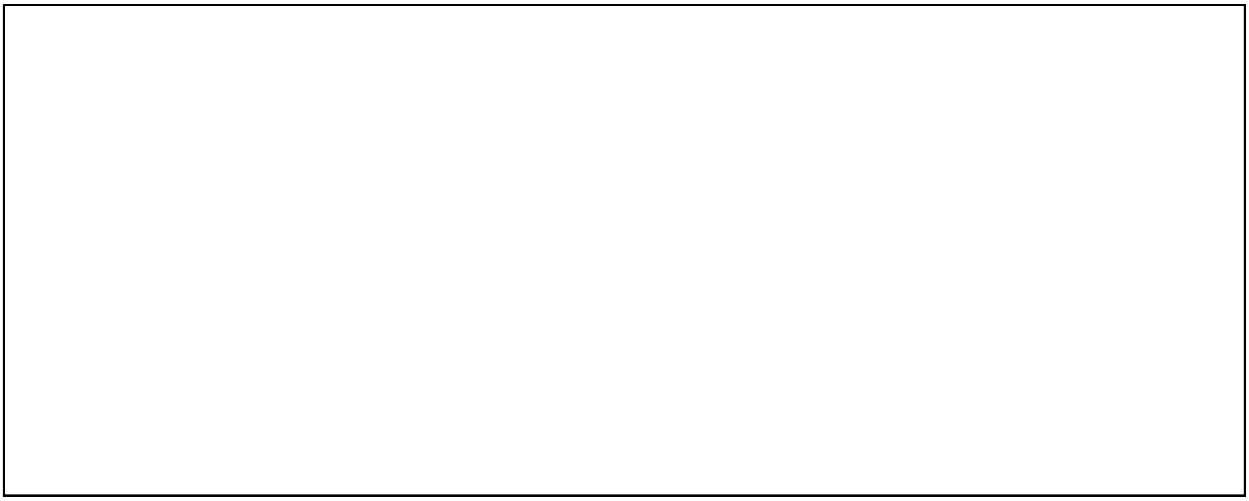

ROUNDTABLE ON COMPETITION AND SPORTS

-- Note by the United States --

1. Section 1 of the Sherman Act prohibits agreements among competitors that unreasonably restrain trade,[1] a prohibition that both the Antitrust Division of the United States Department of Justice and private parties are authorised to enforce. In part because sports leagues and competitions require some agreements among competing, separately operated teams in order to structure on-field competition,[2] United States courts have been routinely required to deal with private antitrust challenges involving sports leagues and sanctioning bodies.[3] All such cases have been brought by private parties, however. Since 1970, the federal enforcement agencies' involvement in sports cases has consisted of filing *amicus* briefs designed to assist, as a "friend of the court," in the adjudication of private disputes.

2. In the United States, competition policy issues in professional sports have arisen mainly with respect to the four most popular leagues—Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL). Each of these leagues is organised as a joint venture of separate businesses. Each has a central office responsible for many operating decisions, such as determining the schedule of games for each season, but the individual teams are separately owned and operated and team owners participate in significant decisions made by the league as representatives of their respective teams. The leagues pool revenues to varying degrees, but each team is a separate profit centre and team profitability varies widely within a league.[4]

3. In the United States, some competition policy issues have arisen in non-team professional sports, such as golf and auto racing. These issues typically concern the conduct of sanctioning bodies, such as the PGA TOUR, which governs men's golf, and the National Association for Stock Car Auto Racing (NASCAR). These bodies generally operate much like a sports league's central office in determining the schedule of events and in licensing broadcast rights. In these sports, however, no business entities comparable to the teams in the four major leagues participate in decision making.

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1 See Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

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1. The Single-Entity Issue with Professional Sports Leagues

4. A critical legal issue in this area is when, if ever, a sports league structured as a joint venture of separately owned teams should be considered a single economic entity for antitrust purposes. Under U.S. Supreme Court precedent, Section 1 of the Sherman Act does not apply to agreements among subsidiaries of a single firm or agreements among any other parties that are considered members of a single economic entity.[5] It is therefore important to decide when, if ever, a sports league (or other form of joint venture) should be treated as a single-entity.[6]

5. On May 24, the Supreme Court addressed this issue in the *American Needle* case.[7] The case arose from the National Football League's decision to grant a single, exclusive license for use on apparel to all the team's logos and trademarks. A hat manufacturer denied a license filed suit, arguing that the exclusive license violated the Sherman Act as an agreement among competing firms (*i.e.* the teams). The complaint was dismissed by the district court. The court of appeals, adopting the approach suggested by its precedent, held that the single entity issue had to be addressed "one facet of a league at a time,"[8] and found that, at least with respect to licensing of team logos and trademarks, the NFL acted as a single economic entity.[9] It therefore affirmed the dismissal of the complaint.

6. The Supreme Court unanimously reversed the court of appeals on the basis that the NFL teams "compete in the market for intellectual property" so collective licensing decisions "by the NFL teams . . . 'depriv[e] the marketplace of independent centres of decision-making.'"[10] Even if the relevant decisions were not directly made by the teams, but rather the league's licensing entity, NFL Properties, the Court held that its actions were not those of a single economic entity because it acted as an instrumentality of the teams.[11] Consequently, the Court remanded the case to the lower court for further proceedings consistent with the Supreme Court's holding that the collective conduct at issue must be analysed under the rule of reason.

7. The Court also observed, however, that many collective actions by the teams in a sports league would be lawful under the Sherman Act either because the teams "must co-operate in the production and scheduling of games" or because of league interests in maintaining competitive balance.[12] As the Court's observation suggests, sports league cases raise unique issues because, with respect to *on-field* interaction,

a major source of innovation and efficiencies and a dangerous opportunity for concerted, anticompetitive conduct, this is an area where the careful development of sound rules is essential, and it is thus important to keep in mind the facts that make sports league cases distinct from many others.

2. Antitrust Cases Involving Professional Sports under Section 1 of the Sherman Act

8. As the Supreme Court has recently observed: “The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. . . . In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”[13] Although the United States has experienced a great deal of Section 1 litigation involving sports leagues, the cases have yielded little insight into the unique issues arising in the application of the rule of reason to sports. One appeals court decision noted complexities arising from the fact that co-operation among teams can be procompetitive in markets h.1828ti.1 (a)9.8 (t)-4.1 (es h)11.6 (a)-1.1 (s)]TJ0.0019I2. es(t)1.1 (s)9 sd2t (r)-2(t)-4.1/TT1a-4ntmimir S

Raiders.[19] At issue in another case were the NFL's rules requiring approval by team owners of all transfers of ownership and the NFL's policy against public ownership. A jury held that the rule and policy violated the antitrust laws. On appellate review, the court rejected most of the NFL's contentions regarding errors of fact and law but found that other trial errors necessitated retrial.[20]

3. The Relevant Market in Professional Sports

15. Few judicial antitrust decisions involving professional sports have devoted significant attention to the definition of the relevant market. The Supreme Court appears to have addressed sports market definition just twice: a 1959 decision involving the promotion and broadcasting of boxing upheld a lower court's determination that the relevant market was limited to championship boxing matches,[25] and a 1984 decision involving the broadcasting of college football games approved the lower courts' determination that the relevant market was limited to "college football broadcasts."[26]

4 Limitations on the Application of Antitrust Law to Professional Sports

4.1 The Baseball Exemption

18. Antitrust law is an exercise of the congressional power to regulate "interstate commerce." Based on the then-prevailing understanding of those words, the Supreme Court in 1922 held that the Sherman Act did not apply to the conduct of a professional baseball league because the exhibition of professional baseball games was neither commerce nor interstate.[33] Within two decades, Supreme Court decisions greatly expanded the definition of "interstate commerce," and the Court determined that Congress had not

player mobility.[40] The best-known case concerned an NFL rule requiring compensation to a team when one of its players is signed by a rival team, and the court of appeals determined that the rule had been imposed on the players union rather than bargained for.[41] In antitrust litigation involving the NBA and NHL, the courts held that the exemption did not apply on the view that it could not be invoked to advantage employers in a dispute with workers.[42]

21. More recent decisions, however, have consistently held that player market restraints are protected by the non-statutory labour exemption whenever they were within agreements negotiated with the players unions.[43] For example, one case held that the exemption applied to the NFL rule barring participation in the player draft for three football seasons after high school graduation.[44]

22. A recurring issue in antitrust litigation between major professional sports leagues and their players is the application of the non-statutory labour exemption a3-S7n3 (t)813 (er(t)813 (h)228 (e epp)13.1 (i)-2