COMPETITION LAW POLICY AND SPORTS: INTERFACE AND CHALLENGES

- *Mohit Khandelwal & Purvi Nanda*

Governing and organizing bodies of sports have faced several challenges under the Competition Law in past few decades. This paper has mainly fixated upon the implications of Competition Law on sporting bodies and subsequent aspects. Primarily, addressing the legal debate regarding application of Competition Law in sports sector, there is an implicit overlap between the economic gains and self-regulation. Hence, the federations cannot be granted absolute immunity against the jurisdiction of Competition Law. Secondly, dealing with the implications of Competition Law upon restrictive rules of sporting bodies and restrictions imposed on the players, it is pointed out that there is need for clear demarcation between the governance and any commercial function of sports association. Thirdly, legitimacy of selling of collective rights by the league has been scrutinized. Ergo, there is a need to bring a specific regulation governing the conduct and functioning of these sports associations to bring uniformity and remove arbitrary action. Also, the adjudication of pending litigation before judicial forums like Competition Commission of India and Supreme Court of India dealing with these issues will result in emergence of a settled legal approach in our country.

I. INTRODUCTION

"Given the specificities of sport, the Competition Law must be applied with sufficient flexibility to take account of the unique features inherent in sports that distinguish it from other sectors."[1]

Increasing commercialization of sports in the form of Private Professional Leagues has attracted the application of Competition Law principles in the sports sector and thus, governing and organizing bodies of sports have faced several challenges under the Competition Law in past few decades. This paper has mainly fixated upon the implications for Competition Law on sporting bodies and subsequent aspects. Primarily, the paper has addressed the legal debate regarding

[1] Sh. Dhanraj Pillay & Ors v. Hockey India, 2013 Indlaw CCI 38.

application of Competition Law in sports sector and tried to touch upon other issues arising out of regulating and conducting sporting events. Furthermore, the paper has scrutinized in detail the need and validity of creating exception for sports associations. Henceforth, while construing the impugned aspects, the paper inertly highlights the extent of protection that Competition Law has allowed against the rapidly varying commercial scenario in the realm of sports. The second part shall shed light on the implications of Competition Law upon restrictive rules of sporting bodies and restrictions imposed on the players. This shall further redress the conflict of interest between the dual roles performed by the sporting associations. The third part of the paper has expounded the validity of various agreements entered into by a professional league with various other stakeholders in market including sponsors, broadcasters and merchandisers. The paper shall analyse the legitimacy of selling of collective rights by the league.

II. COMPETITION LAW IN SPORTS SECTOR

The broad scenario in the sports sector is that the federations, usually, disdain from state interference in the sports realm. Consequently, they observe a strong protectionist vision against interference of various legislations governing commercial entities [specifically under Anti-trust/Competition Laws].[2] Traditionally, the state itself has acknowledged the self-governing network of these bodies. In fact, for almost a century, the state recognized sports sector as socio-culture hub rather than commercial enterprise, leading to almost negligible intervention in the network. However, with rapidly changing commercial scenarios, the governing associations of sports sector could not remain immune from Anti-trust legislations. The question 'whether and to what extent sporting activities are subject to the Competition Law', arose in 1974 in *Walrave Case*[3]. The Court of Justice of European Union [hereinafter referred to as the **CJEU**] held that, keeping

[2] R. Parrish, *Sports Law and Policy in the European Union*, MANCHESTER UNIVERSITY PRESS (2003).

[3] Walrave and Koch v. Union Cycliste Internationale, (1974) ECR 1405, Case 36/74.

in mind the objectives of competition realm, sports activities are subject to Competition Law only to the extent that it constitutes an economic activity within the meaning of Article 2 of the European Union Treaty. This was reiterated in the *Bosman Case*[4] in 1995 and was followed in subsequent rulings.

However, the *Meca Medina Case*[5] became the turning point in the governance of sports sector. The CJEU ruled that "sport are subject to Community law in so far as it constitutes an economic activity. If those rules do not constitute restrictions on freedom of movement of persons and freedom to provide services because they concern questions of purely sporting interest, that fact does not mean that the sporting activity in question necessarily falls outside the scope of the Community rules on competition."[6]. The Court expounded the principle of 'inherent proportionality', or the *Proportionality Test* as the most appropriate mechanism for delineating anti-competitive practices in the field of sports. This test has been explained profoundly in subsequent chapters. Accordingly, in order to assess the applicability of the prohibitions laid down by the EC Competition Law, one should take into consideration the 'overall context' in which the rule was laid down; whether the restrictions imposed by the rule are 'inherent' in the pursuit of the objectives; and whether the rule is 'proportionate' in light of the objective pursued.[7]

[4] Union Royale Belge des Sociétés de Football Association v. Bosman, (1995) ECR I-4921, Case C-415/93.

[5] P. Meca-Medina & Majcen v. Commission, (2006) ECR I-6991, Case C-519/04.

[6] Deliège v. Ligue francophone de judo et disciplines associées e.o., (2000) ECR I-2549, Joined Cases C-51/96 and C-191/97, paras 36-38.

[7] MECA-MEDINA, *supra* note 5.

Furthermore, in the *MOTOE Case*[8] the CJEU emphasized that any activity consisting in offering goods or services on a given market is an economic activity.[9] Albeit, though the activity has sporting element, it shall be subjected to the rules of the Treaty[10] including those governing Competition Law[11].

During the course of development of Competition Law in the arena of sports, many new concepts emerged and evolved, both positively as well as negatively. The paper has subsequently discussed two important concepts: Specificity of Sports and Pyramid Structure.

SPORT EXCEPTION AND SPORT SPECIFICITY

As mentioned earlier, organization and governance of sporting event was not regarded as commercial/economic activity, thus, outside the ambit of Competition Law. For instance, in America the Major League Baseball is immune from the Sherman Antitrust Act[12]. This was held by the U. S. Supreme Court in *Federal Baseball Club* v. *National League*[13] for the first time in 1922. The Court unanimously ruled that Baseball is not inter-state commerce or business industry for purposes of the Sherman Act. This was reiterated in *Toolson* v. *New York Yankees*[14]. However, this time two judges dissented on the ground that "the League and its revenue sources had changed enough since 1922 and so the logic of 1922 ruling cannot be applied". The Baseball exception was

[8] Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio, [2008] All ER (D) 02, Case No. C49/07.

[9] Commission v. Italy, (1987) ECR 2599, Case 118/85, para 6; Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, (2000) ECR I-6451, Joined Cases C-180/98 to C-184/98, para 75.

[10] WALRAVE, *supra* note 3; BOSMAN, *supra* note 4.

[11] MECA-MEDINA, *supra* note 5, paras 22 and 28.

[12] Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. § 1 (1890).

[13] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

[14] Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

reaffirmed in *Flood* v. *Kuhn*[15] in 1972 by 5:3.[16] Nonetheless, the decision received enormous criticism and was even considered the most frequently criticized example of excessively strict 'stare decisis' that made an earlier mistake 'uncorrectable'[17]. Evidently, the 94 years old Baseball exception continues to sustain even after a massive condemnation.

However, with the development in Competition Law policy and rapidly changing commercial scenarios, sport exception has been replaced by 'sport specificity'. The applicability of Competition Law to sport activities has been elucidated in great detail in the Staff Working Document titled "The EU and Sport: Background and Context"[18]. Sports sector has certain specific characteristics; these characteristics are termed as the specificity of sports. While applying Competition Law on any action of a sports body the specificity of sports shall be considered, however no general exception shall be provided to any such body as absolute immunity from Competition Law. The White Paper on Sport[19] has enunciated two approaches regarding the specificity. They are:

- The specificity of sporting activities and of sporting rules: There are separate competitions for men and women, for instance. Moreover, the number of participants is also limited. A competitive balance between the member clubs is maintained and the uncertainty of results is ensured;

[15] Flood v. Kuhn, 407 U.S. 258 (1972).

[16] *Id.*, Mr. Justice Douglas and Mr. Justice Brennan, dissenting, stated that "an industry so dependent on radio and television as is baseball and gleaning vast interstate revenues (see H.R.Rep. No. 2002, 82d Cong., 2d Sess., 4, 5 (1952)) would be hard put today to say with the Court in the Federal Baseball Club case that baseball was only a local exhibition, not trade or commerce. Baseball is today big business that is packaged with beer, with broadcasting, and with other industries." Page 407 U. S. 287.

[17] Eskridge, William, Jr., *Overruling Statutory Precedent*, GEORGETOWN LAW JOURNAL 76: 1361 (1988).

[18] Commission Staff Working Document, Brussels, European Commission, SEC (2007) 1473.

[19] White Paper on sport, Brussels, European Commission, 2007 (COM (2007) 391 final).

- The specificity of the sport structure: There are diversity and variations in the structure of sports organisations, be it the pyramid structure of competitions from grassroots to elite level or the principle of ensuring a single sports-federation for each sport.

III. PYRAMID STRUCTURE AND SPORT GOVERNANCE

What is Pyramid Structure?

Pyramid structure implies an organizational structure comprising of a single national sport association per sport and Member State, operating under a single Continental/National Federation. A single Worldwide Federation is at the top.

Significance of Pyramid Structure

For successful development of any sport the Pyramid Structure is significant for the following reasons.

(i) It ensures sincere implementation of uniform rules, schedule for competitions and other special requirements of sports.[20]

(ii) It is imperative for organization of national and selection of athletes and teams for international competitions.[21]

(iii) Pyramid structure assures apt enforcement of rules ensuring systematic organization of international competitions which is a valuable aspect of sport.[22]

[20] MOTOE, *supra* note 9.

[21] WHITE PAPER, *supra* note 20.

[22] WALRAVE, *supra* note 3.

(iv) It is required for administration of rules protecting integrity of the sport. This maintains the confidence of general public in sports governance.[23]

Disservice aspects of Pyramid Structure

There are certain potential competition concerns that arise out of the pyramid structure. According to the structure, the organizations devoted to systematic development of the sport, are responsible for regulating the sport, along with being the commercial beneficiaries of sport. With recent escalation in the revenues, a new dimension of pyramid structure has loomed. Through cases like *Bosman*, the concerns are quite evident that the structure can be operated to engage into acts like hindering the free movements of players[24], discrimination[25] and barring the entry of the rival leagues[26], which may violate the Competition Laws. As a result, the structure, though ostensibly established for augmenting efficiency in sports sector, has the potential to result in anti-competitive practices.

Henceforth, although the sports bodies shall have the right of self-regulation with regard to issues which are 'purely sporting', for instance, selection of teams, formulation of rules of the sport etc., but the Competition Law has jurisdiction over the commercial activities in which they engage. Thus, since there is an implicit overlapping between the economic gains and self-regulation, the federations cannot be granted absolute immunity against the applicability of Competition Laws.

Continuing Battle field: Competition Authority v/s Sports Regulatory Body

[23] Surinder Singh Barmi v. Board of Control for Cricket in India, 2013 Indlaw CCI 10.

[24] BOSMAN *supra* note 4.

[25] DONÀ, *supra* note 6.

[26] BCCI, *supra* note 24.

Even after such clear demarcation of legal position on this issue there has been continuing battle between the authorities regulating anti-competitive practices and Sports Federations. Recently, on 27th September 2016, European Commission sent a Statement of Objections[27] to the International Skating Union, sole body recognized by the International Olympic Committee (IOC) to administer the sports of figure skating and speed skating on ice, expressing its concerns over the anti-competitive nature of ISU Eligibility Rules. According to Commission, such rules imposes life-time ban on skaters if they participate in international speed skating events that are not approved by the ISU. The rules restrict the athletes' commercial freedom unduly and prevent new entrants from organizing alternative international speed skating events because they are unable to attract top athletes. Thus, it results in violation of Article 101 and 102 of TFEU which prohibits anti-competitive agreements and practices.

However, in the immediate reply issued by ISU it has tried to justify its actions under the shadow of long recognized autonomous governance structure of sport being essential to the protection of the integrity, safety and health in sport and thus, held such allegations to be unfounded. ISU has regarded the act of Commission to be against the interest of the sport and stated that "it appears then that the European Commission has failed to take adequate account of the importance of the legitimate objectives pursued by the ISU's eligibility rules. A neoliberal and deregulated approach to sport could destroy the Olympic values underpinning sport. The ISU will show that the specific nature of sports governance as applied in its rules is perfectly compliant with EU Competition Law".[28]

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[27] Press Release IP/16/3201, *Commission sends Statement of Objections to International Skating Union on its eligibility rules,* EUROPEAN UNION, (September 27, 2016) http://europa.eu/rapid/press-release_IP-16-3201_en.htm.

[28] *ISU believes that the European Commission's antitrust allegations are unfounded*, INTERNATIONAL SKATING UNION, (September 27, 2016) http://www.isu.org/en/news-and-events/news/2016/09/ec-antitrust-allegations-are-unfounded.

It is pertinent to mention here that on 5th October, 2015 the Commission formally initiated Antitrust investigation[29] into the International Skating Union (ISU) Eligibility Rules on complaint by two Dutch ice speed skaters who wanted to participate in a new speed skating event in Dubai. However, ISU decided to un-sanction by regarding it closely connected to betting, and threatened anyone participating to become ineligible for ISU activities and competitions.

Similar issued were also heard by Belgian Competition Authority (BCA) in 2015 in the dispute between Global Champions League (GCL) and International Equestrian Federation (FEI), the governing body for equestrian which also organizes its own commercial league. Here FEI, having exclusive right to approve any International equestrian event, denied sanction to GCL's new league. However BCA rejected the FEI's application seeking interim injunction and permitted organization of GCL's new league, till the case is finally decided.[30]

Thus, irrespective of various categorical ruling by various commissions and authorities, the Sports regulating authorities continue using their dominant position as a sole regulator to avoid competition in the relevant market of organizing private professional leagues. This aspect to restrictive policy and conflicting interest of spots associations causing severe damage to interest of other organizers and players have been discussed in detail in the next section.

[29] *European Commission opens investigation into ISU eligibility rules*, EU OFFICE, (November 4, 2015) http://www.euoffice.eurolympic.org/blog/european-commission-opens-investigation-isu-eligibility-rules.

[30] Alex Haffner and Krish Mistry, *The Law On Banning Athletes From Competing In Rival Sports Leagues*, LAW IN SPORT, (OCTOBER 5, 2016) http://www.lawinsport.com/articles/competition-law/item/the-law-on-banning-athletes-from-competing-in-rival-sports-leagues?category_id=125.

IV. RESTRICTIVE POLICIES OF SPORTING BODIES AND CONFLICT OF INTEREST

The International/National Sports Association responsible for regulating and governing that particular sport holds a monopolistic control and thus, is a dominant enterprise. This is because of the "sporting exception" given to it in the form of pyramidal structure. However, such associations try to use, rather abuse their dominance, in the field of organizing any sporting event by creating hurdles for private organization/persons organizing private professional league. It is often contended that sports association fetters the participation of players in leagues organized by persons other than these associations[31] by putting "solidarity clause"/"Non-compete clause" or Code of Conduct Agreement specifying 'non-participation in disapproved/unsanctioned tournament' in the agreements entered between players of a particular sport and the sport regulating body.[32]

The issue regarding the validity of such clauses has been challenged before many judicial forums across the world and has received varied interpretations and adjudications. The paper shall first delineate the arguments presented by both the parties and then analyse their validity on the pedestal of Competition Law policy.

A. Arguments in favor of Sports Association

- Restrictions imposed on players fall within the power conferred on the sports association as the regulator of sport. It also forms the part of sporting exception and thus, shall not be governed by Competition Law policy.[33]

[31] India Times, *150 Indian players sign up for World Series Hockey*, (Nov. 18, 2011) http://www.indiatimes.com/hockey/150-indian-players-sign-up-for-world-series-hockey-6599.html

[32] Greig and Others v. Insole and Others, [1978] 1 W.L.R. 302.

[33] Hendry v. World Professional Billiards & Snooker Association Ltd. (WPBSA), [2001] All ER (D) 71.

- These restrictions imposed on players are directed toward uniform application of rules protecting the sport and stakeholders, enforcing anti-doping rules, preventing integrity of sports in a fair and transparent manner, organizing and conducting the sporting calendar in order to promote sport and to prefer national interest over the commercial interest of players and private enterprise.

B. Arguments against Sports Association

- They use their dominance as regulator of sports to deny market access to other players in market form organizing any private league by imposing unreasonable conditions on players in their contract which violates Section 4(2) (c) of the Indian Competition Act, 2002 or similar provisions under other Competition Law regime.
- They use their dominance in regulation of sports to enter in to the market of organization of private professional league which is violative of Section 4(2)(e) of the Competition Act, 2002 or similar provisions.
- Unreasonable restraint is imposed on players which causes hardships on them and deny them right to earn livelihood and restrain their freedom to trade, i.e., violate the constitutional provisions.

C. Objective analysis of the arguments

Judicial forums, across the world, have dealt with these issues by taking into consideration principles under Competition Law and also gave importance to specific nature of sports sector. European Grand Chambers while dealing with the similar issue held that:

> "*Not every agreement between undertakings or every decision of an association 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]. For the purposes of application of that provision to a particular case, account must first of all 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 has then to be*

considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."[34]

Therefore the validity of such clauses in player's agreement can be checked with the help of two tests, i.e., Rule of Reason test and Proportionality test.

Rule of reason test

Vertical restraints are not per se illegal and subject to "Rule of Reason" approach, which reflects the fact that such restrain are not always harmful and may actually be beneficial in particular market structure circumstances [35]. Thus, the reasons behind imposing such conditions have to be taken into consideration. If restraint or conditions are imposed for the betterment of game and welfare then such restrains may be allowed[36]. Howbeit, the idea behind restraint, directly or indirectly, is to create hurdle in the success of rival league/tournaments or to promote its own league over others, then such restraint cannot be held to be valid.[37]

Proportionality Test

Justifying certain actions on the ground to achieve certain object cannot be sufficient. Sports

Association must show that its conduct is objectively necessary, indispensable and proportionate to the goal to promote the game.[38] Unreasonable restrain should not be imposed on the rights of the players and such conduct must be determined on the basis of factors external to the sports

[34] MECA-MEDINA, *supra* note 5.

[35] Tata Engg. & Locomotive Co. Ltd. v. Registrar of Restrictive Trade Agreements, AIR 1977 SC 973.

[36] MECA-MEDINA, *supra* note 5.

[37] WPBSA, *supra* note 34.

[38] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Brussels, European Commission, (2009/C 45/02).

body.[39]

V. NEGATIVE COVENANT IN CONTRACTS: INTERFACE BETWEEN CONTRACT AND COMPETITION LAW

Let us now understand the general legal framework regarding the validity of negative covenants or non-compete clause in contractual obligations. Negative covenants entered between parties which subsist till the period of continuance of service have been held to be valid and legally enforceable under the contract law.[40] However, if the restraint subsists even after termination of contract then such restraint is excessive and held to be invalid.[41] Therefore, under the Contract Law, restrain on movement of players by the Sports Association may be justified by following the same principle. The issue regarding validity of Non-compete Clause in general contracts has been specifically settled by the Competition Commission of India. Yet, it shall be difficult to justify such clause, specifically in service sector, under Sections 3 and 4 of Competition Act because of its potential to cause appreciable adverse effect on competition. Thus, these negative covenants in the agreement between players and association shall be invalidated under Competition Law, if not contractual laws.

Ergo, the validity of restrictive clause in the agreement depends upon object and purpose which is to be achieved through inception of such clauses. However, entrance of sports regulatory body in the field of organization of professional leagues has changed the object behind imposing such fetters on the movement of players.

[39] Hilti v. Commission, (1991) ECR II-1439; Tetra Pak International v. Commission (Tetra Pak II), (1994) ECR II-755.

[40] Superintendence Company of India (P) Ltd. v. Krishan Murgai, AIR 1980 SC 1717.

[41] Percept D'Markr (India) Pvt. Ltd. v. Zaheer Khan and Anr., AIR 2006 SC 3426.

A. *Effect of Regulatory Body performing commercial function*

Ever since the high commercial viability of sporting events has been recognized, the organization of commercial league or private professional league has become the common practice as it brings enormous funds in coffers of these regulatory bodies. However, at times, it creates "conflict of interest" between the twin roles of these bodies and thus raises potential competition concerns in the mind of the Commission.[42]

It is very pertinent to be considered that because of its regulatory dominance, the sports association shall always be in an advantageous position as compared to its other competitors in the market of 'organization of private professional league'. It is pertinent to consider the following observation:

> "…*a system of undistorted competition, such as that provided for by the treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators. To entrust a legal person such as ELPA, the National Association for Motorcycling in Greece, which itself organizes and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorization to organize such events, is tantamount de facto to conferring upon it the power to designate the persons authorized to organize those events and to set the conditions in which those events are organized, thereby placing that entity at an obvious advantage over its competitors. Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market…*"[43]

Thus, the argument forwarded reading the "conflict of interest" and "inherent dominance" holds a substantial premise and has to be taken into consideration while adjudicating upon the validity of actions of sports association. Further, this conflict of interest has often resulted in imposing

[42] DHANRAJ, *supra* note 1.

[43] MOTOE, *supra* note 9.

excessive restrictions on players, than what is required for betterment of game, by the associations, just to secure and subsist their dominance in the commercial market of sports.

B. Need for Disintegration

The aforementioned issue raises serious concerns regarding the fairness in the conduct of these associations. Dual role of these sports associations as regulator as well as organizer always keeps alive the possibility of transgression of the lines. Strong reliance is placed on the observation made by CCI in *Dhanraj Pillay & Ors.* v. *M/s Hockey India*[44] which states that:

> *"The scope afforded for restricting competition in sports is a strong possibility when the "power to sanction" an event and the "organization of the event" is vested with a single entity namely the designated National Association. Duality of roles assigned or appropriated by the designated National Association also raises concerns about the possible violation of the Competition Act, 2002.*

European Union also acknowledged the need for clear demarcation between the governance and any commercial function of sports association.[45] Such demarcation may be achieved by the allocation of the various roles to different committees or bodies. In such a case, each committee or body should have clearly defined responsibilities and reporting

forwarded by recent Report of the R. M. Lodha Committee regarding special and separate body for IPL.[46]

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[44] DHANRAJ, *supra* note 1.

[45] Press Release IP/01/120, *Commission Welcomes progress towards resolving the long- running FIA/Formula One Case,* EUROPEAN UNION, (January 26, 2001) http://europa.eu/rapid/press-release_IP-01-120_en.htm.

[46] Justice R. M. Lodha Committee, Supreme Court of India, *Getting off the Mark*, FINAL REPORT VOLUME-1 (2016), page 29.

VI. LEAGUE WIDE LICENSING AND MERCHANDISING AGREEMENT

This part shall be focusing on two aspects. First, whether the league can enter into agreement viz. merchandisers, sponsors and other licensing agreements, on the behalf of all its franchisee. Second, whether that league will be considered as single enterprise (with all its franchisee as its sub-enterprise) within the definition of enterprise/undertaking under the Competition Law.

A. Single entity defense of league

In all major leagues organized round the globe it is often seen that league, on the behalf of all its franchisee, appoints a merchandiser for whole league by entering into collective agreements with all its franchisee in this regard or by creating an intellectual property right trust.[47] However, this polling of rights by all franchisee or selling of collective rights has been intermittently brought into question as it denies access to other merchandisers in the market and is exclusionary in nature.

The most pertinent question to address this issue has been regarding the appropriate delineation of relevant market, i.e., whether a league in itself constitute a separate market (with all teams being competitors) or should the market be a broad entertainment market. Supreme Court of United States in the case of *Cooperweld* v. *Independence Tube*[48] held that for the purpose of single entity it is essential that the parent and its wholly owned subsidiary have a complete unity of interest or a common design. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousness, but one. Therefore, can the teams or franchisee be considered as subsidiary of the league?

In *National Football League et al* v. *North American Soccer League et al*[49], Justice Rehnquist of the United States Supreme Court opined (dissenting) that National Football League should be considered as

[47] Chicago Professional Sports Ltd. Partnership v. National Basketball Assn., 95 F.3d 593 (7th Cir. 1996).

[48] Copperweld v. Independence Tube, 467 U.S. 752 (1984).

[49] National Football League et al v. North American Soccer League et al, 459 U.S. 1074 (1982).

a single economic enterprise in the market of sports entertainment as it has to compete with other enterprises existing in this market. Thus, the conduct of NFL in regulating its enterprise should not be regarded as violation of Sherman Act as the pro-competitive effect because of such restraint outweighs anti-competitive effect.

Howbeit, each of the franchisee is a substantial, independently owned, independently managed business, whose 'general corporate actions are guided or determined by separate corporate consciousness' and whose 'objectives are not common'. They compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel.[50]

This issue has reached to a conclusive end through the decision in *American Needle* v. *NFL*[51], wherein the Supreme Court of United States has held that the National Football League is not a single entity but rather a joint venture consisting of thirty-two separate business enterprises (the individual teams), and, thus, it is subject to antitrust analysis under Section I of the Sherman Act (which deals with anti- competitive practices).

B. Broadcasting Rights: Exception to rule

Over the years the licensing rights for telecast of a professional league has been dealt in a unique manner under the Antitrust Law. In the case of *United States* v. *National Football*[52], district court in USA held that if all teams pool their IP rights and broadcasting rights to a particular broadcaster, on the behalf of whole league, then such act shall be collusive and thus, anti-competitive in nature. In response to this judgment the Congress enacted the Sports Broadcasting Act, 1961 which enabled teams participating in professional leagues to collectively issue broadcasting rights of their

[50] *Brown v. Pro Football, Inc.,* 518 U. S. 231, 249.

[51] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010).

[52] United States v. National Football League, 842 F.2d 1335.

league and to share the revenue from the pooled sale of those rights and granted them exemption under Competition Law.[53] According to the report prepared by House Committee on Judiciary, allowing teams to collectively sell their telecast rights shall help in promoting public interest and shall help in maintaining parity between teams, therefore minor exemption under Antitrust law should be granted.[54]

Further, in the *UEFA Championship Case*[55], European Court of Justice held that "the joint selling of the media rights to the UEFA Champions League by UEFA is unlikely to eliminate competition in respect of a substantial part of the media rights in question. It is therefore appropriate to grant an exemption pursuant to Article 81(3) of the Treaty and Article 53 (3) of the EEA Agreement, subject to a condition". The European Court accepted the collective selling of media rights by teams participating in the league. Consequently, unlike other agreements entered by the sports league, as discussed above, clear exemption has been granted to collective selling of media rights.

Spanish Government's Royal Decree-Law 05/2015

Spanish Government has recently issued a Royal Decree which mandates collective selling of Broadcasting and Media Rights of professional football league.[56] According to this decree, though the football clubs will continue to own media rights however they are obliged to assign their right to common pool managed by the organizing body of the league (i.e. Spanish Football league and Spanish Football Federation). These bodies shall be ultimately responsible for negotiating and

[53] Sports Broadcasting Act, 15 U.S.C. § 1291 (1961).

[54] U.S. Congress, House Committee on the Judiciary, *Telecasting of Professional Sports Contests,* H. REPT. 1178, AT 3 (1961).

[55] COMP/C.2-37.398, *Joint Selling of the commercial rights of the UEFA Championship League*, EUROPEAN COMMISSION (2003/778/EC).

[56] COMPETITION/MEDIA LAW ALERT, *New Trade Regulation Applicable to the Marketing of Football Broadcasting Rights. A Competitive Outcome?*, CALLOL COCA, (June, 2015), http://callolcoca.com/wp-content/uploads/2015/05/JUNE.pdf

granting media rights for the entire league. However, under Article 4 appropriate measures have been incorporated to control anti-competitive practices while allotting such rights which includes fair and equitable distribution of rights, allotment of rights in packages (whether on exclusive or non- exclusive basis), fixing maximum duration of allotment which shall be 3 years and other such measures.[57] Furthermore, the Decree specifically mentions the criteria of division of funds, received though collective allotment of media rights, amongst all stakeholders which on one hand ensures the commercial interest of clubs and on the other hand safeguards appropriate use of funds for development of the game.[58] The underlying reason for such response from the government was the increasing disparity and confusion amongst the clubs of same league due to individual selling model of media rights. Thus, there arose a need to promote competition in the market for the 'pay-per-view' television.[59]

The Sports Broadcast Signals (Mandatory Sharing with Prasar Bharati) Act, 2007

Unlike above mentioned statutory provisions, there exists no specific legal framework in India which permits or restricts league wise allotment of broadcasting rights. However in order to secure the interest of general public and to provide access of sports viewership to large public, Government of India has enacted The Sports Broadcast Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 which mandates all owners of broadcasting rights of sporting event (Both Radio

[57] OSKAR VAN MAREN, *The Spanish TV Rights Distribution System after the Royal Decree: An Introduction. By Luis Torres*, ASSER INTERNATIONAL SPORTS LAW BLOG, (May 27, 2015), http://www.asser.nl/SportsLaw/Blog/post/the-spanish-tv-rights-distribution-system-after-the-royal-decree-an-introduction-by-luis-torres.

[58] Article 6 mandates the specific allotment of the funds, generated in common pool, to certain bodies engaged in development and promotion of game which includes funds for development of amateur football (1%), aid to women football clubs and union of players (0.5%), to Spanish Government for promotion of sports in Spain etc.

[59] RD 5/2015, Explanatory Memorandum.

and Television) to simultaneously share live broadcasting signal, without advertisement[60], with Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified.[61]

This exception provided in broadcasting rights may be based on circumstance that the actual beneficiary of the wide broadcasting a sporting event is the general public watching the game and thus promote public welfare. If each team is allowed to enter into its own broadcasting agreement then that shall restrict the scope of telecast of the game. However, on the other hand the ultimate beneficiary of the merchandising agreement is the merchandiser himself (whose brand get promoted through the league) but no direct benefit is availed to general public. Thus, no such exception is required in the merchandising agreement, which is a purely commercial venture.

C. *Implications*

If a league is not allowed to take the defense of single economic entity in the broader entertainment market then, its actions has to surpass the challenges faced under the Competition Law regime. Its actions can be called into question in the following manner:

a) Agreement between league and all its franchisee is ultimately an agreement between all its franchisee to collectively allow the league to sell their merchandising rights to a single merchandiser, for the whole league. If the league is not a single entity, then such agreement is the horizontal agreement entered into between the competitors in the market (i.e. all teams or franchisee). Such agreement is collusive in nature (or carter)[62] and is affecting the

[60] Star Sports India Pvt. Ltd. v. Prasar Bharati & Ors., Civil Appeal No. 5252 of 2016, SC Held that term "without advertisement" means that such broadcasting signals are to be without advertisements, whether it is of the content rights owner, content holder or that of television or radio broadcasting service provider.

[61] Competition Act, 2002, sec. 3 [Act 12 of 2003].

[62] PAUL SAMUELSON & WILLIAM NORDHAUS, ECONOMICS 579 (13th ed., 1989).

supply of goods in the market by allotting rights only to single merchandiser. The Agreement shall face a challenge under Section 3(1) and 3(3) of The Competition Act, 2002 in India, Section 1 Sherman Act in USA and Article 101 in TFEU. The horizontal agreements are pre se illegal and thus cannot be allowed to sustain.

b) The second approach is a lenient approach, which takes into consideration the specific circumstances prevailing in the sports sector by recognizing that the interest in 'maintaining a competitive balance' among athletic teams is 'legitimate and important'. Thus, this approach considers the agreement between league and franchisee as a vertical agreement, an agreement entered by enterprise at different level of production[63] and is not per se illegal but based on rule of reason, i.e., its pro-competitive can effect outweighs the anti-competitive affect caused due to such agreement.

What is generally followed is the second approach (as also followed in *American Needle Case*[64]) by several courts. Accordingly, the paper shall try to outline all probable pro-competitive effects and anti-competitive effects in collective allocation of merchandising rights to bring more clarity and conclusiveness to this issue.

Pro- competitive Effect

The probable pro-competitive effects of collective selling of merchandising rights by the league are mentioned hereunder:

a) Collective effort Protection

For the purpose of promotion of a league in the market collective effort of all franchisee or teams is required in this direction. However, if teams are allowed to enter into merchandising agreement

[63] Competition Act, 2002, sec. 3(4) [Act 12 of 2003].

[64] American Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2206-07 (2010).

at their own then such team shall focus on increasing its own revenue in comparison to other teams. Thus, teams shall get engaged in competition with each other in market (instead of competing on field) rather than competing with other leagues and promoting its own league. This shall ultimately result in disparity amongst the teams of same league and lower the value of the league.[65]

b) Fair distribution of revenue

If merchandising rights are sold collectively by the league on the behalf of all its franchisee then the revenue generated by such transfer of IP rights shall be equally distributed amongst all the franchisee in that league. Such distribution prevents the excessive accumulation of wealth in the hands of few teams which further brings all teams on equal footing[66] in terms of their capacity to purchase players and hire others managerial personal in their squad thus, promoting healthy competition amongst the teams. Further, since all the teams are equally responsible for promotion of the league, the money generated by the league should also be equally shared.[67]

c) Best promoter of the league

According to this argument, by controlling the merchandising rights, a league can ensure that no second rated merchandising company gets attached to it. Good merchandiser and sponsor brings good name to the league and improves its position in the market in comparison to its competitors. At times, individual teams may get good incentives in allotting merchandising rights to the second

[65] Brandon L. Grusd, *The Antitrust Implications Of Professional Sports' League-Wide Licensing And Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1 (1999).

[66] JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS (1992).

[67] Jeffrey A. Rosenthal, *The Football Answer to the Baseball Problem: Can Revenue Sharing Work?*, 5 SETON HALL J. SPORTS L. 419, 428-432 (1995).

grand merchandiser. However, it may result in reduction in the popularity of the league in comparison to its competitors.

Anti- Competitive Effect

a) No incentives to consistent performer

If all teams are given equal share in the revenue earned by the league through merchandising rights then there is no incentive for the team which performs exceptionally well and puts up good show for the general public. Under the collective merchandising agreement the team does not reap any benefit from their on-field success which discourages their effort.

b) Endorses Free Riding

The revenue sharing aspect of the league also exacerbates free-riding by smaller market teams. In the merchandising market, consumers buy a disproportionately large amount of merchandise licensed with the marks of popular or larger market teams. Nevertheless, all teams share equally in this income regardless of the amount of merchandise that was actually sold with any particular team. Under this system, smaller market teams have no incentive to market their merchandise or the league product because they receive, large amount of their merchandise and sponsorship revenue from the other teams. Thus, collective contract exacerbates free riding problem. The leagues wide plan actually creates disparity in competitiveness among teams decreasing the leagues overall value to consumers.

c) Right of individual team

Individual teams are better able to assess their local demographics, consumers, and sponsorship bases. This informational advantage is useful when teams are seeking sponsors or seeking to license their marks. The league cannot have better information about the local team than that local team itself. It is rather ironic that in other areas the league has chosen to use a decentralized approach,

but in the merchandising realm they have not, in spite of the advantages local teams would have in this area. Individual teams have on many occasions raised voices on restriction imposed on them to not to enter into their own merchandising agreement. In 1996, Jerry Jones, the owner of the Dallas Cowboys brought an antitrust suit against NFLP, arguing that the grant of exclusive rights to NFL was a 'classic price-fixing cartel' that that prevented 'free competition' in the professional football sponsorship and merchandise markets.[68]

D. Analysis of the aforementioned reasons

From the above mentioned following factors can be deduced:

- Individual allotment of merchandising rights will not hamper interest of league. Instead, it will promote healthy competition amongst all the teams to increase their efficiency in order to secure best merchandisers for their team. This will bring more money in the league and improve its stand in comparison to other leagues.
- In any league, main interest of any franchisee is not to promote the league but to secure the interest of its own. However, franchisee can only gain popularity and money if it forms a part of popular and successful league. Therefore, franchisee will have to promote its league.
- The aspect of fair or equal distribution of revenue not only promotes the problem of free riding but also reduces the morale of good performing because the benefits received by them are not proportionate to their efforts. Thus, this defense cannot be taken by the league.

[68] Dallas Cowboys Football Club v. Nat'I Football League Trust, No. 95 Civ. 9426 (S.D.N.Y. filed Dec. 12, 1996); *New York Yankees v. Major League Baseball Enterprises,* No. 97-1153-civ-T-25B (M.D. Fla. filed May 6, 1997).

- If large number of merchandisers gets attached to a league then that shall enhance the market of the league and bring down the prices of the products due to increased competition. This shall promote consumer interest.

Henceforth, by taking into consideration the above mentioned points, it can be concluded that the pro-competitive effect caused due to such pooling of rights shall fail to outweigh the anti-competitive effect of such action. Therefore, the arguments of league are unconvincing.

VII. CONCLUSION

This paper has tried to address the growing concerns over the role of the sports regulatory authorities and the possible approaches to tackle such developments. Emergence of Competition Law in the sports sector has challenged the application of this commercial regulation in the arena of partly commercial enterprises which have aspects like public welfare, public function gripped into it. Thus, there is a need to bring a specific regulation governing the conduct and functioning of these sports associations to bring uniformity and remove arbitrary action. Also, the adjudication of pending litigation before judicial forums like Competition Commission of India and Supreme Court of India dealing with these issues will result in emergence of a settled legal approach in our country.