC Act. Even though the FTC has no jurisdiction under the Sherman Act, it can use the FTC Act's prohibition of all "unfair methods of competition" to attack Sherman Act violations.[142] Federal Courts, staffed with generalist judges, have exclusive jurisdiction over cases arising under the federal antitrust laws. Decisions of the district (trial) courts can be appealed to one of the thirteen US courts of appeals (also called the circuit courts) and, ultimately, to the US Supreme Court.

### 3.1 Scope of application

For nearly a century, professional baseball has uniquely enjoyed an exemption from federal antitrust law. In *Federal Baseball Club of Baltimore v. National League* (1922), the Supreme Court famously held that the business of professional football, characterized as "giving exhibitions of baseball", did not constitute interstate trade or commerce and therefore fell outside the scope of the Sherman Act. The Court's opinion, written by Justice Oliver Wendell

[139] 15 U.S.C. §§ 1-2.
[140] 15 U.S.C. §§ 12-27.
[141] 15 U.S.C. §§ 41-58.
[142] See e.g. FTC v. Cement Institute, 333 U.S. 683 (1948).

Holmes, recognized that teams had to cross state lines to play against each other, but considered this was incidental to the local performance, which is a purely state affair.[143] The Court also found that "trade or commerce" was not involved since "personal effort, not related to production, is not a subject of commerce".[144] In two subsequent cases, the Supreme Court reaffirmed that the rules and practices of Major League Baseball (MLB) are shielded from antitrust liability. The last time the issue came before the Court, in *Flood v. Kuhn* (1972), the Court admitted that professional baseball now undeniably engaged in interstate commerce, making the antitrust exemption "an aberration" and "an anomaly". Yet it stressed that the aberration was a longstanding one in which Congress had acquiesced. The exemption is thus fully entitled to the benefit of *stare decisis* (respect for precedent).[145]

Despite criticisms by later courts and judicial invitations to Congress to remedy baseball's anomalous immunity — other professional sports (leagues), notwithstanding striking similarities with baseball, have never enjoyed the same privilege[146] — the antitrust exemption still exists to a great extent. In 1998, Congress repealed the exemption only in a limited respect. Pursuant to the Curt Flood Act, major league baseball is subject to the antitrust laws (to the same extent as other professional sports leagues) for practices directly related to the terms and conditions of player's employment.[147] The Act does not apply to other aspects of baseball. And while it does allow MLB (but not minor league) players to file antitrust suits against their league to resolve labor disputes, the non-statutory labor exemption will often rule out such enforcement action in practice since the MLB players are unionized.[148]

There are two exemptions to antitrust law that are related to union activities. The US Congress has established a narrow statutory labor exemption, which applies to unilateral union conduct.[149] The US courts have also recognized a so-called "non-statutory labor exemption", which immunizes concerted action or agreements between unions and employers from antitrust scrutiny. Similar to the reasoning adopted by the Court of Justice for the purposes of EU antitrust law (see section 2.1), the Supreme Court explained that the exemption seeks to

[143] 259 U.S. 200 (1922).
[144] Idem, at 206.
[145] Flood v. Kuhn, 407 U.S. 258 (1972) 282-285. See also Toolson v. New York Yankees, 346 U.S. 356 (1953).
[146] See National Collegiate Athletic Association v. Alston (2021) 594 U.S. __; United States v. International Boxing Club, 348 U.S. 236 (1955); Radovich v. National Football League, 352 U.S. 445 (1957); Haywood v. National Basketball Association, 401 U.S. 1204 (1971).
[147] 15 U.S.C. § 26b.
[148] On the practical impact of the Curtis Flood Act, see e.g. Nathaniel Grow, "Reevaluating the Curt Flood Act of 1998" (2008) 87 Nebraska Law Review 3, 747-758.
[149] Clayton Act, 15 U.S.C. § 17, § 52 and the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, 105, 113.

accommodate the conflict between congressional policies favoring collective bargaining and congressional policies favoring competition.[150] It recognizes that, to allow meaningful collective bargaining to take place, some restraints on competition must be shielded from antitrust sanctions.[151] In the context of professional sport, this means that labor restraints in professional sports (such as a salary cap, player draft, or free agency restrictions) are protected by this judicial exemption provided that they are included in agreements negotiated at arm's length with the player unions.[152] Since the players in each of the four major leagues have unionized, this exemption has resulted in substantially less antitrust challenges to labor restraints imposed by these leagues. The availability and scope of the exemption beyond expiration of a collective bargaining agreement, and the effects of decertification of a union, however, continues to give rise to frequent litigation between the major professional sports leagues and their players.[153]

Finally, it should be noted that the Sports Broadcasting Act of 1961 provides a limited exemption from section 1 of the Sherman Act for arrangements made by the professional leagues for baseball, hockey, basketball, and football for the collective sale of their media rights.[154]

### 3.2 Principles for assessment under the Sherman Act, Section 1

In the US, the vast majority of sports-related antitrust cases are brought under Section 1 of the Sherman Act, rather than under Section 2. I will therefore focus exclusively on the substantive principles that govern the application of Section 1 to sporting rules and practices. To establish a violation of Section 1, a plaintiff must prove three elements: (1) the existence of a concerted action (a "contract, combination ... or, conspiracy" — often collectively referred to as "agreements"); (2) that unreasonably restrains trade; and (3) that affects interstate commerce

[150] See e.g. Meat Cutters v. Jewel Tea Co., 381 U. S. 676 (1965); Connell Construction Co. v. Plumbers & Steamfitters Local Union, 421 US 616 (1975); and Brown v. Pro Football, Inc., 518 U.S. 231 (1996).
[151] Brown v. Pro Football, Inc., 518 U.S. 231 (1996), at 237.
[152] See chapter Stephen F. Ross in this volume.
[153] In *Brown v. Professional Football, Incorporated* (1996) the Supreme Court held that the NFL's owners' unilateral imposition of employment conditions after an impasse in collective bargaining were protected by the non-statutory labor exemption. 518 U.S. 231 (1996). In *Brady v. National Football League* (2011), for instance, the Eight Circuit left open the question whether this extension of the exemption shields a lockout from antitrust liability, even after the players have dissolved their union. The NFL and the players eventually settled the case and reached, after the recertification of the player's union, a new collective bargaining agreement. 644 F.3d 661 (8th Cir. 2011).
[154] 15 U.S.C. §§ 1291–95.

or commerce with foreign states. The following subsections will discuss to what extent sporting rules and practices may meet these requirements.

### 3.2.1 Contract, combination, or conspiracy

When faced with Section 1 challenges, professional sports leagues have periodically asserted that they should be regarded as single economic entities. Section 1 of the Sherman Act applies to a "contract, combination, … or, conspiracy" and thus requires the coordinated efforts of two or more independent economic actors. If one indeed accepts that a league effectively functions as a single enterprise — since no single team acting alone can produce a marketable product — any collusion is "internal" and its activities would fall outside the scope of Section 1.

The US Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.* (1984), in which it repudiated the so-called intra-enterprise conspiracy doctrine,[155] suggested some hope for the single entity defense. The Court stressed that "substance, not form" should determine whether a separately incorporated entity is capable of conspiring. In the case at hand, which involved the relationship between a parent company and a wholly owned subsidiary, it drew a sharp distinction between concerted action and purely "internal agreements" that implement a single unitary firm's policy.[156]

In *American Needle, Inc. v. National Football League* (2010), however, the Supreme Court firmly rejected the notion that a single entity can be found in the mere fact that member teams of a professional league have certain common economic interests and "must cooperate in the production and scheduling of games".[157] The case arose out of a challenge to the National Football League (NFL)'s trademark licensing arrangements. In 1963, the NFL teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Historically, NFLP granted non-exclusive licenses to various manufacturers,

[155] Under the intra-enterprise conspiracy doctrine, cooperation between legally separate entities, including between parents and incorporated subsidiaries, is necessarily covered by Section 1 since an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent". See e.g. *United States v, Yellow Cab Co.*, 332 U.S. 218 (1947), at 227.
[156] Copperweld v. Independence Tube, 467 U.S. 752 (1984). In *Fraser v. Major Football League, L.L.C.* (2000), for instance, the district court found that Major League Soccer (MLS) and its teams were uniquely integrated and thus constituted a single entity under *Copperweld.* On appeal, the First Circuit called for a more nuanced single entity appraisal, identifying the league as a complex "hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a cooperative arrangement between existing competitors". Because it dismissed the antitrust claim on other grounds, however, the court ultimately left open the question whether MLS had to be treated as a single entity. 284 F.3d 4, at 55-59.
[157] 560 U.S. 183 (2010), at 202.

including American Needle. Yet in 2000, the teams authorized NFLP to grant Reebok an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. American Needle brought a claim alleging *inter alia* that the agreements between the NFL, its teams, NFLP, and Reebok violated Section 1 of the Sherman Act. Both the district court and the Seventh Circuit Court of Appeals dismissed that claim, ruling that the NFL and the teams acted as a single economic entity. Interestingly, both the NFL and American Needle subsequently requested the Supreme Court to review.

The Supreme Court unanimously concluded that the NFL teams, at least with regard to the licensing and marketing of their individually owned intellectual property, cannot be deemed to operate as a single entity. First, the Court explained that *Copperweld* was premised on the recognition that a parent company and its wholly-owned subsidiary "were controlled by a single center of decisionmaking" and "control a single aggregation of economic power". Because the enquiry is one of competitive reality, it is not determinative that the parties are legally distinct entities or have organized themselves in a structured joint venture. The relevant question is "whether the agreement joins together separate decisionmakers" that pursue "separate entrepreneurial interests", as a result of which competition that otherwise would exist is prevented.[158] Second, the Court applied this framework to the NFL, finding that the teams "do not posses either the unitary decision-making quality or the single aggregation of economic power characteristic of independent action".[159] The Court noted that each team is independently owned and managed and that the teams compete with one another, not only on the playing field, but also to attract fans, for gate receipts, for players and managers … and for the licensing of trademarks.[160] Despite their common interest in promoting the NFL brand, the teams still are "separate economic actors pursuing separate economic interests". So, when they decide to license their intellectual property collectively (and only to one party), the teams deprive the marketplace of "independent centers of decisionmaking" and thus engage in a concerted action.[161] Consequently, the Court remanded the case to the lower court for further consideration.

[158] Idem, at 194-195.
[159] Idem, at 196.
[160] Idem at 196-197.
[161] Idem, at 197.

Prior to *American Needle*, a majority of courts refused to characterize franchised sports leagues as single entities. The Supreme Court's ruling certainly reinforces that interpretation.[162] Yet it does not preclude that in certain circumstances and/or within the context of professional sports that rely on different structures, the single entity doctrine could still shield "internal" governance decisions from Section 1 liability.

### 3.2.2 Effect on interstate commerce or foreign trade

To be covered by Section 1, the challenged agreement must have an effect on US interstate commerce. This jurisdictional requirement of interstate effects initially placed meaningful limits on the scope of the Sherman Act, as exemplified by the controversial 1922 Supreme Court ruling establishing the baseball antitrust exemption.[163] Since then, however, the Court's use of a far more expansive "effect on commerce" test, which only demands that the parties or the commerce affected by the agreement have some connection to "commerce among the several states",[164] has made the requirement practically irrelevant.[165]

The requirement to find a restraint on "commerce" precludes the application of Section 1 to non-commercial activity.[166] Antitrust cases involving intercollegiate athletics have been the primary testing ground for the argument that sporting rules and practices are not related to commercial activities.[167] For instance, several courts have held that the National Collegiate Athletics Association (NCAA)'s eligibility rules are noncommercial restraints.[168] Yet it is difficult to draw a clear dividing line between commercial and noncommercial restrictions — as also recognized by the Court of Justice for the purpose of the application of the EU antitrust rules.[169] The modern legal understanding of "commerce" is therefore broad, "including almost

[162] For references and discussion, see e.g. by Matthew J. Mitten, Timothy Davis, Rodney K. Smith, and Kenneth L. Shropshire, Sports Law and Regulation: Cases, Materials, and Problems (5th edition, 2019, Wolters Kluwer) pp. 404-414; Stephen R Ross, "The single-entity doctrine of antitrust as applied to sports leagues" in Michael A. McCann (ed.) The Oxford Handbook of American Sports Law (OUP 2017) pp. 225-236; Nathaniel Grow, "American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act" (2011) 48 American Business Law Journal 3, pp. 449-511.
[163] See above section 3.1.
[164] See e.g. Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) at 330-331; McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980) at 444.
[165] Phillip Areeda, Louis Kaplow, and Aaron Edlin, Antitrust analysis: problems, text, cases (7th edition Wolters Kluwer 2013) 98-99.
[166] See e.g. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) at 495 (holding that the application of the Sherman Act requires "some form of restraint upon commercial competition in the marketing of goods or services"); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) at 133 (holding that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations … which normally have other objectives").
[167] ABA Section of Antitrust Law, Sports and Antitrust Law (2014) ABA Publishing, pp. 17-28.
[168] For critical discussion, see e.g. Marc Edelman, "A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act" (2013) 64 Case Western Reserve Law Review 1, pp. 61-99.
[169] See section 2.1.

every activity from which the actor anticipates economic gain".[170] In *O'Bannon v. NCAA*, for example, the Ninth Circuit firmly rejected the NCAA's argument that its rules preventing student-athletes from being compensated for the use of their names, images or likeness are mere "eligibility rules" that do not regulate any commercial activity.[171]

### 3.2.3 Unreasonable restraint of trade

Section 1 of the Sherman Act only prohibits agreements that restrain trade unreasonably.[172] To determine whether a restraint of trade is unreasonable, the US courts have historically applied one of two methods of analysis: the "per se" rule and the "rule of reason". The rule of reason is the default standard test under Section 1.[173] It essentially calls for a detailed analysis of the challenged restraint to determine whether its harm to competition outweighs its procompetitive effects.[174] Under the per se rule, on the other hand, the anticompetitive effects are inferred from the conduct itself, without consideration of any asserted justifications (which sets a finding of per se illegality apart from the otherwise analogous finding of a restriction "by object" under EU antitrust law).

The sharp dichotomy between a per se rule (which does not require plaintiffs to prove market power or anticompetitive effects) and the comprehensive effects-based rule of reason analysis led to the exploration of the space between these two approaches.[175] In recent decades, lower courts and the FTC have begun to apply an intermediate standard known as the "quick-look" or "truncated rule of reason" analysis, most frequently in cases that involved restraints within the context professional (sports) organizations and other legitimate joint ventures.[176] The US Supreme Court eventually recognized, however, that there is "no bright line separating per se from rule of reason analysis", since "considerable inquiry into market conditions" may be required before the application of a "per se" condemnation is justified.[177] Hence, it is better to

[170] Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (4th edition 2014 Wolters Kluwer), ¶ 260b.
[171] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
[172] See e.g. National Society of Professional Engineers v. United States, 435 U. S. 679 (1978), at 688.
[173] See e.g. Continental T.V. Inc. v. GTE Sylvania, 433 U.S. 36 (1977) at 49; Texaco Inc. v. Dagher, 547 U.S. 1 (2006), at 5; Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) at 882.
[174] Justice Brandeis gave the classic formulation of the test in United States v. Board of Trade of the City of Chicago, 246 U.S. 231 (1918) at 245 (calling for an analysis that ordinarily considers "the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained").
[175] Herbert J. Hovenkamp, "The Rule of Reason" (2018) 70 Florida Law Review 1, p. 122.
[176] Idem, pp. 129-131.
[177] California Dental Assn. v. FTC, 526 U.S. 756 (1999) at 779.

see the methods (per se, quick-look, rule of reason) as representing a continuum, a sliding scale, with different evidentiary burdens for different circumstances.[178]

#### 3.2.3.1 Per se illegality

The per se approach, on one end of the spectrum, is exceptional. It is reserved for those restraints "whose nature and necessary effect are so plainly anticompetitive" that they can be presumed illegal "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use".[179] Over the years, the Supreme Court has narrowed this category of restraints to horizontal price-fixing, bid-rigging, allocation of markets or customers, and certain group boycotts or concerted refusals to deal. In sports cases, the per se rule is rarely invoked successfully.[180] The Supreme Court has held that when "restraints on competition are essential if the product is to be available at all", which generally holds true for the sports sector, "per se rules of illegality are inapplicable".[181] It follows that a sporting rule or practice, challenged under Section 1, will almost always be analyzed under the rule of reason or quick-look.

#### 3.2.3.2 Quick-look

The abbreviated form of rule of reason, which came to be known as quick-look, lacks definition and no coherent legal standard has yet emerged. But the main distinguishable feature of this analysis would appear to be the court's reliance on presumptions as evidentiary shortcuts.[182] For instance, the approach could result in a "quick-look to condemn" a restraint when its anticompetitive effects are obvious and when there are no apparent countervailing procompetitive justifications. In *American Needle*, the Supreme Court made clear that, on the flip side, courts may also "at the twinkling of an eye" approve (at the motion-to-dismiss stage) restraints that are necessary to produce the game, given that they are "likely to survive the rule

[178] See e.g. Hovenkamp (2018); Andrew I. Gavil, "Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice" (2012) 85 Southern California Law Review, pp. 733-782.
[179] National Society of Prof. Engineers v. United States, 435 U.S. 679 (1978) at 692; Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958) 5.
[180] ABA Section of Antitrust Law, Sports and Antitrust Law (2014) ABA Publishing, p. 38. See e.g. Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983) at 380 (observing that a "clear trend has emerged in recent years under which courts have been extremely reluctant to subject the rules and regulations of sports organizations to the group boycott per se analysis"); Los Angeles Memorial Coliseum Com'n v. N.F.L, 726 F.2d 1381 (9th Cir. 1984) at 1392 (finding that "the unique structure of the NFL precludes application of the per se rule" to rule that allocates markets among the teams).
[181] American Needle, Inc. v. National Football League, 560 U.S. 183 at 203; NCAA v. Board of Regents, 468 U.S. 85 (1984) at 101.
[182] Herbert Hovenkamp, "Rule of Reason" (2018) 70 Florida Law Review 1, pp. 126-128.

of reason".[183] This prompted some lower courts to dismiss antitrust challenges, e.g., against certain NCAA bylaws, without any detailed inquiry because they "are essential to the very existence of the product of college football".[184] More recently, however, the Supreme Court qualified its dictum in *American Needle*. The fact that some restraints are necessary to create and maintain a league sport, the Court noted, "does not mean that all aspects of elaborate interleague cooperation are". It then considered that the challenged NCAA rules fixing wages for student-athletes presented complex questions (about the reasonableness of the restraint) "requiring more than a blink to answer", i.e., a full-blown rule of reason.[185] Although this is a sensible approach, justified by the particular circumstances of the case, it does highlight the lack of guidance as to where along the continuum a certain restraint should be evaluated.[186] Going forward, lower courts may thus be even more reluctant to apply a quick look to determine the legality of sporting rules and practices, opting for the rule of reason standard instead.

#### 3.2.3.3 Rule of reason

A "full-blown" rule of reason inquiry into the restraint's overall competitive effect is on the other side of the spectrum. Courts usually describe the analysis as a four-step burden-shifting test.[187] First, the plaintiff (including the federal antitrust agencies) must establish a prima facie case of competitive harm. It must demonstrate that the restraint has had substantial adverse effects on competition. Second, if the plaintiff establishes their claim, the burden shifts to the defendant to demonstrate that the restraint has a procompetitive justification. Third, if the defendant successfully provides evidence of such a justification, the burden shifts back to the plaintiff to show that the restraint is not suitable to achieve its objectives or that the justification could have been achieved by a less restrictive alternative. Fourth, if the plaintiff fails to rebut the justification, the court needs to engage in a balancing exercise to determine whether the anticompetitive harm outweighs the procompetitive benefits. In practice, however, this

[183] 560 U.S. 183 (2010) at 203.
[184] ABA Section of Antitrust Law, Sports and Antitrust Law (2014) ABA Publishing 38-44. See e.g. Agnew v. NCAA, 683 F. 3d 328 (7th Cir. 2012).
[185] National Collegiate Athletic Association v. Alston, 594 U.S. __ (2021). See also e.g. Rothery Storage & VanCo. v. Atlas Van Lines, Inc., 792 F.2d 210, at 227-28 (D.C. Cir. 1986) ("We do not believe, however, that … the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgments of degrees of efficiency. There is no reason in logic why the question of degree should be important.").
[186] Antitrust plaintiffs thus face a difficult tactical decision. If they litigate only on a quick-look theory, they may be prevented from further factfinding if the court would find that the challenged restraint merits a full-blown rule of reason. Maurice E Stucke, "Does the Rule of Reason Violate the Rule of Law?" (2009) 42 U.C. Davis Law Review 5, pp. 1412-1415.
[187] Sometimes the test is also described in three steps, leaving out the final balancing stage. See e.g. Ohio v. American Express Co., 585 U.S. ___ (2018); National Collegiate Athletic Association v. Alston (2021) 594 U.S. __ (2021).

balancing has been described as "perhaps the greatest myth in all of US antitrust law" since it rarely occurs.[188] In fact, the vast majority of cases do not make it past the second stage of the test.[189] In other words, they are resolved based on the weight of the evidence of either the anticompetitive effects or the procompetitive justifications.

The structured rule of reason analysis bears closes similarities with the analytical framework that is used to assess sporting rules and practices under Article 101 and 102 TFEU. The *Wouters* proportionality test similarly uses a sequence of considering anti-competitive effects, potential legitimate justifications, and less restrictive means to assess whether a sporting rule or practice amounts to a restriction of competition (or abuse). The main difference is the burden shifting between the parties. When the defendant can articulate cognizable justifications for the challenged restraint, the plaintiff would have the burden to show that the same legitimate objective could have been achieved by a less restrictive alternative. Since US antitrust doctrine is principally shaped by judicial decisions in individual cases, considerable debate remains over the necessary degree of proof at the different stages of analysis. The US Supreme Court has, however, directed lower courts not to second-guess degrees of reasonable necessity. Since "skilled lawyers will have little difficulty imagining possible less restrictive alternatives", judicial acceptance of such imaginings "would risk interfering with the legitimate objectives at issue" and be "a recipe for disaster".[190] The standard is therefore demanding: the court should ask whether the plaintiff has identified a significantly, not marginally, less restrictive means achieving the same procompetitive benefits".[191] In *O'Bannon v. NCAA*, for instance, the Ninth Circuit stressed that only where a restraint "is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives", can an antitrust court invalidate it and order it to be replaced with a less restrictive alternative.[192] Moreover, US antitrust law does not require sports organizations to employ the least restrictive means of achieving their legitimate objectives.[193] In the EU, by contrast, it is for the sports organization to put forward arguments and evidence that convincingly demonstrate that the collateral restriction of

[188] Andrew I Gavil, Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice" (2012) 85 Southern California Law Review, p. 761.
[189] Michael A. Carrier, "The Four Step Rule of Reason" (2019) 33 Antitrust 2, pp. 50-55; Michael A Carrier, "The Rule of Reason: An Empirical Update for the 21st Century (2009) 16 George Mason Law Review, pp. 827-838.
[190] National Collegiate Athletic Association v. Alston (2021) 594 U.S. __ (2021) (citing in part Phillip E Areeda and Herbert Hovenkamp, Antitrust Law, ¶1913b (2018)).
[191] Idem.
[192] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) at 1075.
[193] National Collegiate Athletic Association v. Alston (2021) 594 U.S. __ (2021) ("We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes").

competition is strictly limited to what is necessary to attain the relevant legitimate objective.[194] And although such arguments can, and should, only be refuted when there is a workable (and not merely hypothetical) less restrictive alternative, this does imply that the enforcer, typically a competition authority rather than a generalist judge, will calibrate degrees of reasonable necessity in evaluating whether the defendant has discharged its burden of proof.[195]

## 4. Conclusion

Both in the EU and the US, antitrust law offers a unique and potentially powerful tool to curb the private regulatory power of sports organizations. Although sports organizations typically fear and contest antitrust scrutiny of matters of "internal" sports governance, this chapter has demonstrated that both EU and US antitrust law are in principle well-equipped to subject organizational sporting rules and practices to review. The relevant analytical frameworks, the *Wouters* proportionality test in the EU and the rule of reason standard in the US, provide sufficient flexibility to pay due regard to the specific characteristics of professional sport and its structures. As long as sporting organizations can make their case that their rules and practices are suitable and necessary to achieve a legitimate objective in the interest of sport, their consequential anti-competitive effects will not be caught by the antitrust rules. This is not a blind application of the law.

There are, however, important differences between the EU and the US, primarily in terms of enforcement and procedure, which impact the effective use of antitrust law as an accountability mechanism. Sporting rules and practice are generally subject to antitrust scrutiny in the EU. The sphere of application of the US antitrust rules is more limited. This is especially due to the practical significance of the non-statutory labor exemption and a stricter distinction between amateur and professional sports activities. Furthermore, in the US system of private litigation, plaintiffs face substantial hurdles to reach a trial on merits. And generalist judges from the federal courts are typically not just mindful to give sports organizations ample latitude for their regulatory choices, as they should, but extremely reluctant to engage in a less restrictive alternative inquiry. In comparison, the predominant administrative enforcement system in the

[194] See Sections 2.2.3 and 2.3.1.
[195] See e.g. Case T-168/01, GlaxoSmithKline Services Unlimited v Commission, ECLI:EU:T:2006:265, paras. 235-238; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services and Others v Commission, ECLI:EU:C:2009:610, paras. 93-95.

EU provides a far more suitable forum for scrutinizing the proportionality of sporting rules and practices as well as for remedial action. The recent decisional practice discussed in this chapter illustrates that EU antitrust enforcement does not turn a competition authority into an imprudent sports regulator. The German NCA, for example, did not simply second-guess less restrictive alternatives. To determine the proportionality of its negotiated solution with the DOSB and IOC (regarding the individual advertising opportunities of German Olympic athletes and their sponsors), it surveyed hundreds of athletes and (potential) sponsors. And in its *ISU Eligibility Rules* decision, the European Commission ordered the ISU to ensure that its eligibility rules would only provide for objective, transparent, and non-discriminatory criteria and penalties, but left it entirely to the ISU how to comply with this general requirement. So, rather than tinkering with the authority of sports organizations to govern themselves, antitrust enforcement set the goalposts, affirming the constructive role that it can play in promoting procedural and substantive principles of good (sports) governance.