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Premiership Rugby Union: Through the Antitrust Looking Glass

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The relationship between competition law and sport is an uneasy one, but one that seems to be evolving, particularly in respect of professional football. The same however, cannot be said for professional rugby union. This is particularly true in England where the governing body, the Rugby Football Union, appear able to implement anti-competitive practices with relative impunity, or at least, significant disinterest from the competition authorities. This paper seeks to consider those practices through a competition law lens and in doing so, highlight just how far professional rugby union in England has yet to travel down the competition law rabbit hole.

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**I. INTRODUCTION**

Professional sport has become increasingly big business. The English Premier League, for example, had a cumulative viewing audience of 4.7 billion for the 2010/2011 season.<sup>1</sup> This gives the league an incredibly strong position from which to negotiate broadcasting and sponsorship deals as some regard the possession of such rights as “crucial” for the success of most media operators.<sup>2</sup> Indeed for the 2013/2014 season, the rights to broadcast the league’s domestic games were sold for just over £3 billion for 3 seasons.<sup>3</sup> Similarly Premiership Rugby managed to negotiate £152 million from BT for the right to broadcast its games over a period of 4 seasons, and that was a 50 per cent increase on the deal with ESPN and Sky that preceded it.<sup>4</sup> This growing commercial success of sport, evidenced in part by the vast sums of money that are obtained in exchange for the right to broadcast matches, is one reason why the relationship between professional sport and competition law is becoming increasingly tense. The jurisprudence on this is clear, however its relationship and application to the organisation of sport, is not. The judgment in *Meca-Medina v Commission*<sup>5</sup> concluded that a rule or decision being ‘purely sporting in nature’ was insufficient to exclude it from the scope of the Treaty, but that not every sporting rule capable of restricting competition was a breach of Article 101 or 102 TFEU. In that case two long distance swimmers tested positive for the banned substance steroid nandrolone in accordance

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<sup>1</sup> Premier League, The Most Watched League in the World, available at: <http://www.premierleague.com/en-gb/about/the-worlds-most-watched-league.html>.

<sup>2</sup> Stein and Kienapfel, 'The application of Articles 81 and 82 in the sport sector', (2007) No.3 Competition Directorate-General of the European Commission, Competition Policy Newsletter. Available at: [http://ec.europa.eu/competition/publications/cpn/cpn2007\\_3.pdf](http://ec.europa.eu/competition/publications/cpn/cpn2007_3.pdf).

<sup>3</sup> *Supra*, n.1.

<sup>4</sup> Halliday, 'BT lands exclusive UK television rights to show live rugby union', The Guardian, 12 September 2012. Available at: <http://www.theguardian.com/media/2012/sep/12/bt-tv-rights-live-rugby>.

<sup>5</sup> Case C-519/04 P *David Meca-Medina v Commission* [2006] ECR I-6991, [2006] 5 CMLR 1023.

with the International Olympic Committee's (IOC) anti-doping rules. They were subsequently given a 4-year ban by the Federation Internationale de Natation Amateur (FINA) as a result. The ban was reduced to 2 years on appeal to the Court of Arbitration for Sport (the CAS). The swimmers complained to the Commission that this amounted to, inter alia, a restriction of competition in breach of Article 101 or 102 TFEU. The Court of Justice (the CJ) concluded, applying *Wouters*,<sup>6</sup> that account had to be taken of the overall context in which the decision was made and its objectives and in doing so, a *prima facie* anti-competitive restriction could avoid an infringement of Article 101/102 TFEU if it was inherent, justified and proportionate to aims and objectives which were integral to the organisation of the sport. The fact that the dispute was about anti-doping rules, the objective of which are to ensure the competitiveness and fairness of the sport, did not prevent an assessment of their effect on competition within the meaning of Article 101/102 TFEU. The CJ found that the restriction of competition that was necessitated by the imposition of those anti-doping rules, was justified and proportionate to a legitimate objective and so no breach of Article 101 or 102 TFEU had occurred. The implications of that judgment for other sporting rules are not straightforward; the difficulties being well illustrated by the organisation of English rugby and the case of *London Welsh v RFU (and Newcastle Falcons)*.<sup>7</sup>

Despite the need to ensure compliance with competition law, sports organisations - along with their regulating bodies, rules and decisions - do not make easy bedfellows with provisions to prevent anti-competitive restrictions within commercial market places. The comparative lack of case law, caused in part by an inherent tension between the average duration of a court case and the quick annual turnaround of leagues, has meant that there have been few opportunities to develop this relationship further, particularly within the context of rugby union. Nevertheless, there have been examples of contentious issues arising, like that of *London Welsh*. This demonstrates that sports leagues will find themselves challenged on competition law principles, notwithstanding that it only occurs in front of their own tribunals.

This article seeks to look at professional rugby union in England through an EU competition law lens. In order to do so, the *London Welsh* case and the distribution of central funding within the Aviva Premiership (the Premiership), the apex of professional rugby union in England, will be considered.

## II. EU LAW

Articles 101 and 102 TFEU prohibit anti-competitive collusion and abuse of dominant position. This paper will concentrate on Article 101 TFEU because that was the focus in the *London Welsh* Appeal, but much of the discussion is as relevant to Article 102 TFEU.

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<sup>6</sup> Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913.

<sup>7</sup> *London Welsh Rugby Football Club Limited v The Rugby Football Union and Newcastle Falcons Rugby Football Club*, Appeal Judgment, 29 June 2012.

The relationship between the prohibition of anti-competitive agreements in Article 101 TFEU and sport is not a comfortable one. The collusion frowned upon by antitrust law is required for sports leagues to operate. Sports teams are not competitors in the traditional sense as all are dependent on their sporting rivals for their own commercial survival; without credible opponents the league is diminished, and when the league is diminished, the individual teams feel the effects. Individual teams cannot produce the end product alone - the league produces the product as a whole.<sup>8</sup> The advance of competition law into the sporting arena is relatively recent, although the Commission did seek to clarify the relationship between sport and the Union in its 1999 Helsinki Report on Sport.<sup>9</sup> However, its focus was firmly on safeguarding sporting structures and protecting the 'social function' of sport within communities and the within the Union. It provided little by way of assistance in navigating this complex legal environment. That task has been left to the courts to tackle.

Weatherill states that there have been 'three major judgments of the [CJEU which] demonstrate an evolution'<sup>10</sup> in the relationship between competition law and sport; *Walrave and Koch v Union Cycliste Internationale*<sup>11</sup> (*Walrave and Koch*), *URBSFA v Bosman*<sup>12</sup> and *Meca-Medina*. From *Walrave and Koch*'s concession that rules that were 'purely sporting in nature' were outside of the scope of the Treaty; to *Bosman* were the Court, having rejected arguments that football should be immune from the intervention of EU law, accepted that drawing a line between the purely sporting aspects of sport and those of an economic nature, was in practice very difficult. In the most recent of the three, *Meca-Medina*, the Court bought the case law involving sport more clearly in line with accepted competition law jurisprudence. It made clear that a rule being sporting in nature was insufficient to take it entirely outside of the scope of the Treaty. When a sport can be considered an economic activity within the meaning of the Treaty, it must comply with and respect the Treaty requirements. *Meca-Medina* therefore inched away from a reliance on the complex distinction between purely sporting rules and the economic aspects of sport, and attempted to re-align sport more closely with the traditional competition law jurisprudence.

The existence of these three major cases, do not of course negate the influence and importance of traditional antitrust case law on sports bodies and their decisions. The line of case law regarding contractual restrictions which are ancillary to a primary legitimate purpose is particularly helpful to the *London Welsh* case, *Wouters* being a good place to start.<sup>13</sup> That case involved a Dutch barrister wanting to work as a lawyer within a firm of accountants. In order to do so he sought to challenge the Dutch Bar Council's prohibition on lawyers entering into partnerships with non-lawyers. The Court agreed that such a rule could limit competition within the meaning of Article [101(1)(b)]

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<sup>8</sup> *Re Televising Premier League Matches* [2000] EMLR 78, para.160.

<sup>9</sup> COM (1999) 644 and/2

<sup>10</sup> Weatherill, *European Sports Law; collected papers*, The Hague, TMC Asser Press, 2007, p.2.

<sup>11</sup> Case 36/74 [1974] ECR 1405

<sup>12</sup> Case C-415/93 [1995] ECR I-4921

<sup>13</sup> *Wouters*, n 6.

TFEU, but went on, in paragraph 97 of its judgment, to make it clear that not all rules that restrict competition constitute a breach of Article [101] TFEU. The Court in *Wouters* stated that the question in that case, was whether the restriction could ‘reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in [the Netherlands]’.<sup>14</sup> The Court considered the restriction to be ancillary to the legitimate objective of regulating the legal profession within the Netherlands. Whish points out that this amounts to an ability to weigh non-competition objectives against restrictions of competition and allowing the former to prevail. This is as opposed to merely weighing up of pro- and anti- competitive concerns. This then results in a non-infringement finding<sup>15</sup> rather than a finding that Article 101(1) has been infringed, but saved from being void under Article 101(2) because it satisfied the exemption criteria of Article 101(3).

In *Meca-Medina*, the Court opened the *Wouters* door to sporting rules. It stated that sporting rules were to be assessed under Article 101 TFEU when relevant but that the prohibition could be sidestepped when that rule created a restriction that was in pursuit of an objective that was legitimate within the context of the sport, and so long as the restriction of competition aspect of the rule was (a) inherent to that legitimate objective; (b) integral to it and (c) no more than was necessary to achieve it. As a result of that analysis, the anti-doping regulation was considered to be inside the scope of Article 101 TFEU but not an infringement of it despite the fact that the rules allowing for the banning of swimmers found guilty of doping, amounted to a restriction. This was because the restriction was indispensable and proportionate to the legitimate objective of protecting the fairness and integrity of competitions. The case is regarded as relatively controversial in that some argue it introduces an American-style ‘rule of reason’ approach to European competition law.<sup>16</sup> The pertinent aspects of the case are referred to later in the paper in respect of London Welsh’s fight to be promoted.

### III. THE RELEGATION ISSUE

At the end of the 2011/2012 rugby season in England, London Welsh Rugby Football Club (London Welsh), winners of the (then) RFU Championship,<sup>17</sup> were refused promotion to the Premiership by the Rugby Football Union (the RFU). Rugby union in England operates a system of promotion and relegation in which a specified number of the worst performing teams in a league are relegated to the division below at the end of each season, to be replaced by the corresponding number of the best performing teams from that lower league. In theory, this should be sufficient to prevent a cartel-type environment from being established and maintained with regard to which teams are able to operate in the market for participation in Premiership rugby. This is because the

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<sup>14</sup> Ibid, para. 107.

<sup>15</sup> Whish and Bailey, *Competition Law*, 7th eds, Oxford, OUP, 2012, p.131.

<sup>16</sup> For example see, Jones, ‘Analysis of Agreements under the US and EC Antitrust Law – Convergence or Divergence’, *Antitrust Bulletin*, 51, 2006, 691, where Jones argues that it is an example of a ‘limited application of the “rule of reason”’.

<sup>17</sup> It is now the Greene IPA Championship following the conclusion of a deal with Greene IPA to sponsor the league

results on the pitch are determinative of entrance and exit, which are, or should be, outside of the manipulation of the RFU or the incumbent teams.

When a club seeks promotion to the Premiership, the RFU together with Premiership Rugby Limited (Premier Rugby/the PRL) require that the club satisfy additional entry criteria called the Minimum Standards Criteria (the MSC). These criteria are created by the Professional Game Board (the PGB) which is a Board appointed by the terms of the 2007 Heads of Agreement. It has an RFU appointed Chairman, four other RFU representatives, four representatives from the PRL (so the Premiership clubs), two representatives from the Rugby Players Association and one representative from the Championship clubs.<sup>18</sup> The 2007 Agreement is between the RFU and the PRL and it governs every aspect of the professional game.<sup>19</sup> Premier Rugby is a limited company that commercialises Premiership rugby, through for example, the sale of the rights to broadcast its games, the proceeds of which are distributed amongst those teams. It was incorporated on 31<sup>st</sup> August 1995 and has 10 Directors currently listed, each of which are Chief Executives from one of the current Premiership teams.<sup>20</sup> The RFU is made up of three constituent bodies, (i) the Board, which has general power of management; (ii) the Council, which is able to initiate and veto certain decisions; and (iii) the members in a general meeting.<sup>21</sup>

The MSC are therefore created predominantly by representatives of the RFU and the Premiership rugby clubs. The contentious criteria in the case of *London Welsh*, were those that require that teams *entering* the Premiership be able to:

1. schedule home matches on any Friday, Saturday, Sunday and any bank holiday or public holiday during the season, with a kick-off time between 12 noon and 8pm, and on any other day during the season with a kick-off time between 6pm and 8pm
2. Meet the requirements of the PRL's broadcast partner, that being, to be able to allow broadcast of home games, on the receipt of 6 weeks' notice for matches in the middle of the season, and 4 weeks for those within the last 3 months of the season.<sup>22</sup>

These criteria effectively amounted to a requirement that teams be the primary tenant at their home stadium, (Primacy of Tenure), notwithstanding the fact that three longstanding teams (The Three)<sup>23</sup> competing in the Premiership at the material time, were not.

The 2012/2013 MSC document itself articulated that its purpose was:

<sup>18</sup> Slaughter and May, 'The Review of Governance of the RFU', November 2011. Available at: [http://www.rfu.com/abouttherfu/~/\\_/media/files/2011/aboutrfu/mjmc162.ashx](http://www.rfu.com/abouttherfu/~/_/media/files/2011/aboutrfu/mjmc162.ashx)

<sup>19</sup> For more information see: <http://www.rfu.com/news/2007/november/news%20articles/rfuandprlsignneweightyearagreement>

<sup>20</sup> [www.companycheck.co.uk](http://www.companycheck.co.uk), Premier Rugby Limited

<sup>21</sup> Slaughter and May, 'The Review of Governance of the RFU', November 2011. Available at: [http://www.rfu.com/abouttherfu/~/\\_/media/files/2011/aboutrfu/mjmc162.ashx](http://www.rfu.com/abouttherfu/~/_/media/files/2011/aboutrfu/mjmc162.ashx)

<sup>22</sup> Professional Game Board (PGB), 'Minimum Standards Criteria for Season 2012/2013', p.6.

<sup>23</sup> London Wasps, London Irish and Saracens

- a. To ensure the improvement of playing facilities for the purpose of improving player performance and safety.
- b. To improve the customer experience in order to enable clubs to increase revenues.
- c. To improve media facilities thereby ensuring a high standard of 'visual product for TV and media, thereby achieving increased revenues for distribution to the clubs'.<sup>24</sup>

The 2006/7 MSC stated that its purpose was to achieve:

Higher standards across the Premiership, both on and off the field, including those linked to the quality of spectator experience will lead to increased spectator attendance and enjoyment; this will lead to increased sponsorship and television revenue and increase the earning potential of individual clubs, allowing further investment in grounds and services, coaching and staff, contributing to further enhanced standards (sic).<sup>25</sup>

The requirement that teams have Primacy of Tenure specifically, and the MSC more generally, are not in themselves problematic; they seek to improve the end product for the consumer by improving the facilities and by increasing revenues for the purpose of re-investing in and therefore, further enhancing the league. Nevertheless, the manner in which they were enforced against London Welsh could arguably be regarded as an attempt to enable a cartel-style control to be exercised on entrance to, and exit from the league.

The RFU accepted that they were an association of undertakings within the meaning of Article 101 TFEU and in accordance with European jurisprudence on the issue. The General Court made it clear in *Pian*<sup>26</sup> that national associations that group clubs together were associations of undertakings, a position unchanged by the fact that amateur and professional clubs were grouped together,<sup>27</sup> as is the case with the RFU. It also did not challenge that it enjoys a position of sole dominance in the market, or by agreement with the Premiership clubs 'for the organisation of Premiership rugby union matches in England.'<sup>28</sup> Further, the RFU accepted that the requirement for Primacy of Tenure was a prima facie restrictive measure<sup>29</sup> and an abuse of the dominant position that it enjoyed. Having accepted all of this, the RFU then sought to argue, (a) that Article 101 TFEU does not apply because the rule is sporting in nature and necessary for the organisation of fixtures and the health of the sports, per *Meca-Medina*; or alternately (b) that the Primacy of Tenure requirement was exempt from prohibition by virtue of Article 101(3) TFEU. A position that they later declined to expand upon.<sup>30</sup>

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<sup>24</sup> Professional Game Board (PGB), 'Minimum Standards Criteria for Season 2012/2013', p.1.

<sup>25</sup> Appeal Judgment, para. 20.

<sup>26</sup> Case T-198/02, [2005] ECR I-209, [2005] 5 CMLR 42.

<sup>27</sup> This was upheld by the CJEU in *Meca-Medina* [2006] ECR I-6991, where the International Olympic Committee was held to be an undertaking.

<sup>28</sup> Appeal Judgment, para. 39.2.

<sup>29</sup> *Ibid*, para. 39.

<sup>30</sup> *Ibid*, para. 43.

The RFU's argument as to point (a) could be described in one of two ways; one is reliant upon what could be regarded as a relatively controversial reading of the European jurisprudence since it appears to support a 'rule of reason' approach for assessing the applicability of Article 101 TFEU. The second is to view it as an example of a regulatory ancillary restraint. The existence or not of a rule of reason in EU law 'is perhaps the most disputed issue in European legal circles ever since Article 101's inception' and it is not the aim of this paper to add to that debate. In brief, the rule of reason is an American doctrine that provides for a means by which collusion that is assessed to be a reasonable restraint on trade, can escape action under the Sherman Act 1890.<sup>31</sup> In order to come to that conclusion, the pro- and anti-competitive aspects of the rule in question are considered. If as a result of that assessment, it can be concluded that the restraint had a positive effect on competition, then it will be regarded as a reasonable restraint. The ancillary restraint doctrine on the other-hand, requires no balancing of the pro- and anti-competitive aspects; the restrictive element of the rule or decision is ancillary, that is secondary to, a primary legitimate purpose. These restraints can be permissible so long as they are not object restrictions in their own right and they are strictly limited to what is necessary to achieve that primary, legitimate objective. They are permitted because of their ancillary status unless they are disproportionate and then they would infringe Article 101(1) TFEU. It is the contention of this work that regulatory ancillary restraint is the correct interpretation of the *Wouters* case, as rather than pro- and anti-competitive concerns being balanced against one another, the restriction in that case was incidental to the primary regulatory purpose of the rule. Non-competition concerns were able to prevail over the concerns regarding competition. Therefore, either the enforcement of the Primacy of Tenure rule against London Welsh was capable of exemption under Article 101(3) TFEU, a position that the Tribunal regarded as unlikely, or it was an example of a regulatory ancillary restraint.

The RFU contended that the Primacy of Tenure requirement and the restriction that it resulted in, were inherent in the pursuit of a legitimate objective necessary for the proper conduct and organisation of premiership rugby union in England, and so took it outside of the scope of Article 101 TFEU. The legitimate objective, as articulate by the RFU was to 'maintain and increase the general health and popularity of the sport',<sup>32</sup> and more specifically that the Primacy of Tenure requirement of the MSC was 'necessary for the organisation of fixtures ... inherent on the organisation of sport.'<sup>33</sup> The RFU argued that as the rule was sporting in nature, they had a wide discretion as to this assessment as per *Meca-Medina*.<sup>34</sup>

The relevant parts of the *Meca-Medina* judgment are as follows:

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<sup>31</sup> See *Standard Oil Co. of New Jersey v United States*, 221, U.S. 1 (1911).

<sup>32</sup> Appeal Judgment, para. 45.

<sup>33</sup> *Idid*.

<sup>34</sup> London Welsh argued that the Primacy of Tenure requirement was an example of a restraint ancillary to the broadcasting rights within the meaning of *Métropole Television*, and as a result the RFU should be allowed very little by the way of discretion.

‘Where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine ... whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.’<sup>35</sup>

...

Not every agreement between undertakings or every decision by an associations of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1) TFEU] ... account must be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. *It then has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters and Others, paragraph 49) and are proportionate to them.*’ (Emphasis supplied)<sup>36</sup>

When applied to the facts in *Meca-Medina* the Court went on to say that:

‘... even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants’ freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article [101(1) TFEU] *since they are justified by a legitimate objective*. Such limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.’ (Emphasis supplied)<sup>37</sup>

And,

‘In order to not be covered by the prohibition laid down in Article [101(1) TFEU], the restrictions ... must be limited to what is necessary to ensure the proper conduct of competitive sport’.<sup>38</sup>

When articulated as a regulatory ancillary restraint, the RFU’s argument therefore is that, the prevention of a fourth team without primacy of tenure from entering the Premiership market, was secondary to the legitimate objective of enabling organisation of the league and proportionate to it. In order to have successfully made this argument, two things would have had to have been established; (i) that the restriction was strictly limited to what was necessary to achieve that legitimate purpose, and (ii) that it was not an object restriction in its own right.

The evidence adduced before the Tribunal demonstrated that a rule only permitting three teams to compete in the Premiership who were not primary tenants, was overly restrictive as the league could accommodate five, and had known that this was the case

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<sup>35</sup> *Meca-Medina*, supra n 5, para. 30.

<sup>36</sup> *Ibid*, para. 42.

<sup>37</sup> *Ibid*, para. 45.

<sup>38</sup> *Ibid*, para. 47.



since at least March 2011. This change to five teams was in fact welcomed by the RFU in a letter to the PRL dated 9<sup>th</sup> June 2011, before the circulation of the 2012/2013 MSC to the clubs on the 15<sup>th</sup> July 2011.<sup>39</sup> It was highlighted by the Tribunal in paragraphs 62-64 of the Appeal Judgment that an increase to the number of teams, from three to five who did not have Primacy of Tenure, could be accommodated in the Premiership because, '[a]t this number, the PRL can still manage the issues of freedom of fixture scheduling which flow from the TV contracts'.<sup>40</sup> As a consequence, it could not be maintained by the RFU that the restriction was strictly limited to what was necessary.

When the increase in the number of teams unable to satisfy the primacy of tenure requirement that could be accommodated in the Premiership was discussed, the focus was on the ability of the league to satisfy the demands of the broadcast partner,<sup>41</sup> and not for example, the ability to overcome difficulties caused by scheduling fixtures with teams that must also take into account the fixtures of co-tenants at their home stadium. The relationship between the MSC and the health and popularity of the sport was explored in the Appeal Judgment, the Office of Fair Trading, in their report into a previous incarnation of the MSC, shed some light on that relationship. They found that the requirement did 'appear to generate benefits for consumers. In particular [they noted] that broadcasters can screen matches when they are most desirable to consumers.'<sup>42</sup>

Had it been the finding of the Tribunal that the restriction was however, strictly limited to what was necessary to achieve the legitimate purpose, the RFU would also have had to establish that the restriction was also not an object restriction in its own right. The Appeal Judgment made no distinction between rules that were restrictive of competition by object or effect, undoubtedly due to the time constraints of the Appeal process and the fact that it was demonstrated that the restriction was not strictly limited to what was necessary. Nevertheless it is usually an important step to take when determining the status of a course of conduct under Article 101 TFEU. For an agreement to have an anti-competitive object, the subjective intent of the agreement is not determinative. So whilst the RFU may have claimed that their subjective intent was to ensure the easy scheduling of matches, that would not be conclusive. The purpose of that particular element of the MSC was to exclude a certain class of potential new entrant from the market; teams who were not primary tenants of their home stadium (who were seeking admittance to the Premiership for the first time) despite their competitive superiority as compared with their rival teams. This underpins the function of the Primacy of Tenure criterion and so could arguably be regarded as anti-competitive by object. When it is determined that a restrictive measure is anti-competitive by object, there is no need to examine whether there is a direct effect on the price paid by the end consumer. As such, Article 101 TFEU is able to protect the

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<sup>39</sup> Appeal Judgment, para. 64.

<sup>40</sup> Appeal Judgment, para. 63.

<sup>41</sup> Ibid, para. 63.

<sup>42</sup> OFT Letter, 31st March 2003, cited in the Appeal Judgment at para. 16.

structure of the market and competition within it.<sup>43</sup> Had this been the finding in the present case, the RFU would not have been able to rely on an argument of ancillarity as a result, because as previously mentioned, ancillary rules cannot be object restrictions in their own right.

In any case, no arguments were adduced by the parties as to this particular issue and it was not explored by the Tribunal who ultimately concluded that the rule was in fact a hybrid rule,<sup>44</sup> unable as they felt, to sever the sporting aspects of the rule from the commercial. Their finding was based on the fact that whilst the rule was a means of allowing maximum value to be achieved for the broadcasting rights, the purpose of doing so was to benefit the game.<sup>45</sup> As a consequence of that finding, they afforded the RFU a ‘substantial margin of appreciation’<sup>46</sup> with regard to the proposed amendment of the rule. The granting of such a generous discretion is arguable at odds with *Meca-Medina* where the substantial margin of appreciation was granted as a result of the purely sporting nature of the rule. The hybrid nature of the rule in the present example, would suggest that a less liberal discretion may have been more appropriate. Notwithstanding, the Tribunal concluded that the RFU had exceeded that discretion, as what occurred was disproportionate to the legitimate objectives they were seeking to achieve. The conclusion that the rule was a hybrid rule is at odds with the language of ancillary restraint. Ancillary restraints are permitted because their purpose is subordinate to some other legitimate purpose. If both aspects of the rule are equal, in that one is not ancillary to the other, then a claim that Article 101 TFEU does not apply to one of these aspects dies. To find that a rule was a hybrid rule, is arguably just an unhelpful way of rejecting a claim of ancillarity and therefore concluding that the rule in its entirety is subject to Article 101 TFEU.

Various critical elements of an antitrust case were not explored in the *London Welsh* appeal, undoubtedly because of the time constraints places on the Tribunal, and the fact that it was decided by a Tribunal and not in a Court. Nevertheless, a failure to do so enabled a jurisprudentially unsupported finding of a hybrid rule to be adopted. In addition to this, the determination as to the specific type of anti-competitive conduct that RFU had engaged in was also not explored in the Appeal. The lists of conduct prohibited in Articles 101 and 102 TFEU are not exhaustive, so it is not essential that the specific agreement under investigation fit neatly into one of the articulated types. Nevertheless, excluding teams who are not primary tenants of their stadium irrespective of their competitive superiority,

could be regarded as an attempt to control the market by manipulating who is able to enter it, which can be an example of an object restriction. Alternatively, both Article 101 and 102 TFEU stipulate that applying dissimilar conditions to equivalent transactions, thereby creating competitive disadvantage is a prohibited form of conduct. Typically this will take the form of price discrimination, refusal to supply and

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<sup>43</sup> Case C-8/08 *T-Mobile* [2009] ECR I-4529, [2009] 5 CMLR 1701, para. 36-39.

<sup>44</sup> Appeal Judgment, para. 47.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, para. 48.

preferential terms and conditions. There is not an extensive discussion of what is meant by ‘competitive disadvantage’ in the jurisprudence, although the CJ has been clear that it is necessary to show that competition has been distorted. There needs to be a finding that ‘[it] tends to distort that competitive relationship, in other words to hinder the competitive process of some of the business partners of that undertaking in relation to others.’<sup>47</sup> When applied to the facts of the London Welsh scenario, the relevant comparator would be teams competing in the Premiership already who fail to satisfy the Primacy of Tenure requirement of the MSC. Allowing The Three to continue to compete in the Premiership without even any form of sanction<sup>48</sup> whilst attempting to prohibit London Welsh from doing the same, would appear to be a clear example of the kind of conduct that this particular provision is seeking to prevent. To take the example to its conclusion, had one of The Three been relegated from the Premiership and sought re-admittance the following year, it would be highly unlikely that their path would be blocked in the same way.

The issue of what is an object restriction versus what is a restriction by effect is again, a hotly debated issue in European antitrust circles, the feeling of the Court of Justice of the European Union in the recent *Groupement des cartes bancaires (CB) v Commission*<sup>49</sup> case being that the definition of restriction by object had been allowed to become too wide in its scope. In the words of the ECJ,

[t]he concept of restriction of competition “by object” can be applied only to certain types of coordination between undertakings which reveal a *sufficient* degree of harm to competition that it may be found that there is no need to examine their effects otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition’.<sup>50</sup> (Emphasis supplied)

The CJEU held that the General Court had erred in their finding of a restriction by object since they had failed to explain ‘in what respect that restriction of competition reveals a sufficient degree of harm in order to be characterised as a restriction “by object.”’<sup>51</sup>

To establish that the restriction in the present case was one by way of object therefore, it would have to be shown that preventing London Welsh from entering the Premiership created a sufficient degree of harm as to allow it to be categorised as an object restriction. Failing to adequately do so would mean that London Welsh would have had to rely on proving a restriction by effect, which would have entailed an

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<sup>47</sup> Case C-95/04 P *British Airways plc v Commission*, [2007] ECR I-2331, [2007] 4 CMLR 982.

<sup>48</sup> Appeal Judgment, para. 72. A sanction was not imposed because it was determined by the PRL that to do so would have been ‘arbitrary’.

<sup>49</sup> Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, ECLI:EU:C:2014:2204.

<sup>50</sup> *Ibid*, para. 58.

<sup>51</sup> Court of Justice of the European Union PRESS RELEASE No 123/14 Luxembourg, 11 September 2014, Judgment in Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-09/cp140123en.pdf>

investigation as to the effect of that decision upon competition in the market. The fact that these issues attracted no attention in the Appeal is, as has already been said, undoubtedly due to the time constraints placed upon the Tribunal by the very nature of the case and its context within the professional rugby season. Nevertheless, these are not easy matters to determine, and it cannot be said with absolute authority that had they be explored during the course of the Appeal, that the outcome would have nevertheless been the same.

There are various ways in which a finding of competitive abuse could have been reached by the Tribunal, however as many of the pertinent issues were not explored during the Appeal, it is difficult to make a determinative assessment as to path that should have been taken in order to reach the correct result, which the Tribunal ultimately did. It was the disparity of treatment between the incumbent teams and the potential new entrant, together with the fact that it had been documented that the presence of an additional team who failed to satisfy the criterion would not inhibit the organisation of the league or the scheduling of the matches, which led to the Decision being overturned at the Appeal. The RFU engaged in a course of anti-competitive conduct that inhibited competition within the market. Manipulation of the market for Premiership rugby would seem at odds with a system that utilises promotion and relegation. Further, in an environment where teams are able to create sufficient brand loyalty to charge higher prices to the end consumer unconstrained by their competitors, it would appear unnecessary. That is until the financial implications of expulsion from the market are considered.

#### **IV. 'P SHARES' AND CARTEL ENTRY**

The system of promotion and relegation that typifies most league sports in Europe is meritocratic; teams that outperform their rivals will advance up the league structures with the ability to ultimately compete in the highest professional leagues being determined by results on the pitch. The problem with this system, particularly in English rugby union, is that it creates a fairly substantial financial risk for those teams who may be ejected from the top league, and it also necessitates a substantial financial commitment for those seeking admission. Financing a Premiership rugby club is a very expensive pastime.<sup>52</sup> Nevertheless, competing amongst the English elite also brings in a fairly sizeable sum in the form of central funding. This is made up in part, of the distribution of profits from the sale of broadcasting rights, sponsorship revenues and the ever lucrative European competitions. This supplementary funding goes some way to offsetting the financial burden felt by club owners. However, as the league immediately below the Premiership struggles to attract a buyer to broadcast its games<sup>53</sup>

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<sup>52</sup> Saracens, Bath, Wasps and Worcester recording an aggregate loss of £15.8 million for the 2012/13 season. ESPN Staff, 'Club bosses cry foul on financial fair play', April 13th 2014, ESPN. Available at: <http://www.espnscrum.com/premiership-2013-14/rugby/story/221695.html>

<sup>53</sup> Having purchased the rights to broadcast 11 Championship games, following the loss of broadcasting rights to the Premiership to BT, SKY negotiated for a further 7 Championship games at no additional cost to them. See: <http://www.therugbypaper.co.uk/featured-post/9418/greene-king-to-be-title-sponsors-of-rfu-championship/>

and earns sponsorship that pales in comparison to that which is provided to the Premiership by Aviva,<sup>54</sup> the financial risks of dropping down a league are substantial.<sup>55</sup> Regarded in this light, it is perhaps understandable why the MSC could in theory, be manipulated in a manner which enabled the Premiership clubs to retain some level of control over entrance and exit of the market. Such a view may be considered as unduly cynical, but taken together with the provision of central funding, is possibly not too far from the truth.

In 2005 Premiership Rugby together with the incumbent premiership teams, agreed to implement a system for the distribution of the profits obtained from the sale of broadcasting rights to Premiership games. This system resulted in the creation of a share system that utilises three types of shares. A 'P Share' which is a perpetual share, was given to each of the Premiership teams at the time the system was started and yield the greatest value. It is retained unless a team is relegated and forced to sell it. Then there are 'B Shares' which each Premiership team obtain automatically. Finally, there are 'A Shares'. The clubs get 5 A Shares for each consecutive year that they are in the Premiership for a maximum of 6 years and a total of 30 A Shares.<sup>56</sup> The number of shares that a team has directly impacts the amount of central funding that a team receives. When a team is relegated from the Premiership, they lose 5 A Shares for each year that they are out. When a new team is promoted they will be awarded the B Share but will not be permitted to purchase a P Share until they have served two consecutive seasons in the Premiership. Until that time, any relegated team in the Championship in possession of the P Share, cannot be compelled to sell it. This means that for the first year that London Welsh were in the Premiership they had only a B Share, whereas Bristol Rugby Football Club, relegated to the Championship at the end of the 2009/2010 season, are still in possession of their P Share, although will have lost all but 10 of their A Shares due to the length of time that they have been out of the premier league. Consequently, despite having not competed in the Premiership for over three seasons, this current season being their fourth, they receive a greater amount of central funding from the RFU than London Welsh in the 2012/13 season, and again in this current 2014/15 season, London Welsh having won promotion again. Further, Bristol will not be compelled to sell on that P Share to London Welsh unless London Welsh

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<sup>54</sup> Greene IPA are rumoured to have sponsored the Championship for £1.2million for 3 years. The RFU did not disclose the details of the deal. See: <http://www.therugbypaper.co.uk/featured-post/9418/greene-king-to-be-title-sponsors-of-rfu-championship/> . Compare that with the sponsorship achieved for the Premiership with Aviva Insurance for a total of £20million for 4 seasons. See: <http://www.hkstrategies.co.uk/latest/news-archive/hk-negotiates-a-long-term-partnership-with-aviva-and-premiership-rugby.aspx>

<sup>55</sup> This can be contrasted with the professional game in France, where the top two leagues operate on a fully professional basis. Television broadcasting sales are distributed between both leagues, albeit with the greater share going to the top league, the Top 14, enabling the development of the game at both levels and thereby ensuring that the lower of the two divisions, the ProD2 offers an attractive product that consumers are happy with.

<sup>56</sup> Maires, 'MP demands probe into 'cartel' funding of Premiership clubs which discriminates against promoted teams', 3rd October 2014, The Telegraph. Available at: <http://www.telegraph.co.uk/sport/rugbyunion/premiership/11206854/MP-demands-probe-into-cartel-funding-of-Premiership-clubs-which-discriminates-against-promoted-teams.html>.

manage to remain in the Premiership at the conclusion of this season.<sup>57</sup> The Rugby Paper recently reported that for the current season London Welsh will receive approximately £1.5 million in funding from the RFU, whereas the rest of their Premiership colleagues will receive between £3 and £4 million. Worcester Warriors, the team relegated at the expense of London Welsh will receive £2.5 million more than London Welsh while they compete in the Championship (whilst the rest of the Championship teams receive a rumoured £500,000, with the exception of Bristol). As a result of their possession of the perpetual share, it was reported that Bristol will receive £1 million more than London Welsh, despite not having competed in the Premiership for 4 seasons.<sup>58</sup>

In an interview with the author, a representative of Premiership Rugby intimated that the purpose of the share system was threefold: (1) it was seen as an effective way of preventing teams seeking promotion simply to gain a share before being relegated again. Yorkshire Carnegie (then Leeds Carnegie) sold their P Share in 2011 to Exeter Chiefs, having been relegated from the Premiership at the end of the 2008/2009 season. The share was given a market value of £5 million so the shares in themselves represent an attractive source of income. He further said that the shares (2) represented an asset, recognised by banks, that a club could borrow money against should they find themselves in financial dire straits and lastly (3), it was a way of recognising the huge investment that incumbent rugby club owners had made in order to effectively compete and remain in the Premiership. This argument could be compared with the rules which provide for the payment of compensation to clubs that have invested time and money into the development of young players, who then go on to play professionally, for another team. Regulation 4.7 of the International Rugby Board's Regulations Relating to the Game states that such payment are due for players aged between 17 and 23 only, and only when they leave their Home Union for the first time. It also states in Regulation 4.3 that each Union should provide for a similar compensation scheme for domestic transfers within its jurisdiction.<sup>59</sup> The RFU therefore, in Regulation 7.6.2 have established for such compensation to be due for up to a maximum of £55,000 for qualifying transfers that occur between domestic clubs.<sup>60</sup> Again, it ceases to apply once the player has reached the age of 23 years of age. This recognises the fact that there comes a point at which the original club has derived sufficient benefit from their investment, and that compensation for that investment is no longer appropriate. Applying this analogously, the financial investment and contribution made by

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<sup>57</sup> The exact operation of the share system and its impact on funding is not general knowledge, although there have been some public mention of it. Cleary, 'Premiership Rugby chief hits back at Aviva premiership "cartel" claims from Gareth Thomas MP', 28 March 2013, *The Telegraph*. Available at: <http://www.telegraph.co.uk/sport/rugbyunion/club/9958470/Premiership-Rugby-chief-hits-back-at-Aviva-Premiership-cartel-claims-from-Gareth-Thomas-MP.html>

<sup>58</sup> Cain, 'London Welsh may sue Premiership Rugby over giant funding gap', 28 October 2014, *The Rugby Paper*. The original article is no longer available, but a verbatim copy is available at: [http://www.london-welsh.co.uk/index.php?mod=news\\_view&id=2304](http://www.london-welsh.co.uk/index.php?mod=news_view&id=2304)

<sup>59</sup> IRB, *Laws and Regulations*. Available at: <http://www.irb.com/lawregulations/>.

<sup>60</sup> England Rugby, *RFU Regulations*. Available at: [http://www.englandrugby.com/mm/Document/Governance/Regulations/01/30/34/77/RFU\\_Regulation\\_7\\_Neutral.pdf](http://www.englandrugby.com/mm/Document/Governance/Regulations/01/30/34/77/RFU_Regulation_7_Neutral.pdf).

incumbent teams also enabled them to derive benefits from participation in that league. There will come a point at which they have derived sufficient benefit from that investment that additional compensation based upon it, becomes unnecessary and inappropriate.

The money distributed in accordance with share ownership is partly made up of the profits obtained from the collective selling of the exclusive rights to broadcast the games played by Premiership rugby union clubs, and revenue derived from the sponsorship of the league. The PRL is, as mentioned earlier, responsible for the commercialisation of professional rugby union in England. The sale of these rights is a major aspect of that commercialisation. The rights to the games are sold as a bundle, rather than each team selling the rights to individual games. This is vital for the best price to be achieved and reflects the fact that the sum of the league is worth more than its separate parts. This collusive approach to the sale of the sports game is referred to as a 'collective commercialisation agreement', defined as co-operation between competitors in the selling, distribution or promotion of their products.<sup>61</sup> The collective sale of the rights to broadcast Premiership games is one type of collective commercialisation; the joint selling agreement. These agreements are treated with caution by competition authorities because of the inherent risk that such collusion will lead to cartelistic behaviour and in fact, in the context of the sale of rights to broadcast sports events, is a *prima facie* prevention of competition within the meaning of Article 101(1) TFEU as they prevent individual teams from competing to sell the rights to individual games. They pose an inherent risk to consumers in terms of raised prices and reduced access to media content.<sup>62</sup> An example of the Commission's view on the collective sale of broadcasting rights for sporting events can be seen in their Decision on the joint sale of broadcasting rights for the UEFA Champions League.<sup>63</sup> The UEFA Champions League (the Champions League) is a pan-European football competition, UEFA are the governing body for the league and the joint selling body with exclusive right to sell certain Champions League games.<sup>64</sup> The Commission rejected the argument that the joint sale of the broadcasting rights was not subject to Article 101 because they were integral to the structure and organisation of the league. Instead it concluded that the joint sale of broadcasting rights was a *prima facie* restrictive practice because it prevented individual teams from competing for the sale of the games and, because it meant that UEFA determined the price when it invited bids from suitable broadcasters. The Commission accepted that a certain level of cooperation was required to enable the league to operate and that there was a level of interdependence that existed amongst the clubs.<sup>65</sup> It went on to say that it 'endorses the specificity of

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<sup>61</sup> Commission, Guidelines on applicability of Article 101 of the treaty on the Functioning of the European Union to horizontal co-operation agreement, 2011/C 11/01. Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)

<sup>62</sup> *Supra*, n 2.

<sup>63</sup> Commission Decision, Joint selling of the commercial rights of the UEFA Champions League, OJ [2003] L 291/25, [2004] 4 CMLR 9.

<sup>64</sup> Games at the start of the competition are not part of the exclusive arrangement.

<sup>65</sup> *Supra*. n.60, recital (126).

sport'<sup>66</sup> but that 'any need to take the specific characteristics of sport into account, such as the possible need to protect weaker clubs through cross-subsidisation of funds from the richer to the poorer clubs ... must be considered under Article [101(3)].'<sup>67</sup> Nevertheless, the distribution of the revenues raised in that case, had no impact upon the Commission's final decision.

The right to sell broadcasting rights for sporting events en masse is now a feature of professional sport and whilst it was not determinative in the UEFA case, the beneficial effects that the distribution of the income raised has on the competitive balance amongst the teams,<sup>68</sup> is a consideration that may allow for an Article 101(3) TFEU exemption to what is essentially, price-fixing.<sup>69</sup> The fact that the sale of such rights in this manner allows money to be distributed back to the teams and used for the enhancement of the league, as well as enabling degree of financial equality crucial for the competitive balance necessary for a successful league, has been referred to as one of the 'peculiar economics of professional sport';<sup>70</sup> the inherent interdependence and 'organisational solidarity'<sup>71</sup> that is required for the league to exist and prosper. This was consistent with comments made by Advocate General Lenz in *Bosman*, when he said that certain kinds of internal regulation may be acceptable within the context of sport that would otherwise fall foul of Treaty provisions on competition, in recognition of the special features that sports leagues exhibit. He accepted that because of the degree of interdependence that was essential to the operation of a sports league, systems to prevent rich clubs becoming richer and poorer clubs, even poorer could be justified. He specifically mentioned the possibility the distribution of receipts of broadcasting rights.<sup>72</sup>

When this jurisprudence is applied to the case of elite rugby union in England, the operation of the P Shares and their effect on the distribution of the profits from broadcast right sales and other revenue sources, make such collusive selling more difficult to justify. The traditional assessment by way of Article 101(1) and (3) TFEU must take place. As has already been noted, the joint sale of broadcasting rights is a prima facie restrictive agreement. In order to escape a finding that it is void and unenforceable by way of Article 101(2) TFEU, it must be able to satisfy the criteria of Article 101(3) TFEU and gain an exemption. When making such an evaluation, only when the benefits of the arrangement outweigh the restrictive effects, can an exemption be granted.<sup>73</sup> Those benefits include, but are not limited to, the efficiency benefits of

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<sup>66</sup> Ibid, recital (131).

<sup>67</sup> Ibid, recital (129).

<sup>68</sup> *Re Televising Premier League Football Matches* [2000] EMLR 78, para. 165

<sup>69</sup> *Supra*, n 2.

<sup>70</sup> Neale, 'The Peculiar Economics of Professional Sport: A contribution to the Theory of the Firm in Sporting Competition and in Market Competition', (1964) Vol. 78, No.1, *The Quarterly Journal of Economics*, p.1-14.

<sup>71</sup> Case C415/93 *Union Royale Belges des Sociétés de football association, Royal Club Liégeois et UEFA v. Bosman*, [1995] ECR 14921 (CJ).

<sup>72</sup> Ibid. Lenz Opinion at para. 226.

<sup>73</sup> *Supra*, n 60, recital (132).



one undertaking filming and broadcasting the games and the reduced transaction complexity it creates by allowing broadcasters to negotiate with a single outlet.<sup>74</sup> These benefits alone, however, are not sufficient for an exemption under Article 101(3) TFEU, the consumer must receive a fair share of the benefit. The Commission regards the single point of sale for consumers, facilitated by the joint sale of the broadcasting right to be of real benefit.<sup>75</sup> The Commission further agreed that it was important to,

‘maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches, which could be reflected in/translate into better media rights ... The Commission recognises that a cross-subsidisation of funds from richer to poorer may help achieve this. The Commission is therefore in favour of the financial solidarity principle, which was also endorsed by the European Council declaration on sport in Nice in December 2000’.<sup>76</sup>

So whilst in that case, the issue of financial solidarity had no impact, it is clear that it can be a relevant consideration. Article 101(3) TFEU assessments must be carried out on a case-by-case basis, dependent upon the specific characteristics of the sport in question and the context in which the restrictive agreement takes place.

The P Share system is the mechanism by which funds, partly raised from the joint sale of broadcasting rights by the PRL, are distributed amongst the member teams. It is a system however, that creates significant financial disadvantage for one class of members competing in that league; new entrants to the Premiership, and ensures that such a disadvantage remains unless they can remain in the league for at least 6 consecutive years,<sup>77</sup> albeit incrementally less so as each season passes and so long as they can afford to purchase a P Share when the time comes that they are permitted to purchase it. That financial disadvantage has had an appreciable effect of disadvantaging the team competitively in the league, and diminishing the overall product that the league produces. When describing the recent defeat of London Welsh at the hands of Harlequins, to the tune of 52 points to nil, The Independent’s Chris Hewett remarked that, ‘a plate of undercooked halibut would have generated more excitement’.<sup>78</sup>

If the inherent anti-competitive nature of joint selling agreements is exempted because of the countervailing positive effect such joint selling has on the market for Premiership rugby union in England, then the manner in which revenue is currently distributed, having a negative impact on the competitive balance in the league and the final product for the consumer, makes it difficult to maintain an argument that the overall benefits outweigh the anti-competitive restriction. The revenues from the prima

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid, recital (165).

<sup>77</sup> A team must be in the Premiership for two consecutive years before a B Share can be purchased and then A Shares are accumulated for the subsequent 6 years until the maximum of 40 shares are obtained.

<sup>78</sup> Hewett, ‘Terrible’ London Welsh are reigniting demands to scrap play-offs’, 19th September 2014, The Independent. Available at: <http://www.independent.co.uk/sport/rugby/rugby-union/club-rugby/terrible-london-welsh-are-reigniting-demands-to-scrap-playoffs-9745221.html>.

facie prohibited selling arrangements, are being used to ensure that a level of financial disparity is maintained within the market, sufficient to allow market foreclosure to be established. The primary anti-competitive effect of a joint selling agreement is being exacerbated because it is being used to enable the creation of an entrenched de facto cartel in the market.

The share system operates in such a way as to mitigate the risks felt by the incumbent teams, whilst passing on increased risk to potential entrants. When a club in possession of shares is relegated to the Championship, they still receive a level of central funding that far exceeds that which their (new, lower-level) competitors receive. This allows them to field teams that are competitively superior to the teams in their new league and goes a long way towards ensuring that the original P Share-holding teams find it less of a challenge to seek promotion to the Premiership than those seeking admittance for the first time. As one academic noted, seen in this light, it is less a 'parachute payment' and more a 'bungee payment'.<sup>79</sup> This taken together with the substantial financial investment that the MSC primacy of tenure requirement necessitates, means that clubs attempting to rise to the elite of the professional game in England face significant financial barriers that have the potential to drastically impede their chances of success, whilst the original league members benefit from the existence of (at least) these two measures that operate so as to significantly reduce the financial burden of relegation that they face.

The share system can be said then to operate in a manner consistent with a de facto cartel. The teams have colluded to enable them to achieve cartel profits for the sale of broadcasting rights. The teams have then gone on to collude in order to create a system for the distribution of those cartel rents that impedes the operation of the system of promotion and relegation operated by the league and entrenches the incumbent teams. In doing so, they have also defeated a potentially pivotal benefit that the broadcasting rights cartelistic sale was dependent on for its legal justification, and thereby exemption from sanction, to the detriment of the end product to the consumer. Whilst such a benefit was not considered to be crucial within the context of professional football, the implications of financial disparity upon professional rugby union are potentially far greater because it is a smaller and much less profitable league. The effects of this significant financial disparity have been illustrated by London Welsh in the 2014/2015 season and are evident when looking at which teams have been promoted and relegated since the inception of the P Share system, as illustrated in Figure 1 below. The RFU would of course be able to raise efficiency arguments similar to those mentioned above; simplicity of transaction and single point of sale for consumers to name but two. However, the pro- and anti-competitive effects would have to be considered together to ensure that the joint sale agreement and the associated distribution of the revenue it raises, goes no further than necessary to achieve those efficiencies. There is a very strong argument to say that the negative effect on competition caused by the current manner of revenue distribution is disproportionate to the efficiencies created by the

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<sup>79</sup> MacCulloch, personal communication, October 2014.

joint sale; a joint sale that could create those efficiencies and still distribute the funds in a less anti-competitive way.

Entrance and exit from the Premiership on a season-to-season basis may appear to demonstrate the open nature of competition between the Premiership and Championship teams; P Share-holding teams regularly being relegated from the premier league. However, when a long-term view is taken of the impact that such a significant funding disparity has on membership of the Premiership, it is clear that, with the exception of Bristol, all teams in possession of P Shares have been able to secure re-admittance to the Premiership the season following their relegation, see Figure 1 below. Further, the table also shows that Yorkshire Carnegie, a team once in possession of P Shares followed this same pattern until 2011, when they were forced to sell their P Share to Exeter Chiefs. Since that time, they have been unable to achieve promotion.

**Figure 1**

Season	Team Promoted	Team Relegated
2004/2005	Bristol*	Harlequins*
2005/2006	Harlequins*	Yorkshire Carnegie**
2006/2007	Yorkshire Carnegie**	Northampton Saints*
2007/2008	Northampton Saints*	Yorkshire Carnegie**
2008/2009	Yorkshire Carnegie**	Bristol*
2009/2010	Exeter Chiefs	Worcester Warriors*
2010/2011	Worcester Warriors*	Yorkshire Carnegie**
2011/2012	London Welsh	Newcastle Falcons*
2012/2013	Newcastle Falcons*	London Welsh
2013/2014	London Welsh	Worcester Warriors*

\* - teams that are in possession of at least a perpetual P Share

\*\* - Yorkshire Carnegie sold their perpetual share to Exeter Chiefs in 2011. Yorkshire Carnegie have been known by a number of various other names including Leeds Tykes and Leeds Carnegie.

## V. CONCLUSION

The existence of the MSC or mechanisms for distributing funds are not in themselves the problem when put in the context of a professional sports league. They have as their foundation sound, albeit circular, principles; the improvement of standards both for players and spectators, facilitated by increased revenues that such improvements generate. Nevertheless, when manipulated in a way that enables artificial control to be exerted over membership of the Premiership in a way wholly contrary to the ideas of competitive balance and organisational solidarity, the possibility of them being regarded

as justified restrictions on competition seems much more difficult, if not impossible, to achieve.

The RFU seem to have been able to implement at least two ways in which, over the long-term, the interests of incumbent P Share-holding teams can on the whole, be protected. The MSC requires potential new entrants to bare the risk of the substantial financial investment required in respect of the stadia requirement, in a system that is by its very nature is unable to guarantee promotion and so a return on that risk. The financial disparity between the two divisions only serves to make that risk even greater. The risk is again increased when the effects of the P Share system are taken into account, as a team who has borne the financial cost of satisfying the MSC and managed to secure promotion, face the task of surviving in the Premiership for two consecutive seasons whilst operating at a significant budgetary deficit in comparison to their new rivals, a feat that has only been achieved by Exeter Chiefs and Worcester Warriors, the latter now having subsequently been relegated back to the Championship.

The collusion that is vital to the successful operation of professional sports leagues creates a strong risk that other cartel agreements or abuse of dominance may occur. Rules that had a simply sporting beginning, necessary for the organisation of the league, are at risk of being hijacked by more nefarious aims. The special features of sport as compared with most traditional markets leads to the high level of interdependence between competitors. This peculiar economic feature of professional sport can be used as a Trojan Horse for prohibited conduct, with the normally self-correcting features of traditional markets unlikely to constrain the exercise of cartel like behaviour within sports leagues or between clubs. This is why it is vital that consumer interest is protected, and whilst it is preferable that sporting organisations organise themselves 'with due regard to national and community legislation'<sup>80</sup> as opposed to as a result of cumbersome legislative interference, competition authorities should not shy away from asking probing questions about potentially harmful practices.

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<sup>80</sup> Treaty of Nice, European Council Declaration, Dec 2000, Annex IV: Declaration on the specific characteristics of sport and its social function in European, of which account should be taken in implementing common policies. Available at: [http://www.europarl.europa.eu/summits/nice2\\_en.htm#an4](http://www.europarl.europa.eu/summits/nice2_en.htm#an4).