



...with James A. Keyte

In this month's edition of CPI Talks we have the pleasure of speaking with James A. Keyte, Director of the Fordham Competition Law Institute, Director of Global Development at The Brattle Group, and a former antitrust partner at Skadden Arps who litigated many sports-related antitrust cases. James also is an adjunct professor of comparative antitrust law at Fordham and has written extensively on antitrust and sports, including a comparative perspective.

1. Let's start with a general question about convergence and divergence in the sports antitrust area. As both U.S. courts and EU enforcement authorities continue to focus on this subject, do you see an eventual convergence on either analytical frameworks or outcomes?

When we look at competition law and enforcement applied to sports, we see a long and sometimes arduous history in the U.S. (e.g. the single-entity debate), yet a much more recent and relatively vibrant emergence of the topic in the EU. That is not surprising and for reasons that cut across numerous antitrust subjects.

Most importantly, the U.S. enforcement of antitrust laws — whether private or public — takes place in the courts and is only as aggressive or innovative as courts are willing to accommodate. Hence, even if, politically or culturally, there were a desire for more scrutiny and enforcement of the Sherman Act as applied to amateur and professional sports, nothing can be done in the U.S. absent litigation in court or through legislation.

Not so in the EU. There, in its administrative system, enforcement policy and decisions can move forward at a relatively rapid pace, subject only to fairly limited appeal rights. And with the recent EU focus on sports (e.g. broadcast rights and player restraints), decisions to enforce can emerge quickly and often with industry-altering outcomes. While the General Court and the Court of Justice do occasionally review sports-related decisions, the real action is with the front-line enforcers at DG Comp and in the Member States.

Another major difference lies in the historically divergent statutory language and enforcement policies and philosophies between the two jurisdictions, which we also see in the sports-related cases and investigations themselves. For example, the EU has a principle of "fairness" built into its statutory framework. Moreover, in my view, the EU has a greater concern with concentrated market structures as well as behaviors that "distort" competition in the actor's primary market as well as related markets. This type of "leveraging" doctrine was summarily discarded in the U.S. Supreme Court in *Trinko*. The contrasting result in the EU is both the predilection and discretion to be much more aggressive and regulatory-like in considering how to enforce its antitrust laws in a way, in their view, that "levels the playing field" from the supply side and also protects consumers.

At the same time, however, ever since the *Intel* decision in the Court of Justice a few years ago, the EU has been trending (perhaps reluctantly for some) toward an "effects"-based analysis (like our rule of reason) as opposed to categorical condemnations (like our *per se* rules), referred to as restraints "by object" in the EU.

Hence, in addition to the very interesting question of whether different jurisdictions are addressing similar questions in the sports/antitrust field, there always remains the need to closely assess whether the different enforcement systems and policies will lead to disparate outcomes for similar conduct.

2. There is enormous legal and cultural debate surrounding amateurism and whether, for example, the Sherman Act should be used to ensure that NCAA student athletes are “paid” for their play. And, of course, we now have decisions in the Ninth Circuit that recognize “amateurism” as a legitimate collaboration objective, yet also reject certain limits on education-related “grant-in-aid.” In your view, is the court striking the right balance?

The subject of whether student athletes should be paid for their play is one of the most polarizing ones being debated across the U.S. (and elsewhere) today, from dining room tables to courtrooms. On the one hand, people see the commercial value created by amateur sports (at all levels, but most dramatically in the big NCAA sports) and some naturally argue that the players should share in that beyond education-related financial aid. On the other hand, many people believe that student athletes are compensated with scholarships, various forms of aid, educational support and degrees (with future earning power). In their view, “pay for play” would change the nature of the amateur product itself. And then, on top of that debate, is the question of how to bring, if at all, the enforcement power of the Sherman Act into play in an area that for decades had been left outside the scope of the Act — intentionally if one reads the dicta in *NCAA* correctly.

Yet, when one breaks it down, there is a real question of whether this is truly or properly an antitrust debate or, instead, a legislative one. We see, for example, the NCAA struggle with trying to define precisely what type of financial aid and support is education-related so student athletes have the maximum of what other students can get because, after all, they are students as well as athletes. And as long as courts view “amateurism” as an essential aspect of the collaborative product — which they seem to even when the NCAA “loses” — one could argue that antitrust courts should have no role in managing how the NCAA or other bodies define the scope of their jointly created product. From this perspective, the vigorous cultural debate on “paying” student athletes perhaps belongs in a different arena — whether it is within the NCAA itself or the appropriate legislative body.

However, if the courts are going to continue to invoke the Sherman Act in this politically charged area, they likely need a better approach than the simplistic assertion that schools are merely “monopsony cartels” and that the market for players needs to be completely free of self-regulation or collectivized around labor-relation laws and exemptions. I also see that in the articles to follow there is one from John Bigelow & Ken Elzinger, who argue with analytical force that these markets — again if viewed as such from antitrust perspective — are “two-sided,” with organizations like the NCAA acting as an intermediary between fans and student athletes. What we cannot have, I suggest, is a free for all where the minor sports get marginalized or eradicated and schools can’t “compete” if they try to keep the “student” part of the “student-athlete” intact.

A final thought is that a very small percentage of student athletes end up playing professional sports. Moreover, several sports allow athletes to make that professional choice out of high school (e.g. baseball, tennis, soccer). And even for those sports where some time in college appears to be a must, we should not undervalue a college education and degree that is available to those 97 percent plus, and the life experience and earning power it can bring along the way.

3. Restrictions on player movement and salaries (e.g. a salary cap) have long been an issue in the U.S., but now are working their way to the E.U. and Japan, among other jurisdictions. How do you see that playing out?

The subject of salary caps or restraints on player movement is quite interesting, historically, as it parallels the transition from *per se* to rule of reason treatment. I’m sure that many practitioners who do not work in this area might assume that, absent the non-statutory labor exemption, salary caps or free agency restraints are easily condemned in the U.S. But this hasn’t been the case for a while. As the courts focused more on effects and the relationship between input (players) and output (the entertainment product) marketplaces, they began to focus on the benefits of those “restraints” on things like competitive balance among teams over time (which goes to product quality) and the financial viability of teams (which promotes fan loyalty or venture product stability). In fact, in the *Williams* case (which eventually turned on the non-statutory labor exemption), Judge Duffy held, in the alternative after a one-day trial, that the salary cap at issue passed the rule of reason without the exemption — a little known nugget. And, of course, *American Needle*, in its interesting end-of-opinion dicta, highlighted that some restrictions, especially those that appear necessary (and specifically referencing competitive balance), may pass muster on a defense-oriented “quick look.” Going forward, then, challenges to player restraints at a minimum are going to be full rule of reason battles in the U.S.

Jurisdictions outside the U.S., by contrast, are late in coming to this issue, and only recently (and along the path of *Intel*) are transitioning to an effects-based analysis for these type of labor restraints. For example, Benoit Keane’s article below has a thorough and interesting discussion of the recent *Saracens* decision in the UK just on this topic. As he highlights, much like the U.S.’s *NCAA* decision, among others, *Saracens* is likely to transform how enforcers (at least in the UK, which, at that point, was still an EU Member State) analyze sports restraints at the venture level, though we must await further European decisions to see how this will play out in the EU and its Member States.

4. The packaged broadcast of professional sports contests has become enormously lucrative, and both in the U.S. and the EU there have been challenges to the league-level control of broadcast licensing as well as exclusive deals with distributors. Is this an area where standard antitrust principles can apply, and shouldn't fans have the option to view games of their favorite team without having to buy a league package? Where does the debate on this stand?

This is an ongoing, vigorous debate in the U.S. courts today, and from a different angle in the EU as well. The U.S., in the wake of *NCAA* and *American Needle*, is focused primarily on the horizontal issue: should leagues be permitted to control the distribution and sale of broadcast rights (with less concern over exclusive, vertical distribution), while the EU appears perfectly willing to accept the justifications for venture coordination on broadcasts (essentially, investment incentives and the avoidance of free-riding), but is quite focused on the scope and duration of exclusivity.

From a purely analytical perspective, the whole debate is somewhat of a surprise to me (apart from there being so much money at stake). What we are talking about here is the venture product itself (live viewing of the games via broadcast), a venture “product” that no team can create by itself and never could. From this perspective, I always thought that *Bulls II* had it right (in dicta, suggesting single entity for broadcast arrangements), and it seemed to me that both *Dagher* and *American Needle* implicitly support that view — more so in *Dagher* as, for the broadcasts of league games, no team can act as a competitive firm outside of the venture itself and, quite unlike *American Needle*, teams have nothing to license (in contrast to IP, e.g. for hats) absent the cooperatively-created venture product.

The *Sunday Ticket* case in the Ninth Circuit, of course, takes a much different view, treating terms as if they create, or at least “own” in some fashion, the broadcast rights for all of their home games, independent of what the venture may allow contractually. Oddly, the case also treats the subject under the “quick look” rubric, which is ironic given *American Needle*'s discussion of likely procompetitive justifications, especially for those relating to coordination that is necessary. If the Supreme Court does not take the case (and it is entirely possible that it may), I would anticipate seeing the litigation working its way through the quick look doctrine (e.g. addressing free rider issues and investment incentives), and then on to the full rule of reason and all of its complexities (including the challenge of proving harm to consumers as well as constructing a “but for world”).

The assessment of collective broadcast restraints in the EU is a different beast. In the 2003 *UEFA Champions League* decision, the Commission accepted the notion that teams are not truly competitors for broadcast rights, and that a joint selling arrangement is essential to the league's existence. And the Commission acknowledged and accepted that the joint selling arrangement had provisions that prevented teams from selling media rights in parallel against the league. Indeed, as to these horizontal issues, the Commission's analysis highlights the analytical flexibility and enforcement discretion flexibility inherent in the EU's administrative system.

But that same discretion turned back on the leagues on the vertical issue of exclusivity. Hence, whereas in the U.S. (and Canada) long-term exclusive distribution of broadcast rights are not uncommon (sometimes even over 10 years, justified by investment incentives and the avoidance of free-riding), the EU in *UEFA* essentially created a presumptive 3-year limitation on exclusivity with restrictions on scope as well (e.g. non-live media rights and ancillary products). Member States have generally followed the same approach. The contrast with the U.S. highlights how quickly the EU can address a subject area once it has it in its sights and also get to resolution. That just is not possible in the U.S. common law system, which can be good or bad depending on who you are rooting for.

5. More recently, there is a lot of discussion surrounding the notion of “game data,” both the raw data (e.g. for gaming companies) and data used by third parties and developers for related products (video games, etc.) What type of antitrust issues arise in this setting and is there likely to be divergence across jurisdictions?

The question of how the antitrust laws should apply to sports-generated data is a very interesting one, but in large part because it does not neatly fit into any particular category. It also has an overlap with IP law, which raises its own challenges in the U.S and underscores some differences between U.S. and EU law and policy.

We knew, for example, that the Supreme Court in *American Needle* treated team-owned copyrights (for licensing) as the property of independent economic firms for purposes of Section 1 (leaving the merits aside). But we also know that some products do not exist at all independent of the collaboration or venture, which in turn (and as we already discussed) can have significant implications for single entity arguments, effects analyses, and justifications. I tend to think that sports-generated data falls on the side of products that can only be created collectively in the first instance and therefore that leagues (or amateur collaborations) as a venture can collectively decide how to use, distribute, or sell that data. But, of course, there are many types of data as well as sources, so much of the analyses may turn on specific facts.

It would also seem to be the case, at least in the U.S., that collaborations and leagues that generate the data through play would have no “duty to deal” with third parties, even if viewed as “essential” to some product that the third-party has in mind or exists. Absent an *Aspen*-like prior course of dealing, U.S. law simply won’t impose that duty; nor, highly likely would it resurrect the all but dead “essential facilities” doctrine. And this is true even if the venture is “leveraging” the possession of that data into related “markets.” Again, *Trinko* killed that theory for want of a statutory hook. Absent *per se* or “quick look” analysis (which is not for this), Section 1 requires “market power” in the relevant market, and Section 2 requires monopolization or a dangerous probability of obtaining one.

But, as with other areas we have discussed, EU enforcement and law is likely to take a different path — or at least practitioners should be ready for it. These same doctrines are alive and well at DG Comp and the Member States, and one can easily see the real potential for different outcomes, absent demonstrable justifications (e.g. free-riding concerns) for assessing sports data issues across the pond.



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