Exploring the Intersection of Sports and Competition Law in South Africa: Lessons From the EU and the US

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SUMMARY

The South African sports industry is a dynamic sector that is constantly growing. This growth is associated with the commercialisation of the industry in different sporting codes. However, the growth has not been smooth owing to a lack of concise and responsive legislative frameworks, which has resulted in anti-competitive practices such as abuse of dominance and restrictive and collusive practices that may hinder growth of the industry. There is an opportunity for competition law to intervene to regulate anti-competitive practices that may arise in sports. The article explores examples of anti-competitive behaviour in sports and how competition authorities should apply competition law in sports. The article also examines selected judgments that showcase the intersection of sports and competition law in South Africa and other jurisdictions such as the European Union (EU) and the United States (US). The emphasis is placed on these jurisdictions since, at the time of writing this article, there was no precedent for this discourse in South Africa. The article concludes by suggesting that South Africa may draw some lessons from jurisdictions like the EU and the US.

KEYWORDS: Sports, comparative competition law, and unfair/anti-competitive practices

1 INTRODUCTION

The South African sports industry is a dynamic sector that is constantly growing.[1] Generally, sports are associated with national cultures.[2] It is also

[1] Ndlovu "South Africa's Vibrant Sports Tourism: A Field of Dreams and Opportunities" (12 August 2023) https://www.southafrica.net/gl/en/trade/press/south-africas-vibrant-sports-tourism-a-field-of-dreams-and-opportunities (accessed 2024-04-25); Allie "An in-Depth Look at the South African Sport Industry" (06 April 2023) https://uwc.campuslifestyle.co.za/an-in-depth-look-at-the-south-african-sport-industry/ (accessed 2024-05-20); Sports and Recreation South Africa "Draft updated White Paper on Sports and Recreation" (June 2009) http://www.srsa.gov.za/MediaLib/Home/DocumentLibrary.pdf (accessed 2024-04-17) 29.

viewed as a significant contributing factor towards social development. It is undisputed that the sports industry has positively affected the economy in many ways. First, it has created employment opportunities for many people.[3] Secondly, the sports industry plays a major role in the tourism industry.[4] Accordingly, an increasing number of popular sports clubs underline the view that sports are no longer simply a cultural spectacle but are big business.[5]

The evolution of sport into the business and/or economic sector ignited many unfair and/or anti-competitive practices within the industry. Although the practices may be seen as "normal" in certain instances, these practices would not pass competition-law scrutiny.[6] One instance pertains to rules for sports leagues and competitions that benefit certain clubs and/or put a few clubs at an advantage over others.[7] Therefore, Munyai suggests that if other clubs of equal status in the same league are placed at a competitive disadvantage without justifiable reasons, this practice, in the eyes of the Competition Act,[8] could amount to abuse of dominance and/or prohibited and restrictive practices.[9]

Well-established clubs want to sustain and maintain their dominance in the market. This is motivated by an eagerness to gain more sponsorship.[10] Furthermore, these clubs aim to enjoy a significant proportion of the market share,[11] which in turn gives them the financial power to attract players and coaches from other clubs. All this puts the big clubs at a competitive advantage that may be used in ways that amount to abuse of dominance

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2 Dodo and Ntombana "Social Policy Paradigms, Education and Development Through Sports: The Implications for South Africa" 2022 30(3) *Administratio Publica* 44; cited Hartmann and Kwauk "Sport and Development: An Overview, Critique, and Reconstruction" 2011 35(3) *Journal of Sport and Society* 284–305.

3 Raharja, Kusmaedi, Ma'Mun and Berliana "Sports Facilities Create Jobs? The Economic Impact of the Presence of Sports Facilities" 2021 6(1) *JUARA: Journal Olahraga* 110.

4 Lohana, Imran, Harouche, Sadia and Rehman "Impact of Environment, Culture, and Sports Tourism on the Economy: A Mediation-Moderation Model" 2023 36(3) *Economic Research-Ekonomska Istraživanja* 2; Hemmonsbey "Strategic Conceptualisation of the South African Sports Tourism Sector's Response to the Covid-19 Pandemic" 2021 36(3) *African Journal of Hospitality, Tourism and Leisure* 55.

5 Stauff "A Culture of Competition: Sport's Historical Contribution to Datafication" 2018 21(2) *TMG Journal for Media* 31; Malik "Role of Competition Law in Sports" 2020 8 *Pen Acclaims* 1.

6 Practices like buyer power (this is common in well-established teams like Sundowns), collusive agreement (prohibited and restrictive agreements). The latter may be associated with price fixing by agents, collusive television markets and restrictive sports employment contracts.

7 Munyai "Why It's Time Competition Law Was Applied to Sport in South Africa" (14 November 2017) https://theconversation.com/why-its-time-competition-law-was-applied-to-sport-in-south-africa-86782#:~:text=Applying%20competition%20law%20to%20sport,and%20regions%20in%20the%20world (accessed 2024-04-23).

8 89 of 1998.

9 Munyai https://theconversation.com/why-its-time-competition-law-was-applied-to-sport-in-south-africa-86782#:~:text=Applying%20competition%20law%20to%20sport,and%20regions%20in%20the%20world. Also see ss 4, 5 and 8 of the Competition Act.

10 Lang and Zhang *Emerging Trends in Sports Sponsorship and Branding* (2024) 2.

11 See the formula to calculate the market share of a firm in s 7 of the Competition Act.

when viewed in the context of competition law.[12] Gardiner and Welch describe the ability to attract players and coaches from other clubs as "tapping up".[13] Tapping up in football is "an event when an attempt is made to persuade a player under contract with a team to join another team, without the official consent of the current team".[14]

This article explores examples of anti-competitive behaviour in the South African sports industry. It further examines how the EU and the US interpret and apply competition law in sports. In this regard, the EU and the US serve as comparators owing to their similar competition-law statutes and competition policy.[15] Furthermore, both comparators have adjudicated on sports disputes that have raised competition issues.[16] Studying the successes and failures of the EU and the US in enforcing competition law in sports can provide valuable insights and recommendations for South Africa's competition authorities and policymakers.

This article is divided into six sections. Following this brief introduction, the second section provides an overview of competition law *vis-à-vis* sports in South Africa. Under heading 3, this article considers selected anti-competitive practices in sports. Heading 4 discusses recent judicial determinations on competition law *vis-à-vis* sports in the EU and the US as comparators. Heading 5 highlights important lessons that South Africa can draw from the comparators, and heading 6 offers a conclusion.

2 AN OVERVIEW OF SPORTS AND COMPETITION LAW: A SOUTH AFRICAN PERSPECTIVE

2 1 The scope of the Competition Act 89 of 1998

The Competition Act applies to all economic activity within, or having an effect within, the Republic.[17] However, Sutherland and Kemp submit that South African competition authorities have yet to provide a conclusive test

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12 However, market share results not only in abuse of dominance but may also lead to the contravention of s 4(2)–(4) of the Competition Act. The latter provision is discussed in context in the preceding paragraphs.

13 Gardiner and Welch "Player Trades, Free Agents and Transfer Polices in Professional Sport" in Barry, Skinner and Engelberg *Employment Relations in Sport* (2016) 340; Goldberg and Pentol "Football 'Tapping Up' Rules – Anachronism or Necessity?" 2005 14(3) *Sport and the Law Journal* 15; Gardiner and Welch "The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'?" 2016 5(1) *Entertainment and Sports Law Journal* 7.

14 Goal.com "What Is 'Tapping Up' in Football Transfers & What Are the Most Famous Examples?" (31 January 2023) https://www.goal.com/en-za/news/what-is-tapping-up-in-football-transfers--what-are-the-most-infamous-examples/1jty660r0g5w01exvkszgir94u (accessed 2024-04-16).

15 All these statutes (South African Competition Act 89 of 1998 (Competition Act), the Treaty on the Functioning of the European Union of 1957 (TFEU) and the Sherman Antitrust Act of 1890 (Sherman Act)) seek to promote and maintain competition in the market and protect consumer welfare.

16 Relevant case law is discussed in the sections that follow.

17 S 3(1) of the Competition Act; see also *American Natural Soda Ash v Competition Commission of SA (ANSAC)* (2005) 9 *BCLR* 862 (SCA) par 7.

for what defines "economic activity".[18] While the term "economic activity" appears to be difficult to define, in some cases, the economic nature of the alleged behaviour of a firm is self-descriptive.[19] In *Standard Bank Investment Corporation Ltd v Competition Commission*,[20] the Competition Appeal Court (CAC) held that "these words of great generality extend its operation to the countless forms of activity which people undertake in order to earn a living".[21] On the other hand, section 3(1)(*e*) of the Act exonerates "concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose" from the scope of the Act.[22] Sutherland and Kemp argue that courts do not pay due regard to this provision, and submit that "it should follow the general rule that exceptions to broad provisions are to be narrowly interpreted where possible".[23] On the same note, Sun argues that if courts adopt the literal interpretation of section 3(1)(*e*) of the Act, the scope and ambit of the term "economic activity" would be unduly limited.[24] This suggests that activities that are "partially" motivated by socio-economic activity are not to be excluded from the application of the Act.[25] This appears to exempt only "purely" non-economic activities.[26] As appears in further sections of this article, non-economic activities are common in sports.[27]

Following determination of whether an activity constitutes "economic activity" in terms of the Act comes the question of the location of the activity and its effects. It is undisputed that the "activity" itself must either be within or have an effect within South Africa for the Act to be applicable.[28] This requirement affects the scope and application of the Act, particularly its extra-territorial application – noteworthy, because in the context of sports, some sporting codes and international governing bodies "have powers to dictate the rules applicable at a national level".[29] Therefore, international bodies like the Fédération Internationale de Football Association (FIFA) may issue rules that govern the South African Football Association (SAFA), in which case FIFA's rules are implemented in South Africa.[30] These rules are enforceable. However, if they are found to have contravened competition law, then the Competition Act is applicable regardless of the origin of the

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18 Sutherland and Kemp *Competition Law of South Africa* (2000) 4.28.

19 See Sutherland and Kemp *Competition Law of South Africa* 4.20. However, it may be difficult to determine whether aspects of sports competition qualify as an economic activity.

20 2000 (2) SA 797 (SCA).

21 *Standard Bank Investment Corporation Ltd v Competition Commission supra* par 9.

22 S 3(1)(e) of the Competition Act.

23 Sutherland and Kemp *Competition Law of South Africa* 4.43

24 Sun *Sports and Competition Law in South Africa* (LLM thesis, Rhodes University) 2017 57, citing *Cf AEC Electronics (Pty) Ltd v Department of Mineral Affairs* (2009) 2 *CPLR* 379 (CT) par 19; *Phutuma Networks (Pty) Ltd v Telkom (Ltd)* (2011) 1 *CPLR* 213 (CT) par 24.

25 Sun *Sports and Competition Law in South Africa* 58.

26 *Ibid*.

27 Rules of the game, like the number of players, size of the ground, nationality of the player for squad selection, etc.

28 See s 3(1) of the Competition Act.

29 Sun *Sports and Competition Law in South Africa* 58. For instance, the South African Football Association (SAFA) is a member of the Fédération Internationale de Football Association (FIFA),meaning FIFA has power over South Africa (national level) by virtue of SAFA's affiliation.

30 Sun *Sports and Competition Law in South Africa* 58.

rules.[31] In *American Natural Soda Ash v Competition Commission of SA (ANSAC)*,[32] the CAC held:

> "Upon a proper construction of the Act, in order for economic activity occurring outside South Africa to have an 'effect' within South Africa for purposes of s 3, it must be alleged and proved that such activity has had [a] negative or … deleterious effect on competition within South Africa."[33]

In the same case, the CAC held:

> "The question is not whether the consequences of the conduct is criminal or, for that matter, anti-competitive, but whether the conduct complained of has 'direct and foreseeable' substantial consequences within the regulating country. In other words, the 'effects' in the present case must be such that they fall within the regulatory framework of the Act, whether they are anti-competitive or not."[34]

Against this jurisprudence, it suffices to submit that the scope of section 3(1) may extend to sports rules set by international bodies.[35] Thus the Act not only targets anti-competitive conduct originating in South Africa, but also applies to conduct originating somewhere else and which is implemented in South Africa.[36] One may argue that such origins of conduct are what was described as "pure peregrini" in *Competition Commission of South Africa v Bank of America Merrill Lynch International*.[37] To this effect, international sports bodies may issue rules that govern teams at the national level, and if those rules contravene competition laws of the country, the Competition Act may be applicable as long as the rules qualify as "economic activity".

The other jurisdictional ground is the "effects doctrine", which must be relied upon if rules issued by international bodies are subject to South African competition law. This occurs when competition authorities of a certain country exercise jurisdiction over firms or activities that occurred in another country. This doctrine is not uncommon, and "virtually all

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31 Irani, Rajesh and Deshpande "Combatting Anti-Competitive Practices in the Commercialised Sports Industry With Special Emphasis on Sports Federations in India" 2024 *The International Sports Law Journal* 11, citing an Indian case, *Re Dhanraj Pillay v Hockey India*, No 73 of 2011, 2013 SCC OnLine CCI 36.

32 *Supra*.

33 *ANSAC supra* par 8.

34 *ANSAC supra* par 18; citing Jennings and Watts *Oppenheim's International Law* (1996) 468.

35 See *ANSAC supra* par 17, where the CAC stated that "it is not disputed that the Competition Act has extra-territorial application, and it is not disputed that a state may, in certain cases, extend its jurisdiction beyond its territorial borders". Also see Jennings and Watts *Oppenheim's International Law* 460, where they submit that in a sense territoriality also underlies the kind of cases, such as the restrictive rules of FIFA, where these have an effect at home. Also see *ANSAC supra* par 17: "International law thus permits states to exercise their jurisdiction to promulgate rules, whether it be legislation or administrative decrees, prohibiting conduct elsewhere having an 'effect' within the state".

36 Sutherland and Kemp *Competition Law of South Africa* 4.21.

37 2024 1 CPLR 1 (CAC) par 7. "Pure peregrini" are those firms that are neither domiciled nor carry on business in the Republic. This is distinguished from "local peregrini", which are defined as firms with some presence in South Africa by way of a local branch or a representative office in South Africa.

jurisdictions apply some form of the effects test".[38] As a result, in the US, the effects doctrine was developed to catch anti-competitive practices outside the US but having effects within it.[39]

In the context of the football transfer system, foreign national associations may restrict player movement, thus prohibiting South African teams from competing for foreign players. When this exclusion is within the scope of "economic activity", the conduct itself must be within or have an effect within South Africa in order for the Competition Act to be invoked. However, this may depend on a case-by-case scenario.[40]

The other aspect to consider is whether a competition dispute emanates from a regulated industry. The Act, in its current form, provides:

> "In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct."[41]

Section 21(1)(*h*) of the Act states that the Commission may establish agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters to guarantee the consistent application of the principles of the Act.[42] In the same breath, section 82(1) of the Act provides that a regulatory authority that has jurisdiction in respect of conduct regulated by the Competition Act must negotiate agreements with the Commission as provided for in section 21(1)(*h*) of the Act.[43] As a result, the manner in which concurrent jurisdiction is exercised under the Act and any other public legislation must be managed in line with any appropriate agreement signed in terms of sections 21(1)(*h*) and 82(1) and (2), as discussed above.[44]

As previously mentioned, the Act may be applicable when the alleged conduct constitutes "economic activity". It is further submitted that the Act may even apply to activities that are "partially" socio-economic. In addition, the Act applies to conduct that may have occurred outside the country but which has an effect on the country. South Africa may enter into a

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38 Nxumalo "Fruit From the Neighbour's Tree: On Indirect Extra-Territorial Effects of South Africa's Competition Law Rulings" (September 2014) https://www.compcom.co.za/wp-content/uploads/2014/09/Fruit-From-The-Neighbours-Tree-Final.pdf (accessed 2024-04-25); see *United States v Aluminium Company of America (Alcoa)* 148 F 2d 416 (2d Cir 1945).

39 *ANSAC supra* par 16.

40 The South African competition authorities may not adjudicate some matters owing to a Memorandum of Understanding that exists between them and the contravening firm's country. For instance, see Competition Commission South Africa (CCSA) "Memorandum of Understanding between the Directorate-General Competition of the European Commission and the Competition Commission of South Africa" (22 June 2016) http://www.compcom.co.za/wp-content/uploads/2016/05/MOU-between-DG-Comp-and-CCSA-22-June-2016.pdf (accessed 2024-04-23).

41 S 3(1A)(*a*) of the Competition Act; see also *Sasol Gas (Pty) Ltd v Competition Commission of South Africa* (2024) 2 (CAC) 2 par 22.

42 S 21(1)(*h*) of the Competition Act.

43 S 82(1) and (2) of the Competition Act.

44 S 3(1A)(*b*) of the Competition Act.

Memorandum of Understanding (MoU) with foreign competition regulatory bodies on enforcement of the competition law to avoid what is called "double remedy" and/or "double jeopardy". This form of agreement may be entered into when the Commission has jurisdiction over a matter that has occurred in another country. This is not always the case since the Commission may enter into an MoU even in the absence of a competition dispute. For instance, the Competition Commission South Africa (CCSA) has signed an MoU with the Egyptian Competition Authority (ECA) with the purpose of enhancing the partnership of the parties by establishing a general framework for bilateral communication and cooperation in the fields of competition law and policy, as well as enforcement.[45] The CCSA has entered into many agreements for the same purpose with different countries, including Kenya,[46] eSwatini,[47] Namibia[48] and Mauritius.[49]

2 2 Competition law *vis-à-vis* sports

The core goal of the Competition Act is to promote and sustain competition. It provides for the control and elimination of restrictive horizontal and vertical agreements, abuse of dominance, and harmful concentration of economic power.[50] The sports sector regulatory bodies do not preclude and/or oust the application of the Competition Act.[51] Notwithstanding the unique features of the sports industry, especially the cooperative relationship between rivals and the notion of sports competition, competition law may be invoked to regulate and enforce free and fair competition among the participants, be they clubs, associations, agents, broadcasters or organisers.[52] This is

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45 CCSA "Memorandum of Understanding on Anti-Monopoly Cooperation Between Egyptian Competition Authority and Competition Commission South Africa" (31 August 2022) https://www.compcom.co.za/wp-content/uploads/2022/09/MOU-CCSA-and-Egypt.pdf (accessed 2024-11-06) art 1.

46 CCSA "Memorandum of Understanding Between the Competition Competition South Africa and Competition Commission of Kenya" (October 2016) https://www.compcom.co.za/wp-content/uploads/2018/12/CCSA-and-CAK-MOU.pdf (accessed 2024-11-06).

47 CCSA "Memorandum of Understanding Between the Competition Commission South Africa and eSwatini Competition Commission" (25 June 2018) https://www.compcom.co.za/wp-content/uploads/2018/12/Signed-MOU-between-the-Commission-and-eSwatini-Competition-Commission.pdf (accessed 2024-11-06).

48 CCSA "Memorandum of Understanding Between the Competition Competition South Africa and the Namibian Competition Commission" (11 November 2015) https://www.compcom.co.za/wp-content/uploads/2018/12/MOU-between-the-Competition-Competition-and-the-Namibian-Competition-Commission.pdf (accessed 2024-11-06).

49 CCSA "Memorandum of Understanding Between the Competition Commission South Africa and the Competition Commission of Mauritius" (13 October 2016) https://www.compcom.co.za/wp-content/uploads/2018/12/MOU-between-CCSA-and-the-Competition-Commission-of-Mauritius.pdf (accessed 2024-11-06).

50 S 2 of the Competition Act; see also Louw "Anyone for a Game of Monopoly™? A Critical Evaluation of the Ever-Increasing Commercialization of Major Sporting Events Part 2: Examining the Legitimacy of the Creation and Maintenance of Commercially Driven Monopolies in Sports Events" 2010 31(2) *Obiter* 284.

51 See s 3 of the Competition Act; see also *ANSAC supra* par 7; Hartzenberg "Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries" 2006 26(3) *Northwestern Journal of International Law & Business* 669–670.

52 It is worth noting that sports do not form part of the industries contemplated in s 3(1A) of the Competition Act. The National Sport and Recreation Act 110 of 1998 (NSRSA) does not

premised on the increasing commercialisation of sports activities.[53] Furthermore, the Competition Act applies to all economic activities within or having an effect in the Republic of South Africa.[54] However, a claimant and/or complainant is not required to demonstrate that the economic activity has had a detrimental effect.[55] The organisation, operation and commercialisation of sports do not exclude and/or oust the ambit of the Competition Act. It applies to sports as it does to other commercial activities.[56] While the sports industry is not exempt from the application of the Act,[57] competition authorities should apply competition law with caution and pay regard to the special features of the industry.[58] This is evident from judgments of the Court of Justice of the European Union (CJEU) and the US Supreme Court that have considered the characteristics of a certain industry before applying competition law.[59]

The fact that professional sports in South Africa have evolved from serving only a cultural purpose to catering to the commercial needs of the economy remains undisputed.[60] The implications are also for stakeholders of the sports industry that are non-profit-making bodies.[61] Notably, all sports

contain any provisions that regulate competition matters; therefore, the Competition Act's jurisdiction over competition disputes in sports remains uncontested.

53 OECD "Competition and Professional Sports, OECD Competition Policy Roundtable Background Note" (2023) www.oecd.org/daf/competition/competition-and-professional-sports-2023.pdf (accessed 2024-04-15).

54 S 3 of the Competition Act 89 of 1998. Also, see *Industrial Gas Users Association of Southern Africa v Sasol Gas (Proprietary) Limited* [2023] ZACT 55 par 35 and 55; *Telkom SA Limited v Competition Commission of South Africa* (2010) 2 All SA 433 (SCA) par 27; *Standard Bank Investment Corporation v Competition Commission, Liberty Life Association of Africa Ltd v Competition Commission* (2000) 2 SA 797 (SCA) par 9; *Cape Gate (Pty) Limited v Emfuleni Local Municipality* [2023] ZACT 24 par 26; *Siyakhuphuka Investment Holdings v Transnet* [2018] ZACAC 4.

55 Louw 2010 *Obiter* 284.

56 S 3(1) of the Competition Act; see also Loubser "Sport and Competition Law " in Basson and Loubser *Sport and the Law in South Africa* (2000) ch 8–46. However, it is important to note that the Act exempts some practices from its purview. These exemptions include collective bargaining in the employment context, within the meaning of the right to fair labour practices as contained in s 23 of the Constitution of the Republic of South Africa, 1996, and which in terms of the Labour Relations Act 66 of 1995 is excluded from the application of the Competition Act as contemplated in s 3(1)(*b*) of the Competition Act. Furthermore, s 3(1)(*e*) of the Act does not apply to "concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose". Also see s 10(4) of the Competition Act.

57 See s 10 of the Competition Act.

58 Chicajanu "Competition Law Provisions Applied in Sports: Articles 101 and 102 TFEU (Part 1)" 2017 62(1) *Studia Universitatis BabesBolyai Jurisprudentia* 92; OECD www.oecd.org/daf/competition/competition-and-professional-sports-2023.pdf. Also, see *National Collegiate Athletic Association v Alston* 594 US.

59 See *International Skating Union (ISU) v Commission* (C-141/21 P) par 96 and *Nostalgic Partners v Office of the Commissioner of Baseball* 1:2021cv10876 13D. These cases are discussed in context in the sections that follow.

60 Louw and Areias "Anyone for a Game of Monopoly™?* A Critical Evaluation of the Ever-Increasing Commercialization of Major Sporting Events Part 1: An Overview of Ambush Marketing in Sport" 2010 31(1) *Obiter* 59.

61 OECD www.oecd.org/daf/competition/competition-and-professional-sports-2023.pdf. For instance, in *National Collegiate Athletic Association v Alston* (NCAA) 594 US _ (2021) 324D. In the latter case, it was held that the US sport's governing body for amateur

events involve business elements and economic activity, which necessitates application of the Act to all sports organisations.[62]

While the Competition Act applies to the sports industry, competition authorities should pay due regard and/or differentiate between "pure sporting rules"[63] and business or economic activity.[64] For instance, "purely sporting rules" refer to the rules of the game.[65] These rules are non-economic in nature and fall outside of the scope of competition law.[66] These rules can be associated with nationality restrictions in squad team selection,[67] and/or rules regulating the licensing of sports agents.[68] Stewart submits that these rules are purely for sporting interests, to ensure a fair sporting environment.[69] Furthermore, parties in sports ought to claim autonomy and be governed by their specific rules to avoid intervention by other regulatory bodies.[70] The court in an EU case affirmed that nationality-based squad selection for international competition qualifies as a "pure sporting rule" and does not concern or qualify as economic activity.[71]

Notably, the staging of an international event and a competitor's status as an international competitor do have a direct economic effect.[72] Furthermore, activities, like the sale of broadcasting rights, collusive transfers, ticket arrangements and marketing tournament products do constitute economic activities and are subject to competition law.[73] While this distinction is important, there has been criticism that the difference between "purely

collegiate athletics is subject to the Sherman Act, regardless of its allegedly non-profit or social character. See Malik 2020 *Pen Acclaims* 5.

62 The concept of sport constituting an economic activity was first approached by the European Court of Justice (ECJ) in 1974 in the case of *Walrave v Union Cycliste Internationale (Walrave)* 36/74 1974 ECR 1405D. The court found that EU law applies to sports because "the practice of sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of article 2 of the European Community Treaty". Since then, the principle has been followed in cases like *Dona v Manter* 13/76 1976 ECR 1333.

63 These are simple rules of the game that do not have an economic objective.

64 *Walrave v Union supra* 1421D, where the court stated that the concept was introduced that certain rules in sports are of "purely sporting interest", meaning that they have nothing to do with economic activity.

65 For instance, the rules that are essential to produce sports competitions (e.g., the size of the field, the weight and dimensions of the ball, the number of players, the calendar and structure of the tournament, and anti-doping rules).

66 Parrish *Sports Law and Policy in the European Union* (2003) 22.

67 *Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL* 2000 ECR 1-2549.

68 *Meca-Medina v Comm'n* 3 CMLR 60 (2004).

69 Stewart "The Development of Sports Law in the European Union, Its Globalisation, and the Competition Law Aspects of European Sports Broadcasting Rights" 2009 16 *Sports Law Journal* 188.

70 Stewart 2009 *Sports Law Journal* 188.

71 *Walrave v Union supra* 1421D.

72 *Walrave v Union supra* 1421D; see also Weatherill "Fair Play Please! Recent Developments in the Application of EC Law to Sport" 2003 40(1) *Common Market Law Review* 40–56. This signifies the fact that the court was not willing to sanction the nature of international sports. This is despite its essence, which was built on nationality restrictions. The latter has also been affirmed in *Dona v Manter supra* par 19, where the court held that EU law does not apply when "such rules or practice exclude foreign players for reasons which are not of an economic nature" and thus affirmed the purely sporting interest rule.

73 OECD www.oecd.org/daf/competition/competition-and-professional-sports-2023.pdf.

sporting rules" and economic activities is non-existent, since defining the nature of sports competition (e.g., sports-related aims) also has economic consequences.[74] This is because sports organisations can structure "purely sporting rules" to increase the attractiveness of sports to maximise the fan base and revenue. Therefore, one can argue that there is a thin line between "purely sporting rules" and "economic activities" in the sports industry since the former can be used to achieve the latter.[75] However, competition laws seek to encourage investments, innovations and inventions and do not protect inefficiency of competitors; rather, they protect competition in the relevant market and consumer welfare.

As is shown below in this article, various activities by sports organisations and the commercialisation of sports may constitute prohibited practices under the Competition Act.[76] These include practices and policies governing the restriction of player movement through the clauses of employment contracts, legislation, marketing arrangements and the collective sale of broadcasting rights.[77]

In *Federation Internationale De Football v Bartlett*,[78] the court held:

> "[T]his competition is not limited to the football field. It spills over into commerce. One of the issues that will have to be determined in this application is whether the competition, as it pertains to this application, is lawful or not."[79]

In *Competition Commission v Siyavuma Sports Group (Pty) Ltd*,[80] the Commission filed a complaint against the South African Football Intermediaries Association (SAFIA)[81] and its 35 members, including Siyavuma Sports, under section 49(8)(1) of the Act.[82] The Commission claimed that, from at least 2003 to 2023, the respondents had engaged in a deliberate effort to set the price and/or market conditions for the services of negotiating contracts with football clubs on behalf of football players.[83]

The Competition Tribunal (Tribunal) held that the respondents' conduct restricted competition among rivals since they did not independently determine the commission charged to their individual clients.[84] This constituted price fixing and trade-condition fixing in contravention of section 4(1)(*b*)(i) of the Act.

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74 Weatherill *European Sports Law – Collected Papers* 2ed (2014) 384 385.

75 Azoulai "The Law of European Society" 2022 59 *Common Market Law Review* 203; Micklitz "Discussion Society, Private Law and Economic Constitution in the EU" in Grégoire and Miny *The Idea of Economic Constitution in Europe* (2022) 385.

76 Louw 2010 *Obiter* 285, citing Lewis and Taylor *Sports Law and Practice* (2008) 166.

77 Louw 2010 *Obiter* 285.

78 (1994) 2 All SA 62 (T).

79 *Federation Internationale De Football v Bartlett supra* 64D.

80 [2023] 3 *CPLR* 48 (CT).

81 SAFIA is an association whose members are football players' agents, coaches and clubs, and its principal place of business is situated at 93 Protea Road, Chislehurston, Sandton, Gauteng.

82 *Competition Commission v Siyavuma Sports Group (Pty) Ltd supra* par 2.

83 *Ibid*.

84 *Ibid*.

However, it is important to note that *Siyavuma* does not provide much jurisprudence on the discourse. This is because the respondents did not dispute the allegations by the Commission. Instead, they agreed to pay an administrative penalty in the sum of R90 000 (Ninety Thousand Rands), which was less than 10 per cent of their annual turnover for the financial year ending in February 2021.[85] The amount may be substantiated on the basis that:

> "An administrative penalty imposed in terms of subsection (1) may not exceed 10 percent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year."[86]

It appears from the above that application of the Competition Act in a sporting context has not been tested by our courts. One would like to see how these anti-competitive practices in sports will be assessed when such matters arise. However, there is jurisprudence in other jurisdictions, which is discussed below.

3 SELECTED UNFAIR OR ANTI-COMPETITIVE PRACTICES IN SPORTS

3 1 Labour competition issues

All the major professional sports codes in South Africa impose, through their player contracts, various forms of restraint of trade.[87] While these restraints may be justified in terms of contractual and labour laws, when looked at in the context of competition law, they may qualify as restrictions prohibited by the Competition Act.[88] Some commentators submit that sports leagues claim that some restraints on unrestricted competition may be desirable.[89] These restraints may be "pure sporting rules" that are not economic in nature, but as previously submitted, the same "pure sporting rules" may be used to leverage certain teams over others.[90]

Ross correctly points out that labour-market restraints are aimed at promoting competitive balance among teams in the league.[91] This is due to the obvious advantage for fans of having competitions where every team

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85 *Competition Commission v Siyavuma Sports Group (Pty) Ltd supra* par 4. This penalty could have been mitigated if the respondents had not wasted the competition authority's time on litigation. To this effect, see s 60(2) of the Competition Act.

86 S 59(2) of the Competition Act.

87 Louw "Employment Based on a Fiction: Evaluating the Legitimacy of Traditional Notions of Contract in Their Application to an Atypical Employment" 2007 28(2) *Obiter* 190.

88 Ross "Anti-Competitive Aspects of Sports" 1999 7 *Competition & Consumer Law Journal* 3; see also Louw 2007 *Obiter* 190; see also *Blackler v New Zealand Rugby Football League* [1968] NZLR 547 (CA).

89 Ross 1999 *Competition & Consumer Law Journal* 3; Louw 2007 *Obiter* 190.

90 Daniel and James *Sport Fans: The Psychology and Social Impact of Fandom* 2ed (2001) 16.

91 Ross 1999 *Competition & Consumer Law Journal* 2; Ross "The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws" 1997 519 *University of Illinois Law Review* 519. Also, see Louw 2010 *Obiter* 286.

has a chance to win every few years.[92] While labour-market restraints in the sports industry have their advantages, competition authorities should pay due regard to that practice because labour-market restraints can cripple competitive balance among competing teams.[93] In turn, this can affect the growth of the individual player.[94]

As already noted, trade restraints in the sports industry can result in unfair and/or anti-competitive practices. However, some of the restraints do seem to contribute to competitive balance.

Football teams in South Africa's premier league had oversized teams with over 600 players in the years 2017/18 to 2021/22.[95] This suggests that local teams register around 38 players each season, while European teams register no more than 25 players each season.[96] Like Major League Baseball (MLB) rules, the EU league limits the number of players on each club's roster to 25, with various exemptions for younger players.[97] MLB rules appear to be aligned with the purpose of the South African Competition Act,[98] since the rules of the league provide that in instances where a club sells a player when there are more interested buyers, the buyer or club that has the poorest record gets the player.[99] One may argue that this is a trade restraint and does not allow a player to choose the best team and/or the team for which they want to play. However, through the lens of competition policy, this rule appears progressive since it seeks to balance the competition between buyers (clubs). First, the rule protects small or emerging sports clubs from exploitation by big and well-established teams.[100] Secondly, the rule restricts clubs from "stockpiling"[101] the top players.[102]

While the concept of "stockpiling" is not familiar to competition law in the South African context, the concept may be associated with section 8(4) of the Competition Act, which regulates "buyer power" to enhance participation of small and medium-sized enterprises (SMEs) and historically disadvantaged persons (HDPs) in the economy and protects them from

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92 Ross 1999 *Competition & Consumer Law Journal* 3.

93 Simmons "Professional Labor Markets in the Journal of Sports Economics" 2021 23(6) *Journal of Sports Economics* 738.

94 Restraining of players from going to other teams through contractual terms may delay and/or hinder the personal development or career of that player in their specific sporting codes.

95 Mamaila "Bloated Squad Sizes Don't Benefit SA's Top Football Teams" (22 November 2022) https://www.theoutlier.co.za/news/2023-07-25/83745-/bloated-squad-sizes-dont-benefit-sas-top-football-teams (accessed 2024-04-13).

96 Mamaila https://www.theoutlier.co.za/news/2023-07-25/83745-/bloated-squad-sizes-dont-benefit-sas-top-football-teams.

97 Ross 1999 *Competition & Consumer Law Journal* 3.

98 S 2 of the Competition Act provides that the purpose of the Act *inter alia* is "*(e)* to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and in *(f)* to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

99 Ross 1999 *Competition & Consumer Law Journal* 3.

100 Protection of HDPs and SMEs.

101 Stockpiling is referred to as the practice of storing a large supply of something for future use.

102 Ross 1999 *Competition & Consumer Law Journal* 3.

unfair exploitation in supply arrangements with dominant buyers. The participation of SMEs and HDPs can be hindered by high levels of market concentration, high entry barriers, a slow pace of transformation and inequitable bargaining power used by dominant buyers to suppress prices and transfer costs or risks onto suppliers.[103] These strategies affect the ability of SMEs and HDPs to invest, innovate and grow. Therefore, enforcement of the buyer-power provisions is important for the realisation of a growing, deconcentrated and inclusive economy in the South African sports industry.[104]

Recently, Mamelodi Sundowns Football Club (Sundowns) signed six players from *Ubuntu*, Cape Town Spurs and Cape Town City in the Western Cape.[105] In response to this big signing, the Cape Town Spurs informed parents of the players "that they've issued a cease and desist communication on Mamelodi Sundowns scouts in an effort to halt their rivals from recruiting their best players".[106] The basis of the ban was that Sundowns was "poaching"[107] from their *Ikamva*[108] development academy to benefit Chloorkop.[109] Furthermore, *Ikamva* accused Sundowns of using its substantial resources to scout young players from all academies in the country.[110] This conduct constitutes what is called "buyer power" under the Competition Act, as discussed in the preceding paragraph.[111]

On a similar note, Wenger[112] pointed out in an interview: "too many young players miss out on the experience of first-team football because leading clubs 'stockpile' players to safeguard their expensive investments".[113] To curb stockpiling, Wenger suggested:

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[103] CCSA "Buyer Power Guidelines" (12 May 2020) https://www.compcom.co.za/wp-content/uploads/2023/04/Buyer-Power-Guidelines-for-Dominant-Buyers-in-Agroprocessing-Grocery-Wholesale-and-Retail-E-Commerce-and-Online-Services.pdf (accessed 2024-04-25) 22 23 24 24 37.

[104] CCSA https://www.compcom.co.za/wp-content/uploads/2023/04/Buyer-Power-Guidelines-for-Dominant-Buyers-in-Agroprocessing-Grocery-Wholesale-and-Retail-E-Commerce-and-Online-Services.pdf.

[105] Gwegwe "Sundowns Sign 6 Players From Cape Town" (18 January 2024) https://www.thesouthafrican.com/sport/soccer/psl-south-africa/mamelodi-sundowns-news-dstv-premiership-youngsters-cape-town-academy/ (accessed 2024-04-25).

[106] Molefe "Cape Town Spur Ban Mamelodi Sundowns Scouts From Ikamva" (22 January 2024) https://www.sabcsport.com/soccer/news/cape-town-spurs-ban-mamelodi-sundowns-scouts-from-ikamva#:~:text=Cape%20Town%20Spurs%20have%20informed,from%20recruiting%20their%20best%20players (accessed 2024-04-26).

[107] In the context of sports, poaching may refer to the recruitment of players who play for competing clubs.

[108] *Ikamva* means future in isiXhosa.

[109] Chloorkop is the training and administrative office of Mamelodi Sundowns Football Club.

[110] Molefe https://www.sabcsport.com/soccer/news/cape-town-spurs-ban-mamelodi-sundowns-scouts-from-ikamva#:~:text=Cape%20Town%20Spurs%20have%20informed,from%20recruiting%20their%20best%20players.

[111] See S 8(4) of the Competition Act.

[112] Wenger is a French former football manager and player who is currently serving as FIFA's Chief of Global Football Development.

[113] Bein Sports "Clubs Stockpiling Players a Big Problem" (27 December 2016) https://www.beinsports.com/en-mena/football/premier-league/articles/wenger-clubs-stockpiling-players-a-big-prob-1 (accessed 2024-04-27).

> "Maybe you could create a possibility for some clubs to own part of a League One club as a feeder club. After that, a limitation on the number of players on your books could work. The way a youth team is organized now is that all the best young players go to the richest clubs, which is where they have fewer chances to develop, so you have to make sure the system shares out the best young players equally. It's difficult because the development of the players depends on the concentration of the good players. The more [better] players you have together, the more chance they have of becoming even better players."[114]

Young players are more likely to sign with well-paying clubs than emerging clubs with limited resources, leaving the latter clubs at a disadvantage. Therefore, to balance competition in leagues, the consideration and enforcement of salary caps in the sports industry is necessary.[115] This has been adopted in several leagues in Australia and North America.[116] This restraint may be justified on competition grounds because salary-cap rules may impose the same or similar limits regardless of the team's financial muscle. Salary-cap rules and their enforcement may be determined in each season to respond to the competitiveness and financial status of the clubs.[117] These rules can all be based on each league's collective-bargaining agreement between clubs, associations, agents and players.[118] In so doing, the agreements are transparent to all parties involved. Most significantly, collective bargaining is exempt from application of the Competition Act.[119]

While this appears to be progressive, it may be disadvantageous to small emerging teams when the salary caps are more than what they can afford. Therefore, this approach necessitates caution. Furthermore, some commentators argue against the introduction of salary caps to sporting codes as they do not improve competitive balance, as canvassed with fans and owners of the club associations.[120] It is also argued that the quality of player must be proportional to the salary paid, and if a player meets the performance standard or criteria for a club, that club would be willing to pay an agreed-upon or higher salary to that player.[121] Clubs can determine a salary based on the amount of revenue that a player can generate.[122] This is not dependent on the financial muscle of the team or the salary that the

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114 Bein Sports https://www.beinsports.com/en-mena/football/premier-league/articles/wenger-clubs-stockpiling-players-a-big-prob-1.

115 Totty and Owens "Salary Caps and Competitive Balance in Professional Sports Leagues" 2011 11(2) *Journal for Economic Educators* 46.

116 See Totty and Owens 2011 *Journal for Economic Educators* 46–47: "Salary caps have been introduced over the last three decades in three of the four major sports leagues in the United States: The National Basketball Association (NBA), the National Hockey League (NHL), and the National Football League (NFL)".

117 Totty and Owens 2011 *Journal for Economic Educators* 47.

118 *Ibid*.

119 See s 3(1) of the Competition Act.

120 Sanderson and Siegfried "Thinking About Competitive Balance" 2003 4(4) *Journal of Sports Economics* 255–279.

121 Totty and Owens 2011 *Journal for Economic Educators* 47, citing Coase "The Problem of Social Cost" 1960 3 *Journal of Law and Economics* 1–44.

122 See Quansah, Frick, Lang and Maguire "The Importance of Club Revenues for Player Salaries and Transfer Expenses – How Does the Coronavirus Outbreak (COVID-19) Impact the English Premier League?" 2021 (13)9 *Sustainability* 2. This can be through the high performance of the player, either by scoring frequently and/or defending difficult balls that have the potential of landing behind the net.

team can afford to pay.[123] A salary cap may be beneficial to emerging teams, but well-established teams would be at a disadvantage because the latter teams would have the ability to generate more revenue from signing the best player than would emerging teams.[124] This is because big teams have a bigger fan base and more merchandise sales and media coverage. This varying ability to generate revenue may be the main cause of competitive imbalance and the need for a salary cap.[125]

The conduct of "outbidding"[126] other competitors for talented players is recognised as undesirable and raises competition concerns in the sports industry.[127] However, Ross appears to agree with Totty and Owens when arguing that "it is not scientific that 'poaching', 'stockpiling' and 'outbidding' would cripple competitive balance if the team fires all the players it bought and brings in fresh blood rather than keeping overpaid mediocrities".[128] Ross further argues that if a league has a tight salary cap, it reduces competitive balance by preventing teams from improving quickly for the next season.[129] However, in the context of South African football, poaching does affect competitive balance. For instance, Sundowns scouts the best players in the world, more especially in South Africa, using their substantial resources. In turn, it leaves other clubs with no best players to scout, and that eliminates these clubs as competitors in the sports industry (football).[130] They use what the Competition Act terms "buyer power". As much as this contravenes the Act, it not only affects competition, but it also affects the players themselves. This is because the more influx in a team, the more players stay on the bench or are not considered at all.[131] Therefore, one may argue that dominant firms buy top players to ensure that their counterparts do not get them – thereby ensuring that their dominant position is maintained.

3 2 Collusive television market

At its core, the South African Broadcasting Act[132] advances the development of a broadcasting policy that is in the public interest.[133] The Act aims *inter alia* to ensure fair competition in the broadcasting sector.[134] The broadcasting sector is further regulated by the Electronic Communications

123 Totty and Owens 2011 *Journal for Economic Educators* 54.

124 *Ibid*.

125 *Ibid*.

126 This concept refers to a practice where a competitor offers to pay a higher price for something than someone else. In the context of sports, this practice may be prevalent when a club offers to pay a higher price than another club that happens to be a competitor.

127 Mehra and Zuercher "Striking Out 'Competitive Balance' in Sports, Antitrust, and Intellectual Property" 2004 21(4) *Berkeley Technology Law Journal* 1525.

128 Ross 1999 *Competition & Consumer Law Journal* 4.

129 *Ibid*.

130 Molefe https://www.sabcsport.com/soccer/news/cape-town-spurs-ban-mamelodi-sundowns-scouts-from-ikamva#:~:text=Cape%20Town%20Spurs%20have%20informed,from%20recruiting%20their%20best%20players.

131 *Ibid*.

132 4 of 1999.

133 S 2 of the Broadcasting Act.

134 S 1(*f*) of the Broadcasting Act.

Act,[135] the objectives of which include "promoting an environment of open, fair, and non-discriminatory access to broadcasting services, electronic communication networks, and electronic communication services".[136] The broadcasting sector is also regulated by the Independent Communications Authority of South Africa Act[137] (ICASA Act). While all these statutes apply in the sports sector, the Sports Broadcasting Services Regulations, 2010[138] apply specifically to "Free-to-air and Subscription broadcasting service licensees".[139] The regulations aim to regulate the broadcasting of national sports in South Africa.[140]

None of the above statutes ousts the application of the Competition Act.[141] Therefore, competition issues in sports broadcasting, such as collusive and exclusive contracts between content rights holders and broadcasters, attract the attention of the Commission. Practices such as collusive television markets constitute restricted practices in terms of the Competition Act – in particular, restrictive horizontal practices. One possible outcome of these practices is the concentration of a single market, which automatically translates to dominance.[142] However, this is in no way a suggestion that the dominance of a single firm is prohibited.[143]

Section 4(1) of the Competition Act generally prohibits agreements between, or concerted practices by, firms. The agreements are in particular prohibited if they have the effect of preventing or lessening competition in a market, unless parties to the agreement can prove that there is a technological, efficiency, or other pro-competitive gain that outweighs that effect.[144] This provision further prohibits restrictive horizontal practices like cartels.[145] Louw describes section 4(1) of the Act as a threefold prohibition, namely, of an agreement between firms,[146] a concerted practice by firms,[147] and a decision by an association of firms.[148]

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135 36 of 2005.

136 S 2(*g*) of the Electronic Communications Act.

137 13 of 2000.

138 GN R275 in *GG* 33079 of 2010-04-07.

139 Reg 3(1) of the Sports Broadcasting Regulations, 2010; ICASA "Sports Broadcasting Services Amendment Regulations, 2021" (30 March 2021) GN 163 in *GG* 44372 of 2021-03-31 http://www.icasa.org.za/legislation-and-regulations/sports-broadcasting-services-amendment-regulations-2021 (accessed 2024-04-23).

140 Reg 2(a) of the Sports Broadcasting Regulations, as amended.

141 S 3 of the Competition Act. In terms of s 67 of the Act, ICASA is authorised to deal with various competition matters with respect to relevant markets under the Act. The latter includes the markets for broadcasting services, which therefore invokes ss 21(1)(*h*) and 82(1) and (2) of the Competition Act.

142 See s 8 of the Competition Act.

143 See ss 7 and 8 of the Competition Act for the determination of a dominant position and for the prohibited abuse of dominance practices.

144 S 4(1)(*a*) of the Competition Act.

145 S 4(1)(*b*) of the Competition Act.

146 The agreement in terms of the Act is intended to mean contract, agreement or understanding, whether or not it is legally enforceable.

147 Concerted practice refers to cooperative or coordinated conduct between firms. This may be achieved through direct or indirect contact, which replaces the independence of a firm's actions. However, this conduct may not be classified as an agreement.

148 Louw 2010 *Obiter* 287.

In a sports context, agents, club associations and other sporting codes fall within the definition of a "firm" referred to in section 4(1) of the Act.[149] Agents in the sports industry refer to persons and/or companies acting on behalf of players or club associations.[150] Accordingly, Louw submits that "the word person includes any company or body of persons whether incorporated or unincorporated, and the provision of the Act thus applies to companies".[151]

Section 4 of the Competition Act is not applied and interpreted in the same way. The Act contains prohibited horizontal practices (discussed above) and restrictive horizontal practices. For instance, section 4(2) of the Act presumes that an agreement to engage in a restrictive horizontal practice exists between two or more firms if:

> "(a) anyone of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
> (b) any combination of those firms engages in that restrictive horizontal practice."

Section 4(3) of the Act provides:

> "A presumption contemplated in subsection (2) may be rebutted if a firm, director, or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market."

Media companies often hold shares in competing sports bodies (whether as sponsors or partners).[152] When these companies engage in conduct that might be viewed as a restrictive horizontal practice in terms of section 4 of the Act, competition law may apply.[153] Such conduct may be intended to divide geographical markets in relation to the employment of players or to enter into exclusive agreements with media companies.[154]

These contracts and/or agreements impact competition in the downstream subscription-television market.[155] In recent times, exclusive agreements have become more prevalent between MultiChoice and premium-content producers.[156] The concentrated broadcasting rights to Multichoice may lead to the abuse of dominance in the market because Multichoice may end up as the owner of all the rights available. This may raise concerns for the Commission.

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[149] S 1(xiii) of the Competition Act defines a "firm" to include "a person, partnership or a trust".

[150] Bull and Baure "Agents in the Sporting Field: A Law and Economics Perspective" 2022 22 *International Sports Law Journal* 25.

[151] Louw 2010 *Obiter* 287–288, citing s 2 of the Interpretation Act 33 of 1957 and Kelbrick "Ambush Marketing and the Protection of the Trademarks of International Sports Organizations – A Comparative View" 2008 41(1) *Comparative and International Law Journal Southern Africa* 129.

[152] Louw 2010 *Obiter* 288.

[153] *Ibid*.

[154] *Ibid*.

[155] Weeds "TV Wars: Exclusive Content and Platform Competition in Pay TV" 2016 126(594) *The Economic Journal* 1607.

[156] MultiChoice Enriching Lives "Social Report 2020" (date unknown) https://multichoice.com/media/2355/mah-social-report-2020_final.pdf (accessed 2024-04-14). MultiChoice is a leading entertainment platform across Africa, having the aim of enriching lives through providing a wide range of products and services.

It is worth noting that dominance is not prohibited in terms of the Act, but abuse emanating from such dominance is prohibited. Arguably, Multichoice has market power in the subscription-broadcasting market and can outbid other competitors for content rights.[157] This is evident from *eMedia Investments Proprietary Limited, South Africa v MultiChoice Proprietary Limited*,[158] in which the CAC found the refusal of MultiChoice to broadcast eMedia's channels to constitute an abuse of dominant position.[159] MultiChoice's refusal to broadcast eChannels may have been based on it wanting to introduce its own channel packages, and in turn, not have a competitor. To that effect, the CAC noted:

> "Competition jurisprudence requires an approach that looks beyond the entitlement of a dominant firm to decide with whom they wish to do business and that the terms of their business dealings must be unfettered. This is where the Tribunal erred."[160]

The CAC concluded that the refusal to broadcast eChannels by MultiChoice led to a result that the Competition Act seeks to guard against.[161] Accordingly, MultiChoice's conduct fell under abuse-of-dominance conduct, regulated by section 8(1)*(d)*(ii) of the Competition Act.[162] The CAC further held that it is an undisputed fact that satellite capacity is scarce because neither eMedia nor the smaller players can duplicate the number of channels DSTV has. Following these findings, the CAC declared that eMedia only had to make out a *prima facie* case, and that it had succeeded in doing so.[163]

The findings in *eMedia* resonate with the Organisation for Economic Co-operation and Development (OECD) round-table discussion, at which it was mentioned that MultiChoice has amassed a sizable film collection, enabling it to reserve this content and keep both current and prospective rivals out of the market.[164] To this end, the local soccer league, the Premier Soccer League (PSL), has an exclusive arrangement with Multichoice.[165] Multichoice thus uses the transmission of live sports events as a main attraction by entering into exclusive dealing rights with event organisers.[166]

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157 Ferreira "South Africa's Broadcasting Regulator Restarts Its Inquiry Into Multichoice's Near-Monopolistic Market Dominance as the Entry of Video Streamers Grow" (09 May 2022) https://teeveetee.blogspot.com/2022/05/south-africas-broadcasting-regulator.html (accessed 2024-05-06).

158 [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC).

159 *eMedia v MultiChoice supra* par 11.

160 *eMedia v MultiChoice supra* par 96.

161 *eMedia v MultiChoice supra* par 116.

162 S 8(1)(*d*)(ii) of the Competition Act prohibits a dominant firm from refusing to supply scarce goods or resources when it is economically feasible to do so.

163 *eMedia v MultiChoice supra* par 117.

164 OCED "The OECD Holds a Roundtable to Discuss the Main Competition and Regulatory Issues Currently Affecting Competition in Professional Sports" (04 December 2023) https://www.concurrences.com (accessed 2024-11-07).

165 The Multiple-Choice Group "MultiChoice and the Premier Soccer League Are Proud to Announce That DStv Has Signed a Five-Year Deal to Become the New Title Sponsor of the Premier Division" (24 September 2020) https://www.multichoice.com/media/news/multichoice-and-the-premier-soccer-league (accessed 2024-04-18).

166 Thothela *The Influence of Regulatory Approach on Competition in the South African Pay-TV Market* (MCom thesis, Wits University) 2013 37.

4 SELECTED RECENT JUDICIAL DETERMINATIONS OF ANTI-COMPETITIVE PRACTICES IN THE SPORTS INDUSTRY IN THE EU AND THE US

Competition authorities in other jurisdictions have dealt extensively with the anti-competitive aspects of the sports industry. The case-law discussion that follows relates to two jurisdictions, namely the EU and the US. Consideration of the position in the EU and the US is necessary because provisions regulating restrictive agreements and abuse of dominance in these jurisdictions are similar to those in the South African Competition Act regulating the same conduct. Both jurisdictions have also adjudicated and ruled on anti-competitive practices in sports.[167] For these reasons, the EU and the US are used as comparators to interpret the applicability of competition law in the sports industry to South Africa.

4 1 The European Union

The intersection of sports and competition law has ignited complex legal disputes in the EU.[168] Recently, the Court of Justice of the European Union (CJEU) delivered judgments that clarify the intersection between the autonomy of sports associations and competition law. While some commentators argue that the judgments (to be discussed) are not full-on game changers, they are seen to offer recognition of the "role of sports associations and the so-called European Sport Model, while opening doors to alternative competitions and more rigorous judicial review standards".[169]

4 1 1 International Skating Union (ISU) v European Commission (2023)[170]

This matter (*ISU* Appeal) was brought to the CJEU, on appeal by the ISU, in which it requested the court to set aside in part the decision of the General Court of the European Union (General Court).[171] The factual dispute in this matter was about the conduct of the ISU.[172] The association comprises a legislative body and an executive body.[173] The association acts as an

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[167] See the cases mentioned in the above paragraph. Further discussion is undertaken on the recent judgments in this section.

[168] Cukurov, Schreitter and Ritz "Sport Meets Antitrust: Shaping the Field of Play – The CJEU Weighs in on Sports and Antitrust" (09 January 2024) https//www.hoganlovells.com/knowledgeservices/news/sport-meets-antitrust-shaping-the-field-of-play-the-cjeu-weighs-in-on-sports-and-antitrust (accessed 2024-03-15).

[169] Cukurov *et al* https://www.hoganlovells.com/knowledgeservices/news/sport-meets-antitrust-shaping-the-field-of-play-the-cjeu-weighs-in-on-sports-and-antitrust.

[170] *International Skating Union (ISU) v European Commission* ECLI:EU:C: 2023:1012.

[171] *ISU* Appeal *supra* par 1.

[172] *ISU* Appeal *supra* par 4. The ISU is an association governed by private law with its headquarters in Switzerland. It describes itself as the only international sports federation recognised by the International Olympic Committee (IOC) in the field of figure-skating and speed-skating (skating). (The ISU is an international sports federation in the field of figure-skating and speed-skating.)

[173] *ISU* Appeal *supra* par 4.

umbrella organisation to its members, such as figure-skating and speed-skating national associations.[174]

Article 3(1) of the ISU Constitution and General Regulations is aimed at regulating, administering, governing and promoting skating throughout the world.[175] The manner in which the ISU enforced its rules to fulfil the mentioned aims led to this dispute.[176] The ISU plays the role of both referee and player since, on the one hand, it administers and governs skating and, on the other hand, it carries out economic activities like organising international skating events and exploiting the rights associated with those events.[177]

The first rule of the ISU's 2015 published set of rules[178] was about prior authorisation. These rules set out the procedure to which other associations must adhere to get advance authorisation to organise international skating competitions, and those rules were applicable to both national associations under the ISU and any third parties.[179] In essence, the ISU wanted the organisation of such competitions to be subject to its prior authorisation and to be conducted in a manner that aligns with its regulations.[180]

The rules also conferred power on the ISU to accept or reject an application for prior authorisation submitted to it if it did not meet the criteria set out in article 3(1) of the ISU Constitution and General Regulations.[181] The communication containing the rules further provided that, in instances where an application is rejected, an aggrieved organiser may submit an appeal against the decision of the ISU before the Court of Arbitration for Sport (CAS).[182] The second rule in question was about the "eligibility" of athletes to participate in skating competitions. These rules provided that "such competitions must, first, have been authorised by the ISU or its members and, second, comply with the rules established by that association".[183]

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174 *ISU* Appeal *supra* par 5.

175 The Constitution and the General Regulations of the International Skating Union, accepted by the 59th Ordinary Congress in June 2024. Also see *ISU* Appeal *supra* par 6.

176 These rules are discussed briefly in the next paragraph.

177 *ISU* Appeal *supra* par 7.

178 International Skating Union "Open International Competitions" Communication No 1974 (20 October 2015).

179 *ISU* Appeal *supra* par 9.

180 *ISU* Appeal *supra* par 10. The formation of these associations was based on the rules of the ISU. Thus, even the rules to be set by these associations were indirectly influenced by the same ISU.

181 *ISU* Appeal *supra* par 12.

182 *Ibid*.

183 *ISU* Appeal *supra* par 13–18. While the eligibility rules were partially revised in 2016, even the revised version arguably still presents restrictive and anti-competitive effects. This is because in the 2014 version, the eligibility rules *inter alia* contained provisions that a person could participate in activities and competitions under the jurisdiction of ISU only if that person respected the principles of the ISU. Those rules also prohibited athletes from participating in competitions not authorised by the ISU and/or by one of its national associations. If a person were found to have contravened these rules, they would be banned from any competition organised by the ISU. In terms of the 2016 version, an athlete is prohibited from participating in an event not authorised by the ISU and/or by one of its national associations, and if athletes are found to have contravened these rules, they will

The above are the rules that led Mr Tuitert and Mr Kertholt to lodge a complaint to the European Commission (EC).[184] They submitted that the prior authorisation and eligibility rules set by the ISU contravened articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[185] While article 101 of the TFEU generally prohibits agreements between undertakings, article 102 prohibits abuse of dominance by undertakings. In response, the EC opened a procedure,[186] and sent a statement of objections to the ISU, in which it stated that the ISU was in breach of article 101 of the TFEU.[187]

The EC found that the ISU had a dominant position in the relevant market and had the potential to influence competition in the market. It reasoned that the ISU played the central role in the market because of its capacity as the sole international sports association recognised by the IOC in the field of skating.[188] In addition, the EC considered the fact that the ISU organised and commercially exploited in parallel the main international competitions in the field.[189] The EC observed that the ISU held the power to set rules and impose them on all its national-association members and on all international skating competitions. The EC also noted that these rules concerned all matters relating to the organisation (including national associations, athletes, organisers, broadcasters and sponsors).[190]

It was for these reasons that the EC found that the ISU was an "association of undertakings" within the meaning of article 101(1) of the TFEU. It further noted that ISU members are national skating associations that should also be classified as "undertakings" within the meaning of the same provision. It reasoned that these undertakings (national skating associations affiliated to the ISU) also partake in economic activities such as organising, marketing competitions and exploiting the rights associated with such competitions.[191] The EC also stated that the prior authorisation and eligibility rules qualify as "decisions of associations of undertakings" within the meaning of article 101(1) of the TFEU.[192]

The ISU challenged the decision of the EC in the General Court. The ISU asked the General Court to annul the decision of the Commission.[193] The ISU relied on eight pleas, alleging:

> "in the first plea in law, infringement of the obligation to state reasons; in the second to fifth pleas in law, infringement of Article 101 TFEU in so far as that article was applied to its prior authorisation and eligibility rules; in the sixth plea in law, infringement of that article in so far as it was applied to the

receive a warning or the penalty of loss of eligibility. It is submitted that there is no difference between the 2014 and 2016 versions: while the 2016 version appears to be lenient, it also entails a possible ban – the same as the 2014 rules.

184 Mr Tuitert and Mr Kertholt were two professional skaters.

185 OJ C 202, 7.6.2016, pp 47–360; *ISU* Appeal *supra* par 22.

186 *ISU* Appeal *supra* par 23.

187 *ISU* Appeal *supra* par 24.

188 *ISU* Appeal *supra* par 27.

189 *Ibid*.

190 *Ibid*.

191 ISU Appeal *supra* par 28.

192 *Ibid*.

193 *ISU* Appeal *supra* par 35.

> arbitration rules; and; in the seventh and eighth pleas in law, the unlawfulness of both the requirements and periodic penalty payments which were imposed on the ISU."[194]

The General Court held that the issue at hand was not about the illegality of the ISU's prior authorisation and eligibility rules, but rather about the unlawful arbitration procedure.[195] In relation to the first plea, "alleging that the decision at issue was vitiated by contradictory reasoning", the General Court held that this claim was not well founded.[196] In relation to the ISU's second and fourth pleas, the General Court observed that these did not suggest that the EC's decision (that the "prior authorisation and eligibility rules had as their object the restriction of competition within the meaning of Article 101(1) of the TFEU" [197]) was incorrect.

Therefore, the General Court found that the EC had duly found that the prior authorisation and eligibility rules had as their object the restriction of competition, as set out in article 101(1) of the TFEU.[198] The General Court stated that there was no need to examine the remainder of the arguments by the ISU in respect of the third plea, which related to the EC's assessment of the actual or potential effects of those rules on competition.[199] In relation to the fifth plea, the General Court stated that, contrary to the ISU's claim in its fifth plea, the EC did not misinterpret the territorial scope of article 101 of the TFEU by taking into consideration the decision of the ISU's refusal to authorise a planned speed-skating event to be held in Dubai (United Arab Emirates), thus in a third country.[200]

The sixth plea, which concerned the EC's assessment of the arbitration rules, was upheld.[201] Lastly, in respect of the seventh and eighth pleas, the General Court held that they should be partially upheld, insofar as the requirements and periodic payments related to the arbitration rules. It rejected the remainder of the pleas.[202] In light of the above, the General Court dismissed the action of annulment brought by the ISU.

On appeal to the CJEU, the ISU sought, *inter alia*, the setting aside of the decision of the General Court, and the annulment of the decision of the EC.[203] It is worth noting that this appeal was divided into two, namely "the first ground of appeal" and "the second ground of appeal". In its first ground of appeal, the ISU complained that the General Court failed to carry out its mandate as arbiter to assess the legality of decisions adopted by the EC under the competition rules. In its second ground of appeal, the ISU complained that the General Court misconstrued and failed to examine the fourth plea and the evidence in support of it.

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194 *Ibid*.
195 *ISU* Appeal *supra* par 39.
196 *ISU* Appeal *supra* par 40.
197 *ISU* Appeal *supra* par 41.
198 *ISU* Appeal *supra* par 43.
199 *ISU* Appeal *supra* par 44.
200 *ISU* Appeal *supra* par 45.
201 *ISU* Appeal *supra* par 46.
202 *ISU* Appeal *supra* par 47.
203 *ISU* Appeal *supra* par 49.

The CJEU first recalled that there was no challenge to the findings of the EC and the General Court – that is, that the ISU must be characterised as an association of undertakings carrying out economic activities and that prior authorisation and eligibility rules constituted a decision by an association of undertakings within the meaning of article 101(1) of the TFEU.[204] It further noted that the ISU's decision as an association of undertakings is liable to "affect trade between Member States", within the meaning of article 101(1) of the TFEU. Furthermore, there was no challenge to the effect that the decision of the association of undertakings did not meet the grounds for justification in article 101(3) of the TFEU.[205]

Since the fact that the association participated in economic activities was not challenged, the CJEU did not see a need to examine that. Instead, it revisited *Walrave v Union Cycliste Internationale*[206] and *Olympique Lyonnais v Olivier Bernard, Newcastle United FC*,[207] and held: "In so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law applicable to such activity."[208] However, it should be noted that certain specific rules – such as "exclusion of foreign players from the composition of teams participating in competitions between teams representing their country or the determination of ranking criteria used to select the athletes participating individually in competitions" – were adopted and regarded as non-economic activities.[209]

The CJEU examined the object of the conduct in question and stated that if, at the end of the examination, the conduct proved to have an anti-competitive object, there was no need to examine its effect on competition. It is only when the conduct was found not to have an anti-competitive object that it would be important to examine its effect.[210] The analysis of these different concepts, namely object and effect, differs and is subject to different legal and evidentiary rules.[211] The CJEU held that an "anti-competitive object" must be interpreted "as referring solely to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects".[212] In contrast, an "anti-competitive effect" was held to comprise "any

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204 *ISU* Appeal *supra* par 90.

205 *Ibid*.

206 *Walrave supra* par 4. The matter concerned two Dutch nationals who were participating in the sport of cycle racing in France. The dispute arose as a result of the Union Cycliste Internationale issuing rules requiring that participants be of the same nationality, meaning that players could only participate in competition through teams from their own countries. The two individuals challenged this rule because they wished to participate in non-Dutch teams. They challenged this rule based on numerous provisions of the law, including art 7 of the Treaty (prohibiting nationality-based discrimination), art 48 (presumption of free movement of (employed) workers), and art 59 (presumption of free movement of (self-employed) workers).

207 *Olympique Lyonnais v Olivier Bernard, Newcastle United FC* C-325/08 EU:C:2010:143 par 27. This case concerned the question whether a team can oblige a player it has trained to sign a contract with it even when the player refuses, preferring to sign with another team.

208 *ISU* Appeal *supra* par 91.

209 *ISU* Appeal *supra* par 92; *Walrave supra* par 8.

210 *ISU* Appeal *supra* par 98.

211 *ISU* Appeal *supra* par 100.

212 *ISU* Appeal *supra* par 102.

conduct which cannot be regarded as having an [anti-competitive] object, provided that it is demonstrated that the conduct has as its actual or potential the prevention, restriction or distortion of competition which must be applicable".[213]

While the CJEU held that the EC did not make a legal classification of the alternative concepts of anti-competitive object and effect,[214] it commended the EC for classifying the prior authorisation and eligibility rules as having as their object the restriction of competition within the meaning of article 101(1) of the TFEU.[215] Consequently, the CJEU rejected the first ground of appeal.[216]

In respect of the second ground of appeal, the CJEU noted at the outset that even if the General Court had erred in the scope of the fourth plea by considering incorrectly that

> "it was seised of the general question whether the prior authorisation and eligibility rules were justified by a legitimate objective and not the specific question whether the application of those rules to the international speed skating event referred to by that association was justified by such a legitimate objective, the present ground of appeal is, in any event, ineffective".[217]

In addition, the CJEU confirmed that the General Court was correct to confirm the merits of the EC's assessment to the effect that prior authorisation and eligibility rules had as their object the restriction of competition. The CJEU further held that the existence of a potential legitimate objective, even if established, was irrelevant in that context.[218] Since both grounds of appeal were rejected, the appeal was dismissed.

4 1 2 European Super League v Union de Federaciones Europeas de Futbol, Federation Internationale de Football Association (ESLC) (2023)[219]

The facts of this matter are similar to those in the *ISU* Appeal case, in that European Super League Company SL (ESLC), accused Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA) of infringing articles 101 and 102 of the TFEU.[220] As with the ISU, FIFA is an association regulated by private law with its own statutes (FIFA Statutes 2016 edition).[221]

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213 *ISU* Appeal *supra* par 109.
214 *ISU* Appeal *supra* par 119.
215 *ISU* Appeal *supra* par 148.
216 *ISU* Appeal *supra* par 149.
217 *ISU* Appeal *supra* par 155.
218 *ISU* Appeal *supra* par 156.
219 62021CJ0333 – EN.
220 *ESLC supra* par 2.
221 *Ibid*. FIFA "FIFA Statutes | Regulations Governing the Application of the Statutes | Standing Orders of the Congress" (April 2016) https://www.icsspe.org/system/files/FIFA%20Statutes.pdf (accessed 2025-04-18). Any reference to "FIFA Statutes" means FIFA Statutes 2016 edition, and a specific edition will be referred to when citing a different statute.

FIFA has its own associations falling under its ambit; article 11 of the FIFA Statutes provides that an association responsible for organising and supervising football in a given country may become a member of FIFA.[222] This is subject to the requirement that the said association already be a member of one of the six continental confederations recognised by FIFA.[223] These continental confederations include UEFA. It was noted that more than 200 national football associations are FIFA affiliates. Accordingly, these associations have an obligation to cause their own members and/or affiliates to comply with the statutes, regulations and directives of FIFA.[224]

FIFA also issued Regulations Governing International Matches, which required FIFA to authorise, be notified and state other requirements that must be met for organising matches or competitions between teams that belong to different national football associations but are members of FIFA. The regulations further govern competitions between teams that belong to the same national association but play in a third country.[225] These regulations apply to all international matches and international competitions, but not to matches played in competitions organised by FIFA and/or one of the continental confederations recognised by FIFA.[226] It appears as if FIFA centralises everything concerning football competitions under its wing, leaving other associations with no power and influence in the arena.

UEFA is also an association governed by private law and having its own statutes (UEFA Statutes 2016 edition); article 7 of the UEFA Statutes generally provides that membership in UEFA requires compliance with its rules and regulations.[227] The Statutes confer UEFA with sole jurisdiction, except for FIFA competitions, to organise or abolish international competitions in Europe in which member associations and/or their clubs participate.[228] Furthermore, international competitions or tournaments that are not organised by UEFA, but are played on UEFA's territory, require the prior approval of FIFA and/or UEFA or any relevant member associations in line with FIFA Regulations Governing International Matches.[229]

European Super League Company (ESLC) is regulated by private law and is established in Spain. The ESLC was an initiative of a group of professional football clubs in Spain, Italy and the United Kingdom. It comprised the "top" teams in Europe, including Barcelona, Real Madrid Club, Juventus Football Club and Arsenal Football Club. The objective was to set up a new international professional football competition (Super League). It established its own subsidiary companies for different purposes,

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222 *Ibid*.

223 *ESLC supra* par 4; also see art 22 of the FIFA Statutes.

224 *ESLC supra* par 4; also see art 14 and 15 of the FIFA Statutes.

225 *ESLC supra* par 13; also see art 1 of the FIFA Regulations.

226 See art 2 of the FIFA Regulations.

227 UEFA "UEFA Statutes: Rules of Procedure of the UEFA Congress | Regulations Governing the Implementation of the UEFA Statutes" (March 2016) https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/WhatUEFAis/02/33/81/40/2338140_DOWNLOAD.pdf (accessed 2025-04-18) (2016 edition). Any reference to "UEFA Statutes" means UEFA Statutes 2016 edition, and a specific edition will be referred to when citing a different statute.

228 *ESLC supra* par 21; also see art 49 of the UEFA Statutes.

229 *ESLC supra* par 21.

including the exploitation of media rights and other commercial assets related to the competition.[230]

The dispute arose out of a commercial action brought by ESLC before the Commercial Court situated in Madrid, Spain, against FIFA and UEFA.[231] ESLC brought the action after UEFA and FIFA opposed its Super League project.[232] The Commercial Court (referred to as the "referring court") stated that FIFA and six continental confederations recognised by FIFA, including UEFA, issued a communication stating that they refuse to recognise the Super League, and any professional football club or player taking part in that league would be expelled from competitions organised by FIFA and UEFA.[233]

The referring court observed that there are two distinct but complementary economic activities making up the relevant market in that dispute. On the one hand, the organisation and marketing of international interclub football competition in the territory of the EU and on the other hand, the exploitation of various rights related to those competitions.[234] The referring court further found that FIFA and UEFA have held an economic and commercial monopoly that resulted in a dominant position in the market. This dominant position allowed them to conduct themselves independently of any potential competition. Their dominance further makes it difficult for an entity already operating or wishing to enter into that market and confers a particular responsibility on them to preserve competition.[235]

The referring court also stated that the dominant position enjoyed by FIFA and UEFA in the market is based not only on an economic and commercial monopoly but also on their regulatory, control and decision-making powers.[236] In addition, it observed that the combination of all those factors in practice gives rise to a barrier to entry that is difficult for competitors of FIFA and UEFA to overcome. This is because they are confronted with prior approval rules and rules governing exclusive appropriation and exploitation of various rights related to international football competitions.[237] While the referring court made those findings, it was uncertain whether FIFA and UEFA's conduct amounted to the twofold abuse of a dominant position prohibited by article 102 of the TFEU.[238]

Relying on *Motoe v Elliniko Dimosio*[239] and *ISU*,[240] the referring court stated:

> "the fact of entrusting, by regulatory or legislative means, a sporting organisation which pursues the economic activity of organising and marketing competitions while at the same time having the power to designate, *de jure* or

[230] *ESLC supra* par 23.
[231] *ESLC supra* par 28.
[232] *ESLC supra* par 29.
[233] *ESLC supra* par 30.
[234] *ESLC supra* par 34.
[235] *ESLC supra* par 35.
[236] *ESLC supra* par 36.
[237] *Ibid*.
[238] *ESLC supra* par 37.
[239] C-49/07 EU:C:2008:376 par 51 and 52.
[240] *ISU* Appeal *supra* par 70.

> de facto, the other undertakings authorised to set up those competitions, without that power being made subject to appropriate restrictions, obligations and review, confers on that sporting association an obvious advantage over its competitors by allowing it both to deny those competitors access to the market and to favour its own economic activity."[241]

Following this, the referring court observed that it is clear from *Canal Satélite Digital v Adminstración General del Estado*[242] that

> "rules of a public or private nature introducing a system of prior approval must not only be justified by an objective of general interest, but must also comply with the principle of proportionality, which entails inter alia that the exercise of the competent authority's discretion to grant such approval must be based on criteria which are transparent, objective and non-discriminatory."[243]

The referring court observed that these various requirements were not met, as was clear from the various factors shown in the above discussion.[244]

Therefore, the referring court referred the proceedings to the CJEU. First, the referring court asked the CJEU to clarify whether the interpretation of article 102 of the TFEU is applicable to articles 22, 71 and 73 of the FIFA Statutes, and articles 49 and 51 of the UEFA Statutes.[245] Secondly, the referring court asked whether article 101 of the TFEU must be interpreted as meaning that article 102 of the TFEU prohibits FIFA and UEFA from requiring the prior approval of those entities.[246] Thirdly, the referring court asked the CJEU whether articles 101 and/or 102 of the TFEU should be interpreted as meaning that these provisions prohibit conduct by FIFA and UEFA, their member associations and/or national leagues.[247] Fourthly, the referring court asked whether articles 101 and/or 102 of the TFEU must be interpreted as meaning that the provisions of articles 67 and 68 of the FIFA Statutes are incompatible with them.[248] Fifthly, the referring court asked whether the restrictions imposed by the FIFA and UEFA Statutes can have objective justification under the TFEU. Sixthly and lastly, the referring court asked whether articles 45, 49, 56 and/or 63 of the TFEU must be interpreted as meaning that requiring the prior approval of FIFA and UEFA for the establishment and/or organising of football competitions constitutes a restriction on freedom of movement.

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241 *ESLC supra* par 38.

242 C-390/99 EU:C:2002:34 par 35.

243 *ESLC supra* par 45.

244 *ESLC supra* par 39.

245 Art 22 of the FIFA Statutes generally deals with the transfer of players. Art 71 generally provides that all competitions should first be approved by FIFA, and art 73 deals with the authorisation of leagues and associations. In the UEFA Statutes, art 49 gives UEFA sole power to organise or cancel international competitions in Europe, and art 52 provides for general restrictions on members of FIFA to play outside of its territory.

246 *ESLC supra* par 47.

247 *Ibid*.

248 Art 67 provides: "FIFA, its member associations and the confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law." Art 68 provides: "FIFA, its member associations and the confederations are exclusively responsible for authorising the distribution of image and sound and other data carriers of football matches and events coming under their respective jurisdiction, without any restrictions as to content, time, place and technical and legal aspects."

The CJEU did not respond to or clarify the questions in the chronological sequence posed by the referring court. The CJEU noted that the questions originate from the rules found in articles 22, 67, 68 and 71 to 73 of the FIFA Statutes, and in articles 49 to 51 of the UEFA Statutes, respectively.[249] It further viewed those questions as aimed at enabling the referring court to determine whether those rules amount to an infringement of articles 45, 49, 56, 63, 101 and 102 of the TFEU.[250]

The CJEU noted that these rules may not be regulated by EU law, but the rules adopted by sporting associations in order to govern paid work by professional or semi-professional players may invoke articles 45, 49 and 56 of the TFEU.[251] Consequently, those rules may come within the scope of the TFEU on competition law, subject to the conditions of the specific provisions. This means that those associations may be categorised as "undertakings" within the meaning of articles 101 and 102 of the TFEU.[252] As a result, the CJEU found that all of the FIFA and UEFA rules about which the referring court was asked fall within the scope of articles 45, 49, 56, 63, 101 and 102 of the TFEU.[253]

The CJEU held that, to consider whether FIFA and UEFA abused their dominance, it was necessary to demonstrate, using methods other than those that are part of competition on merits between the undertakings, that the conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market, or by hindering the competitor's growth in the market.[254] All these demonstrations must be done in light of all the relevant factual circumstances.

While a member state is not prohibited from granting exclusive rights in a market to an undertaking through regulatory measures, such a situation must not place that undertaking in a position to abuse its dominance resulting from such exclusive rights. For example, an undertaking could abuse its dominance if it exercises the rights in a manner that prevents potentially competing undertakings from entering the market.[255]

In respect of the prior authorisation rules, the CJEU held:

> "[T]he adoption and implementation of rules by associations which are responsible for football at world and European levels and which pursue in parallel various economic activities related to the organisation of competitions, making subject to their prior approval the setting up, on European Union territory, of a new interclub football competition by a third-party undertaking, and controlling the participation of professional football clubs and players in such a competition, on pain of sanctions, where there is no framework for those various powers providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate, constitutes abuse of a dominant position."[256]

[249] *ESLC supra* par 73.
[250] *ESLC supra* par 78.
[251] *ESLC supra* par 85.
[252] *ESLC supra* par 87.
[253] *ESLC supra* par 94.
[254] *ESLC supra* par 129.
[255] *ESLC supra* par 132.
[256] *ESLC supra* par 152.

Furthermore, in determining whether the conduct in question is preventing competition by object or effect, the CJEU noted that in terms of article 101(1) of the TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices that are generally anti-competitive are incompatible with the internal market.[257] Therefore, in order to find that a decision by an association of undertakings is in contravention of article 101(1) of the TFEU, it is necessary to demonstrate either that the conduct has as its object the prevention, restriction or distortion of competition, or that the conduct has such an effect.[258] The CJEU noted that the analysis in each case differs depending on whether the conduct at issue has as its object or effect the prevention, restriction or distortion of competition.[259]

The CJEU further noted that although the rules on prior approval may include the pursuit of legitimate objectives, these rules conferred on FIFA and UEFA power to authorise, control and set the conditions of access to the market for any potentially competing undertaking.[260] This, in turn, deprives professional football clubs and players of the opportunity to participate in those competitions. Therefore, the CJEU found that the absence of a framework detailing criteria and procedural rules to ensure that they are transparent, objective and non-discriminatory shows "sufficient degree of harm to competition and thus have as their object the prevention thereof".[261]

The CJEU further responded to the second question that article 101(1) of the TFEU must be interpreted to mean that the adoption and implementation of rules on prior approval, controlling the participation of professional football clubs, and imposing sanctions constitutes a decision by an association of undertakings having as its object the prevention of competition. However, the CJEU stated that where there is a detailed framework providing criteria and procedural rules to ensure transparency, objectivity and non-discrimination, those rules might not prevent competition.[262] In respect of the third question, the CJEU held that such a public announcement constitutes implementation of the rules infringing both articles 101(1) and 102 of the TFEU. Therefore, it also comes within the scope of the prohibitions laid down in those two provisions, and there was no need to answer the third question separately.[263]

The CJEU, before responding to the fourth question, responded to the fifth question, which relates to the same FIFA and UEFA rules as those to which the first three questions were directed. It held that the rules related to economic activities may benefit from an exemption to the application of article 101(1) of the TFEU, or be considered justified under article 102 of the TFEU, only if it were demonstrated that all the conditions required for those purposes were satisfied.[264] Coming back to the fourth question, the CJEU

[257] *ESLC supra* par 155.
[258] ESLC *supra* par 158.
[259] *ESLC supra* par 160.
[260] *ESLC supra* par 176.
[261] *ESLC supra* par 178.
[262] *ESLC supra* par 179.
[263] *ESLC supra* par 181.
[264] *ESLC supra* par 209.

held that the arrangements for the exclusive exploitation of all the rights from the professional interclub football competitions organised by FIFA and UEFA may be regarded as having as their "object" the prevention or restriction of competition on the different markets concerned within the meaning of article 101(1) of the TFEU.[265] The CJEU further stated that this conduct constitutes abuse of dominance within the meaning of article 102 of the TFEU, unless it can be proved that they are justified.[266]

In respect of the sixth and last question, which relates to the freedom of movement of professional football clubs and players participating in competitions not organised by FIFA and UEFA, the court reiterated that "where there is no framework for those rules providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate", such rules constitute abuse of dominance.[267]

In essence, the CJEU found that the rules adopted and communicated by FIFA and UEFA were at odds with articles 101 and 102 of the TFEU and the Functioning of the European Union on competition law.

4 2 The United States

4 2 1 Nostalgic Partners v Office of the Commissioner of Baseball[268]

In this matter, four Minor League Baseball (MiLB) teams alleged that MLB had violated section 1 of the Sherman Antitrust Act[269] by entering into an exclusive agreement with 30 clubs to exclude 36 MiLB teams from MLB's new Professional Development League (PDL).[270] MLB and MiLB clubs were governed by the Professional Baseball Agreement (PBA).[271] MLB and MiLB clubs were separately owned, except for 25 MiLB clubs that are/were owned by their affiliate MLB clubs.[272]

The PBA expired, and MLB announced a new organisational plan, the PDL. In terms of the PDL, instead of contracting with the national association, MLB contracted with MiLB teams through PDL licence agreements. The new organisational plan reduced the number of MiLB leagues from six to four and limited MLB clubs to a maximum of four affiliates.[273] In response, Nostalgic Partners and other affected and/or interested parties filed a complaint with the United States District Court, alleging violation of section 1 of the Sherman Act. The court held that for

[265] *ESLC supra* par 230.
[266] *Ibid*.
[267] *ESLC supra* par 258.
[268] 1:2021cv10876 - Document 42 (S.D.N.Y. 2022).
[269] 15 USC SS 1-38.
[270] *Nostalgic Partners v Office of the Commissioner of Baseball supra* 1D.
[271] *Nostalgic Partners v Office of the Commissioner of Baseball supra* 2D–3.
[272] *Nostalgic Partners v Office of the Commissioner of Baseball supra* 3D.
[273] *Ibid*.

antitrust allegations to succeed, a plaintiff must allege (a) antitrust injury and (b) that it is an efficient enforcer of the antitrust laws.[274]

Following the precedent developed in *Gatt Communications Incorporated v PMC Associates*,[275] the court must establish a three-part test to establish the alleged antitrust conduct, namely

> "(1) the court must identify the practice complained of and the reasons such a practice is or [the conduct] might be anti-competitive; (2) the court must identify the actual injury the plaintiff alleges … [which] requires [the Court] to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct; and (3) the court [must compare] the anti-competitive effect of the specific practice at issue to the actual injury the plaintiff alleges."[276]

First, the plaintiffs must allege that the defendants have engaged in unlawful anti-competitive conduct.[277] The court noted that Nostalgic Partners had successfully alleged anti-competitive conduct in that the MLB plan to reduce minor-league affiliations would result in an actual adverse effect on competition in the market for minor-league affiliations.[278] Secondly, the court must "look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct".[279] The court was of the view that the MLB's alleged anti-competitive conduct resulted in MiLB losing its affiliations.[280]

Without the affiliations, they cannot attract top talent and are barred from playing against affiliated teams.[281] Thirdly, the plaintiffs "must demonstrate that the defendant's anti-competitive conduct caused its actual injury".[282] Nostalgic Partners alleged further that they were barred from competing with any of the 30 MLB teams and that injury to competition flows from this cap on affiliations.[283] To counter this claim, the defendants submitted that the plaintiffs themselves were involved in a scheme they now delegitimise and claim is anti-competitive.[284] In response, Nostalgic Partners argued that a party that participated in an anti-competitive practice is not prevented from challenging that practice in terms of competition law. It further submitted that a member of a cartel activity has legal standing to challenge the cartel to which it belongs.[285]

The court stated that MLB's reorganisation plan served as direct evidence that agreements between competitors restrict the output of club affiliations. This meant that the plaintiffs had successfully alleged that a competitive market without the agreement would have produced a large number of

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274 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 4D.
275 711 F.3d 68.
276 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 4D, citing *IQ Dental Supply Inc v Henry Schein Inc* 924 F 3d 57 at 62–63 (2d Cir 2019).
277 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 5D.
278 *Ibid*.
279 *Ibid*.
280 *Ibid*.
281 *Ibid*.
282 *Ibid*.
283 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 6D.
284 *Ibid*.
285 *Ibid*.

affiliations.[286] While this was positive for Nostalgic Partners, it still had to allege that the agreement was *per se* prohibited conduct.[287] The court confirmed that "*per se* rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct".[288] This rule is applied when courts have sufficient evidence to "predict with confidence that [the agreement] would be invalidated in all or almost all instances".[289] The court held that the output restrictions that were the subject of this case were *per se* prohibited.[290]

However, the court highlighted that some industries require a thorough inquiry even if the alleged practice is anti-competitive.[291] This does not suggest that competition authorities do not have jurisdiction in regulated industries, but refers to specific features of the industry. Competition law is applicable, but the court nevertheless cautioned against application of the *per se* rule to agreements within sports leagues. This is because a certain agreement between competitors may be important for economic development. Strict enforcement of the *per se* rule in sports is inappropriate as it would prevent considerations of pro-competitive gains and justifications.[292]

Consequently, Nostalgic Partners was left with two rules applicable to the alleged anti-competitive practice. The first was the abbreviated rule of reason – the "quick look" review, which provides, for instance, that output restrictions may allow application of the rule without definition and/or determination of the relevant market.[293] This appears to be the easiest way out as it precludes a long process of market determination. According to this rule, Nostalgic Partners must only allege a detrimental effect on competition. Arguably, since the "quick look" review seemed the easiest, Nostalgic Partners opted for it to challenge MLB's alleged competition restrictions. However, their bid failed, and the court held that "a quick look review without addressing the relevant market would be insufficient to evaluate the effects on competition from changes to MLB and MiLB's complex relationship".[294] This passage implies that the allegations by Nostalgic Partners do not allow for an abbreviated rule of reason analysis but require a full rule of reason.

The full-rule-of-reason inquiry requires the plaintiff to identify the relevant market affected by the alleged conduct and to prove the detrimental effect on competition in the identified market.[295] It is difficult to prove a relevant market in cases of such nature.[296] "Because [the court] cannot know what the characteristics of the industry would be in a free market situation, the

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286 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 11D.
287 *Ibid*.
288 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 12D.
289 *Ibid*.
290 *Ibid*.
291 *Ibid*.
292 *Ibid*.
293 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 13D.
294 *Ibid*.
295 *Ibid*.
296 *Ibid*.

definition of a relevant market necessarily involves some guesswork."[297] The court held that Nostalgic Partners must "allege a proposed relevant market that ... encompasses all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favour".[298]

To prove the relevant market, Nostalgic Partners alleged that the relevant market affected by MLB's conduct is the market for MiLB affiliations.[299] Nostalgic Partners further submitted that there is no alternative to MLB for MiLB affiliation, and that non-affiliation results in their not reaching the same pool of talent, and limited access to and attraction of sponsors and fan base.[300] The court found that Nostalgic Partners had argued salient facts to demonstrate a detrimental effect on competition in the identified market.[301] On the one hand, contracts and combinations in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce are prohibited.[302] On the other hand, the Supreme Court has recognised baseball's exemption from the application of antitrust law.[303]

The court held that the exemption provisions under the Sherman Act were wide enough to accommodate the allegations by Nostalgic Partners in this case.[304] Relying on *Wyckoff v Office of the Comm'r of Baseball*,[305] the court concluded that the interpretation of the exemption of baseball forecloses the argument of the plaintiff since minor league affiliations are important to the business of baseball.[306] As a result, the case was dismissed.

5 LESSONS FOR SOUTH AFRICA

Arguably, competition law in the EU and the US is not distinct from that in South Africa. It may thus be easy for South Africa to draw lessons from the above jurisdictions. In the EU and the US, different courts have adjudicated matters concerning the interface between sports and competition law. South Africa lags behind in this discourse, given that South African cases before the competition authorities do not provide much jurisprudence. Notwithstanding inconsistencies in the EU and US courts' interpretation and application of competition law to sports, these jurisdictions have made significant strides in enforcing competition law in the commercialised sports industry. South Africa can learn from the EU and the US experiences and best practices in the area. Through their jurisprudence, these jurisdictions indirectly share their experiences of how to approach competition concerns within the sports industry. While both jurisdictions enforce competition compliance with sports associations and big clubs, they pay due regard to specific characteristics of the sector. Furthermore, what appears to be anti-

297 *Ibid*.
298 *Ibid*.
299 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 14D.
300 *Ibid*.
301 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 15D.
302 S 1 of the Sherman Act.
303 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 15D.
304 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 17D.
305 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 7D.
306 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 17D.

competitive in terms of competition law could be considered to strengthen actual competition through the lens of sports rules and policies.

The EU shares with South Africa the approach that sporting rules and sanctions must be placed within the competition-law framework to avoid competition-statute infringements.[307] Although this does not suggest that sport's governing bodies are not allowed to establish their own rules and policies to ensure compliance with the sporting code concerned, the regulatory power vested in their regulatory bodies may enable them to prevent market access of potentially competing undertakings.[308] The EU further shares the approach that even when a club or association is found to have contravened the Competition Act under *per se* prohibition, competition authorities and courts should bear in mind that some industries require a thorough inquiry even if the alleged practice is anti-competitive.[309] This is because certain agreements between competitors are essential, and the application of the *per se* rule in sports is inappropriate as it would prevent considerations of pro-competitive gains and justifications.[310] Furthermore, assessment of the sector characteristics is necessary before enforcement of competition law. The EU shares with South Africa the league limit of 25 players on each club roster. South African sporting codes do have a cap or a limit in terms of club list or roster, but the MLB rules add exemptions for young players.[311]

South Africa can also learn from the US practice that in instances where a club sells a player if there are more interested buyers, the buyer or the club that has the poorest record gets the player.[312] At its core, this rule seeks to balance the competition between large and small clubs. The rule protects small or emerging sports clubs from exploitation by big and well-established teams.[313]. Of further potential interest to South Africa is the fact that, in the quest to balance competition in the leagues, the US considers and enforces salary caps in the sports industry (to some sporting codes).

South Africa can draw important lessons from the EU and the US when it comes to enforcement of competition law in the sports industry. The EU and US courts have adjudicated a number of cases to promote competition-law compliance within the sport industry – for example, the recent *ISU*, *ESLC* and *Nostalgic Partners* cases. While in some cases, the plaintiffs did not succeed in their claims for antitrust violations, courts had the opportunity to delve into the interpretation and application of competition law in sports with its complexities.

The recent judgments are a great example of how competition institutions and sports associations can enforce competition-law compliance. These incentives may also encompass applications for exemptions from certain practices in sports. While learning from these jurisdictions, South Africa

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307 *ESLC supra* par 143–152.

308 *ISU* Appeal *supra* par 131–144.

309 *Nostalgic Partners v Office of the Commissioner of Baseball supra* 12D.

310 *Ibid*.

311 Ross 1999 *Competition & Consumer Law Journal* 3.

312 *Ibid*.

313 Protection of HDPs and SMEs.

should not forget that justifications on the basis of efficiency and pro-competitive gains do not qualify as exemptions under the Competition Act.

6 CONCLUSION

The purpose of this article has been to explore examples of anti-competitive behaviour in sports, and how competition authorities can possibly apply the Competition Act when disputes arise. First, the article has discussed the scope of the Competition Act in respect of sports activities. It is submitted that sports practices that are economic in nature are subject to the Competition Act. The article noted that while this is the case, some of the practices are pure sporting rules and do not affect economic activity; therefore, competition authorities, when enforcing competition regulations in the sport industry, should do so with caution. This article notes that some anti-competitive practices in sports may not originate from South Africa, but if such a practice has an effect in South Africa, the Competition Act may be invoked. The Act also provides for regulated sectors, meaning that the Commission may enter into an MoU with a concerned foreign regulator pertaining to investigation and adjudication of a practice that is regulated or affects both jurisdictions. The article also submits that there is no jurisprudence in South Africa on sports and competition law.

The article has further discussed selected anti-competitive practices in sports – in particular, relating to labour contracts and the collusive television market in sports. It is submitted that while labour restraints in sports may be justified in terms of contractual and labour laws, in the context of competition law, these restraints may qualify as restrictions prohibited by the Competition Act.[314] The article has further explored examples of anti-competitive practices and made an example of Sundowns: this article submits that Sundowns uses its substantial resources (buyer power) to outbid other competitors in the market. In respect of the television market, it has been noted that specific statutes and regulations regulate the specific market, but none ousts application of the Competition Act.[315] One example of an anti-competitive practice in this market is the entry by clubs, agents and/or sports associations into restrictive horizontal practices with media companies to televise games, which may lead to concentration of the market, and in turn a single dominant firm like Multichoice.

Since there is no jurisprudence on this discourse in South Africa, this article considers selected recent judicial determinations (2022 and 2023) in the EU and the US. The decisions in *ISU* (2023), *ESLC* (2023) and *Nostalgic Partners* (2022) offer valuable insights into the intersection of sports and competition law. The intervention of competition authorities in the sports industry is necessary, but this does not mean the competition authorities can take away the autonomy of sports. Competition regulators may intervene in

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[314] Ross 1999 *Competition & Consumer Law Journal* 3; see also Louw 2007 *Obiter* 190; *Blackler v New Zealand Rugby Football League supra*.

[315] S 3 of the Competition Act. In terms of s 67 of the Act, ICASA is authorised to deal with various competition matters with respect to relevant markets under the Act. The latter include markets for broadcasting services. Thus ss 21(1)(*h*) and 82(1) and (2) of the Competition Act are invoked.

instances where there is a suspected anti-competitive practice. In doing so, the competition authorities should be cautious of the specific characteristics of the sports industry, in that some practices are necessary for sports competitions. This is in no way a suggestion that the autonomy of sports bodies should be unchecked, as this would give them a chance to stifle competition.[316] These judgments present an opportunity for South African courts to adopt the same approach in regulating the sports industry, depending on case-by-case scenarios.

[316] Colino "Sports and Competition Law: A Not-So-Special Relationship?" 2024 *International Review of Intellectual Property and Competition Law* 672.