

**Comments by the *Business at OECD* (BIAC) Competition Committee
to the OECD Competition Committee
Working Party No. 2**

Competition and Professional Sports

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I. Introduction

1. *Business at the OECD* (BIAC) welcomes the opportunity to comment on the topic of competition and professional sports that is an important part of national culture while also having significant economic relevance.

2. The application of competition law to professional sports is complex as sports have some unique features that may justify some degree of cooperation or coordination among competitors that are not required in other areas of economic activity. For instance, competitors need to work together to create a contest that involves arranging games, leagues, or championships for the sport. Competitors also have to maintain the quality and integrity of the sport, foster its growth and social benefits, and respect its specific rules and traditions.

3. However, effective competition is still essential to ensure market-based efficiencies when sport leagues and associations engage in economic activities. When applying competition law in sport, competition authorities and courts usually examine each case on its own merits, taking into account the particular features of each sport, as well as the nature and effects of the conduct or transaction that requires an assessment of less restrictive alternatives that generally follows a rule of reason approach. Such an approach is generally preferred as it preserves flexibility and is able to adapt to the individual circumstances of each case.¹

4. In these comments, BIAC will address two specific topics: the monopoly status of and potential anti-competitive behavior in sports leagues, and wage fixing and no-poach agreements in sports labor markets. These submissions include examples where traditional competition law tools were relied upon to address possible competition law concerns in professional sports markets.

II. Organization of Sports Leagues

5. Sport leagues (or federations), like many joint ventures, provide a product that otherwise might not exist in the absence of the joint venture. Sports leagues, which require some degree of coordination among competitors, are often necessary to the existence of the respective sport. The U.S. Supreme Court has even explicitly recognized that “‘the interest in maintaining a competitive balance’ among ‘athletic teams is

¹ See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 117 (1984) (“Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.”).

legitimate and important.”² Therefore, flexibility is important to weighing the procompetitive effects of sports league coordination against the potential cultivation of anticompetitive conduct.

6. There are two types of competition relevant to sports leagues – sporting competition and economic competition. Sporting competition (on the field, court, track, etc.) requires certain coordination among competitors, including agreements on rules, scheduling, and eligibility, to provide consumers with the best product. Economic competition (for players, resources, broadcasting, etc.) can also require certain coordination among competitors, including agreements on costs such as salaries, to maintain a threshold level playing field, which drives competitiveness and improves quality for consumers.

7. A further jurisdictional aspect is that in the context of international sport (for instance a world cup or international fixtures), the organizational bodies are not subject to the jurisdiction of any one national competition law agency. It is plausible that countries, particularly those with stronger commercial propositions, may influence the manner in which events and fixtures are organized. It is therefore important that the international governing bodies implement rules in a manner that complements competition law enforcement as national competition laws on their own may not always adequately address cross border effects.³

A. Monopoly of Sports Leagues

8. Because the quality of sport is intrinsically tied to organizing competition between the best athletes or teams to increase outcome uncertainty, the monopolization of leagues or federations within a geographic market is common.⁴ Sport is generally territorial because matches and competitions are watched most fervently by those from hosting or participating countries. In most geographies, there is only a single first division/premier league or federation for each sport – for example, the National Basketball Association (NBA) in the U.S., the Premier League in the United Kingdom, and the National Rugby League in Australia. There are unique consumer benefits relating to having a single league or federation in sports, relative to other industries. Therefore, it is important to weigh the procompetitive factors associated with what may be considered a monopoly when assessing potential anticompetitive conduct in sports.

9. For example, until recently, the PGA Tour was the only “premier” golf league in the U.S. Saudi Arabia-based LIV Golf, founded in 2021, however, began competing with the PGA Tour in the U.S. after attracting top talents, and former PGA Tour players, including Dustin Johnson, Phil Mickelson, Brooks Koepka, and Bryson DeChambeau. Because of non-competes imposed on PGA Tour players, PGA Tour players who joined LIV Golf were suspended from the PGA Tour and prohibited from playing in PGA Tour events.

10. As a result, in 2022, LIV and some of its golfers sued the PGA Tour, alleging illegal monopsonization of the market for “elite golf event services” in violation of Section 2 of the Sherman Act, among other antitrust allegations.⁵ According to the complaint, the PGA Tour’s monopoly position restrained the market for services of professional golfers for elite golf events in many ways, including by

² Am. Needle, Inc. v. Nat’l Football League, 560 U.S. 183, 204 (2010) (citations omitted).

³ For example, the Competition Commission of India found that the BCCI is the de facto regulator of cricket in India (through the rules relating to organization of cricket and control over functions such as granting of ancillary rights which were mandated by the Rules of the International Cricket Council). Case No. 91 of 2013, Pan India Infraprojects Private Limited v. Board of Control for Cricket in India (BCCI), ¶ 26 (2018), <https://www.cci.gov.in/antitrust/orders/details/153/0>. Thus, it was found that by virtue of the pyramid structure of sports governance and endorsement by the International Cricket Council, the BCCI was able to have a monopoly over cricket events in India.

⁴ See Oliver Budzinski & Arne Feddersen, *Should Organizing Premier-Level European Football Be a Monopoly? And Who Should Run It? – An Economists’ Perspective* (Ilmenau Economics Discussion Papers No. 166, 2022), <https://www.econstor.eu/bitstream/10419/264905/1/1817210270.pdf>.

⁵ See Complaint, Jones et al v. PGA Tour, Inc., ECF No. 83, Case No. 5:22-cv-04486 (N.D. Cal. Aug. 26, 2022).

depressing golfer compensation, restricting competition for professional golfers, and decreasing the output of elite professional golfer service opportunities.⁶

11. Nonetheless, there remain potential consumer benefits associated with a single premier professional golf league in the U.S., and in June 2023, LIV and the PGA Tour announced settlement of the litigation and an intention to merge. It has been reported that the U.S. Department of Justice Antitrust Division (DOJ) is reviewing the proposed merger. The DOJ is likely weighing the advantages/disadvantages of two premier golf tours against the advantages/disadvantages of one premier golf tour. Whatever the outcome of the DOJ's review, the complexity of the various incentives, interests, benefits, and harms – all interconnected and generally unique to sports – underscores the importance of utilizing flexible antitrust analyses, like the rule of reason.

12. The same careful balancing of the unique characteristics of a sport with competition was applied by the Bundeskartellamt in their consideration of the Deutsche Fussball Liga (DFL)'s 50+1 rule. In 1999, the DFL introduced the so-called 50+1 rule in Germany to provide new funding possibilities to the Bundesliga and Bundesliga 2. Its purpose was to limit the influence of investors to retain football clubs' character as a sport. The Bundeskartellamt carefully evaluated the related restrictions to ensure that an appropriate competitive balance suitable for the sporting context was maintained. The President of the Bundeskartellamt stated that: "Competition law does not stand in the way of the sport policy objectives pursued by the 50+1 rule. However, DFL must ensure that the rule is consistently applied and enforced for all clubs. Professional sport is for good reasons subject to competition rules. . . the 50+1 rule DFL intends to maintain the club character of the sport and ensure a certain even balance in sports competition. These sport policy objectives can also be recognised under competition law. In its basic form the 50+1 rule seems appropriate and proportionate for achieving such goals."⁷

13. The Competition Commission of India (CCI) has for instance, used traditional competition law rules regarding abuse of dominance, when they penalized the Board of Control for Cricket in India (BCCI) in 2017. The CCI found that the BCCI held a dominant position in the market for organizing professional domestic cricket leagues in India. The BCCI had committed to broadcasters of the Indian Premier League (a domestic cricket league in India that attracts the best local and international players) that the BCCI would not support or recognize any competing professional domestic cricket league. In addition to the penalty, the CCI also directed that the "BCCI shall not place blanket restriction on organisation of professional domestic cricket league/events by non-members. This shall, however, not preclude BCCI from stipulating conditions while framing/modifying relevant rules for approval or while granting specific approvals, that are necessary to serve the interest of the sport. Such changes shall entail norms that underpin principles of non-discrimination and shall be applied in a fair, transparent and equitable manner."⁸

14. The COMESA Competition Commission (CCC) investigated a broadcasting rights complaint regarding the commercial rights to Confédération Africaine de Football competitions. The CCC was concerned that long term exclusive rights; the inclusion of rights of first refusal and the lack of an objective competitive bidding process, in favor of Lagardere Sports (formerly Sportfive), restricted competition within the Common Market. The case was settled without an admission of wrongdoing. However, the CAF agreed to ensure all future broadcasting agreements would, inter alia, not include rights of first refusal to the successful bidder; would follow an open and non-discriminatory tender process; and be limited to no

⁶ *See id.*

⁷ Press Release, Bundeskartellamt Provides Preliminary Assessment of DFL's 50+1 Ownership Rule, Bundeskartellamt (May 31, 2021), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/31_05_2021_50plus1.html.

⁸ Surinder Singh Barmi v. The Board of Control for Cricket in India Case No. 61/2010, ¶ 51(b) (2017), <https://www.cci.gov.in/antitrust/orders/details/760/0>.

longer than four years.⁹ In doing so, the CCC demonstrated that the flexibility of traditional competition law tools was sufficient to address an important area of concern in sports markets, namely broadcasting rights.

III. Anti-Competitive Behavior in the Organization of Sports Leagues

15. The coordination required to organize competition discussed above, combined with monopoly position, can make sports leagues or federations susceptible to anticompetitive behavior. BIAC supports the application of flexible antitrust analysis frameworks that, when applied on a case-by-case basis, allow the unique characteristics of sports to be fully appreciated. For example, in the European Union (EU), the European Court of Justice (ECJ) in *Meca Medina* established a balancing test when presented with a challenge by athletes who had been punished for violating anti-doping regulations.¹⁰ According to the ECJ, when assessing potential violations of Articles 101 and 102 of TFEU, one must assess, on a case-by-case basis: (i) the context of the sporting rule or decision, including its objectives; (ii) whether restrictive effects are inherent in the pursuit of the objectives; and (iii) the proportionality of the sporting objectives to the restrictive effects.¹¹ Similarly, in the U.S., courts have recognized that the rule of reason is generally applicable in the context of sports.¹²

A. Sports Labor Markets

16. Given the unique value proposition of professional sports, there are unique labor issues facing professional athletes. Athletes generally have shorter careers and more limited employment options, for the structural reasons explained above, though the more talented professional athletes may have significant bargaining power. Depending on the sport, athletes tend to operate within the context of either a highly regulated sporting association or more deregulated environment making athletes more akin to independent contractors (e.g., track and field). For those professional athletes falling within the former, collective action is often used to counterbalance employer bargaining power, which can be a byproduct of the coordination required to maintain a high-quality professional sports league.

17. In the U.S., professional athletes participating in the major sports leagues are generally represented by a union. The unions negotiate labor issues with the league and/or team owners, especially relating to restrictions often imposed on the professional athletes, as discussed below. These restrictions relating to unions' collective bargaining are exempt from antitrust laws pursuant to the "nonstatutory [labor] exemption."¹³ Even still, when labor issues do arise within the context of professional sports leagues coordination, U.S. courts usually elect to apply the rule of reason. For example, in *O.M. v. Nat'l Women's Soccer League, LLC*, where the plaintiff challenged the league's minimum age rule, the court employed a rule of reason analysis, weighing the harm to the athlete against the benefits to the league (e.g., cost reduction), to find that the league's rule violated Section 1 of the Sherman Act.¹⁴

B. Wage-Fixing and No-Poach Agreements

18. Certain types of employment restrictions, generally constructed as wage-fixing or no poach agreements, are common in sports leagues. These restrictions are often necessary to the existence of the

⁹ Confédération Africaine de Football and Lagardere Sports S.A.S for the Commercialisation of Marketing and Media Rights of Football Tournaments ACBP/1/1/2017, <https://comesacompetition.org/wp-content/uploads/2023/03/CAF-Commitment-2023.pdf>.

¹⁰ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, 2006 E.C.R. I-06991.

¹¹ *Id.*

¹² *See, e.g., Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202-04 (2010).

¹³ *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975).

¹⁴ *See* 541 F. Supp. 3d 1171 (D. Or. 2021).

respective sport. For assessment of these restrictions, BIAC supports flexible competition laws and rules that allow sport leagues and federations to act efficiently and provide the best sports product for consumers, but also that prevent the sports leagues from operating as a shield to avoid competition where it would otherwise be appropriate. When utilized by sports leagues or federations, employment restrictions resembling wage-fixing or no-poach agreements have unique and important procompetitive aspects that should be weighed against any alleged anticompetitive conduct.

19. Wage-fixing restrictions generally manifest in salary caps, on either an individual or collective basis. Sports leagues may set the maximum salary that can be paid to an individual or, more often, set the maximum collective salaries that can be paid by a single team. As discussed above, the quality and value of a sporting competition increases with added uncertainty and competitiveness. One of the easiest ways to maintain some level of parity between teams is to enforce a salary cap, which limits the degree to which teams compete with each other purely on the basis of spending but also protects the league members from excesses by one team that may create imbalance or damage the league's financial stability. The risk, however, is that professional sports leagues and federations are used as a mechanism by which to anticompetitively constrain the salaries of professional athletes below a competitive, fair market value. BIAC recognizes the complexities involved with weighing these procompetitive benefits against anticompetitive harm, especially where there is a significant connection between competition quality and the value of a sports league (which in turn drives professional athletes' salaries) that requires a degree of wage-fixing that may not be necessary in other industries. This underscores the importance of applying flexible standards that weigh all relevant effects on a case-by-case basis to potentially anticompetitive conduct in professional sports.

20. Restrictions resembling no poach agreements are also common in professional sports leagues. For example, transfer rules may restrict when players are able to move between clubs/teams or prevent players from moving to different club/teams, absent club/team approval. Professional athletes involved in team sports are generally restricted from freely moving between clubs/teams, pursuant to either contract terms or league rules. For example, in the U.S., the NBA has a strict "no tampering" rule that prohibits a team from speaking to a player under contract with another team in an effort to convince that player to join their team. Similarly, contracts between teams and players in most other leagues prohibit players from moving teams while under contract, absent team permission (usually via transfer or trade). These restrictions aim to stabilize competition by protecting investments made by clubs/teams and build fan loyalty. If players were able to move between clubs/teams freely, players would have little incentive to remain with poorly performing clubs/teams, and clubs/teams with particularly valuable players may not be able to capture a return justifying investment. Again, because the quality of professional sports is so intrinsically linked with uncertainty and parity, some restrictions are necessary and have procompetitive effects. But, as stated above, the restrictions should be appropriate in scope and potential anticompetitive harm should be equally considered.

IV. Conclusion

21. Competition law is important for professional sports, especially with respect to market facing activities, just as it is for any other industry. However, BIAC recognizes the unique aspects of professional sports, which require that competitors coordinate, collaborate, and agree on certain matters. Therefore, it is important that competition law be applied in a flexible, case-by-case manner, as courts in both the U.S. and Europe have generally recognized. By allowing for relevant fact inquiry within a flexible framework, competition agencies can ensure that professional sports comply with competition laws while maintaining the unique features of professional sport.