FOOTBALL IN LONDON? AN ANTITRUST EXAMINATION OF THE NATIONAL FOOTBALL LEAGUE'S INTERNATIONAL EXPANSION EFFORTS

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I. INTRODUCTION

It's fourth down, tie score, with one second left on the game clock in the fourth quarter. It's Super Bowl LXI, and the Jets have found themselves in a matchup with the New York Giants to win their first championship since Joe Namath and the 1969 Jets shocked the world.[1] They just put together an eighty-yard drive to be in field goal range at the Giants 20 yard line. With sweat pouring down his face and his heart racing, the place kicker looks up, puts all his force into a kick and . . . it's good!!

The excitement of the National Football League ("NFL") has become a staple of contemporary American culture. Football has become entrenched in our daily lives, and the sport has built its popularity among the country's major sporting leagues. What started as a modest football league that had recently undergone a merger[2] has become a Sunday tradition among American households.

In the early 1920s, professional, organized football in America was born at a small car dealership in Canton, Ohio.[3] The owners of the few professional franchises that existed at the time (though not yet known as the NFL) were nervous because they could not raise enough capital to compete with rising player salaries and the competitive nature of the industry in general, in terms of producing consistent revenue through gate sales and sponsorships.[4] After eleven teams reached an agreement, the American Professional Football Association was formed, and since 1920, this league has evolved into what is now known as the National Football League.[5]

As of 2017, with thirty-two dominant franchises spanning the continental United States, the NFL has recently made efforts to explore a potential international franchise.[6] Regular season games have been played in London and Mexico City, for example, as the NFL seeks to establish a franchise in an overseas market to expand its brand name

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1 *See* SuperBowl.com wire reports, *Super Bowl III*, NFL.COM, (Jan. 13, 1969), http://www.nfl.com/superbowl/history/recap/sbiii.

2 *See* Don Banks, *Forty-five years after the last AFL season, rivalry with the NFL still resonates*, SPORTS ILLUSTRATED, (Nov. 12, 2014), http://www.si.com/nfl/2014/11/12/afl-history-kansas-city-chiefs-oakland-raiders (noting that although the AFL-NFL merger had been announced prior to the 1966 NFL season, "for those who coached and played in the AFL, it was almost as if they were foot soldiers near the front, who never received word that the war was over.").

3 *See* Christopher Klein, *The Birth of the National Football League*, HISTORY, (Sept. 4, 2014), http://www.history.com/news/the-birth-of-the-national-football-league.

4 *Id.*

5 *Id.*

6 *See* Dan Graziano, *Forget the on-field product: The NFL in London is working*, ESPN (Sep. 29, 2016), http://www.espn.com/nfl/story/_/page/HotRead160929/forget-field-product-nfl-london-working-more-games-coming-future-2016.

and cultivate a global fan base. [7] However, establishing an international franchise comes with consequences and obstacles that the NFL must consider. Could an international team compete in the same league as the American franchises? Will there be a disparity in talent? How will the league handle players' adjustment to differences in time zones? These are just some of the practical issues the NFL might face. Along with these issues come inevitable legal ramifications, which at this point are speculative, as the NFL would be the first of its kind to pursue this sort of global venture.[8] Antitrust law comes into play not only in this potential situation, but in sports in general, as there is often a growing fear of one particular league becoming so dominant, that is inevitable squeezes out smaller competitors.

Through antitrust law, the U.S. federal government seeks to prevent monopolies and promote fair economic competition among and within the country's industries.[9] However, despite the efforts the government has made to police monopolies and diminish unfair competition, professional sports has acquired a special set of rules due to its unique corporate structure and business model.[10] Major League Baseball ("MLB"), for example, is the only American professional sport to retain an antitrust exemption.[11] The NFL, on the other hand, has tried on numerous occasions to gain an equivalent exemption, which the Supreme Court has repeatedly denied.[12]

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7 *See* Adam Chandler, *The NFL's Experiment in Mexico City*, THE ATLANTIC, (Nov. 24, 2016), http://www.theatlantic.com/business/archive/2016/11/nfl-mexico-city/508682/, (noting that the NFL recently brought an "International Series" game back to Mexico City, for the first time since 2005. This game further shows the NFL's efforts in expanding its brand and making attempts to globalize the game of American football).

8 *See* Kristi Dosh, *NFL in London raises legal issues*, ESPN, (Sep. 25, 2013), http://www.espn.com/nfl/story/_/id/9716479/nfl-team-london-raises-legal-issues. *See also* Richard Sandomir, *NFL Pulls the Plug on Its League in Europe*, N.Y. TIMES, (June 30, 2007), http://www.nytimes.com/2007/06/30/sports/football/30nfl.html. (NFL Europa was a league established in Europe by the NFL. Established in the early 1990s, the NFL set-up ten teams, and then dropped to six teams, spanning Europe and Canada, including: Germany, Netherlands, Spain, and the United Kingdom. NFL Europe largely failed because it could not establish a passionate fan base in Europe, it had to strong of a presence only in Germany, and it could not solidify a consistent television partner. These issues, as well as others, all doom the NFL as they begin to consider a move abroad again).

9 Federal Trade Commission, *The Antitrust Laws*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

10 Claudia G. Catalano, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d 1 (2003).

11 Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 1 JEFFREY S. MOORAD SPORTS L. J. 2 (2015). *See also* David Greenberg, *Baseball's Con Game*, SLATE, (July 19, 2002), http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html (explaining that the antitrust exemption for baseball stems from the idea that the courts historically viewed baseball as only a game (as it was deemed "America's pastime"), yet the franchise owners and athletes treated Major League Baseball as a business venture).

12 American Needle v. National Football League, 560 U.S. 183, 203 (2010) (holding that

Although the NFL's thirty-two domestic franchises are subject to antitrust law individually, the league has been testing international markets, seeking to place a team in Europe, specifically the United Kingdom. Given the NFL's challenging history with antitrust law in the United States, this Note will explore whether the NFL will have to overcome any of the obstacles it faced with the US courts, in historically trying to escape the scrutiny of antitrust law by deeming itself a single-entity, while simultaneously attempting to establish a permanent franchise in the UK.

This note will also seek to establish the origins and implications of antitrust law in both the US and the UK and reach a conclusion as to whether the NFL can successfully establish a franchise abroad while complying with foreign antitrust laws.

Part I will explore the origins of antitrust law within the United States, as well as the various federal statutes that govern antitrust law today, such as the Sherman Act and the Clayton Act. The Sherman Act will also be explored in detail, by examining the Act's history, why it was created, and the tests used by the courts today to determine if there is a violation.

Within this section, the history of the NFL and antitrust law will also be explored. I will discuss the various ways in which the NFL has tried to avoid antitrust scrutiny in the past, and ultimately this section will reach a conclusion as to whether antitrust law applies to the NFL today.

Next, this note will examine the history of antitrust law, also known as anti-competition law, in the United Kingdom. The United Kingdom's Office of Fair Trading[13] guidelines will be explained, and the implications of the Competition Act of 1998 will be contrasted with those of the Sherman Act and Clayton Act in the United States. This section will set a background for how antitrust law is both viewed and applied in the United States and the United Kingdom, and ultimately it will serve as a transition into an analysis of how a potential NFL franchise in the UK can still comply with British antitrust laws.

Part III will discuss the implications of an international franchise for the NFL, from an antitrust perspective, detailing some of the issues the NFL is likely to face. This section will examine potential problems

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"when 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.").

13 *See Competition Policy*, ECONOMICS ONLINE, http://www.economicsonline.co.uk/Business_economics/Regulation.html, (explaining, "[T]he Office of Fair Trading ("OFT") is an independent body whose main role is to try to ensure that markets work effectively." The OFT helps to police potential actions of unfair competition in the UK; the OFT ultimately acts as the governing body whose job it is to monitor and enforce unfair competition law).

that the NFL might face in expanding abroad. This section will also look at how professional soccer is situated within the sports industry abroad, and how the NFL is likely to follow the business structure and landscape of soccer in the UK to remain compliant with antitrust. Some of these problems include the effects of "Brexit," and how membership in the European Union could affect Britain's anti-competition law; the history and effects of the Maurice Clarett decision in the United States and the creation of the non-statutory labor exemption; and finally, how television and broadcasting rights could pose a problem for the NFL upon international relocation.

Finally, Part IV will explore issues that the NFL might face under UK antitrust law should it ultimately expand. This section looks at the antitrust implications of franchise relocation, by examining the history of NFL franchise relocation in the US, and reaching a conclusion, as to whether the NFL could comply with anti-competition law as well as its own by-laws when operating in Europe.

II. BACKGROUND

A. An Introduction to US. Antitrust Law

The Sherman Act ("Act") was signed into law by President Benjamin Harrison in 1890,[14] after passage by Congress, through its legislative power to regulate interstate commerce.[15] The goal of antitrust law, as defined by the Sherman Act, is to prohibit "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[16] The Sherman Act is one of the main governing statutes of antitrust law and often guides the courts in disputes regarding antitrust scrutiny. The Act enables private citizens, as well as the federal government, to bring suit in federal court to dismantle any formal or informal arrangements of entities that are allegedly in restraint of trade.[17] The two predominant sections of the Act

14 National Archives, 15 U.S.C. §§1-7, (1890), NATIONAL ARCHIVES, https://www.ourdocuments.gov/doc.php?flash=true&doc=51.

15 *See* David F. Forte, *Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause*, THE HERITAGE FOUNDATION, http://www.heritage.org/research/reports/2011/01/commerce-commerce-everywhere-the-uses-and-abuses-of-the-commerce-clause, (noting that the Commerce Clause power is a delegation to Congress and a "constraint upon state legislation").

16 15 U.S.C. §1 (2004). *See also* Albert M. Kales, *The Sherman Act*, 31 HARV. L. REV. 412 (1918).

17 *See Sherman Act*, THEODORE ROOSEVELT CENTER, http://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Sherman-Act.aspx.

in the world of sports are sections one and two. Section one, as previously mentioned, seeks to prohibit contracts, combinations, or conspiracies in restraint of trade.[18] Section two, on the other hand, looks to prevent monopolization of an industry within a given marketplace.[19] Although the Sherman Act is considered a pillar of antitrust law by the courts, there is other guiding legislation that exists to aid courts in making antitrust decisions.

The Clayton Act, which prohibits mergers or acquisitions that unduly restrain competition, and the Federal Trade Commission Act, which gives authority to the Federal Trade Commission to police antitrust actions, also determines the rules and regulations of federal antitrust law.[20] Former President Woodrow Wilson signed the Clayton Act into law in 1914, shortly after the Federal Trade Commission Act was signed into law.[21]

The Clayton Act, as contrasted with the Sherman Act, was designed to foresee possible abuses of antitrust law before they occurred. The Sherman Act, however, was designed to spot antitrust abuses after their completion.[22] Although both pieces of legislation are very much relevant today, courts often rely on two tests derived from the Sherman Act to spot antitrust abuses.

Analysis under US antitrust law consists of two different tests employed by courts: 1) Per se analysis and 2) Rule of Reason analysis.[23] The per se analysis, which is used in a more limited set of cases, is "generally reserved for . . . conduct that almost always raises prices for consumers and has little or no redeeming procompetitive value."[24] Per

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18 15 U.S.C. §1 (2004).

19 *Id*.

20 Federal Trade Commission, *supra* note 9. (The Sherman Act was created by Congress to police fair business practices and punish those who do not help promote fair economic competition in the marketplace. The Sherman Act, however, does not promote all restraints of trade but rather, only those that are *unreasonable*. The FTC explains that a business partnership between two people restrains trade because the formation of this partnership makes it less likely that one of the partners will form his or her own business. However, this is not deemed to be an unreasonable restraint of trade and therefore it does not violate antitrust law. On the other hand, those acts that are so unreasonable that they are clearly illegal are *per se* violations of the Sherman Act are always in restraint of trade and therefore run counter to antitrust law).

21 Debbie Feinstein, *The Clayton Act: 100 years and counting*, FEDERAL TRADE COMMISSION, (Oct. 15, 2014), https://www.ftc.gov/news-events/blogs/competition-matters/2014/10/clayton-act-100-years-counting.

22 *Id*.

23 Daniel C. Fundakowski, *Rule of Reason: From Balancing to Burden Shifting*, 1 PERSPECTIVES IN ANTITRUST 1, n.2 (2013).

24 *Id*.; *See also* Macdonald Flinn Willis B. Snell, Judson A. Parsons, Franklin Poul & Valentine A. Weber, *The Per Se Rule*, 38 ANTITRUST L.J. 731 (1969) ("'per se'" . . . is used by courts and commentators as a single, shorthand expression to describe a variety of trade restraints which are held to violate the antitrust laws without any consideration . . . of the amount of commerce involved, the effect of the particular restraint on competition, the motive of the participants, any social or economic benefits resulting from the restraint, or other surrounding

se analysis also applies, in the more obvious sense, when an act is inherently unlawful (i.e. as proscribed by statute) regardless of the circumstances.[25] Rule of Reason analysis, on the other hand, is the test presumed to apply by the Sherman Act, and typically follows a "burden-shifting framework."[26] In fact, "less than 5% [of Rule of Reason cases are] conduct[ed] [without] any type of balancing."[27] Courts often conduct a burden shifting analysis prior to balancing by: 1) Concluding that the plaintiff failed to demonstrate anti-competitive behavior; 2) concluding that the defendant did in fact demonstrate anti-competitive behavior with a legitimate justification for that action; and 3) concluding that the plaintiff was unable to show that the defendant's behavior "is not reasonably necessary or that there are less restrictive alternatives."[28]

A Rule of Reason analysis employs a three-part inquiry in which the court will consider: 1) What harm may result or may have already been caused due to an anticompetitive act, 2) Does the goal that the parties are trying to achieve seem like a legitimate interest, and 3) Are there any alternatives in which this goal can be accomplished?[29] In *Standard Oil Co. of New Jersey v. U.S.*, the Supreme Court noted that the proper inquiry is that "the standard of reason . . . was intended to be the measure . . . for . . . determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."[30] *Standard Oil* further advocates for the theory that Rule of Reason is a fact-driven balancing test used to discover a potential antitrust wrongdoing.

Further, Rule of Reason analysis seeks to "balance[s] the procompetitive benefits and anticompetitive effects of an opposed restraint to determine which predominate[s]."[31] Rule of Reason analysis serves as the basic, fundamental starting point for courts when employing an analysis under antitrust law. Rule of Reason analysis is

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facts.").

25 Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 25, FED. JUD. CTR., (June 1981), https://www.fjc.gov/sites/default/files/2012/Antitrust.pdf.

26 *Id*. (citing Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 60 (1911) (holding that Rule of Reason requires that "courts identify and balance the precompetitive benefits and anticompetitive effects of an opposed restraint to determine which predominate.").

27 Fundakowski, *supra* note 23, at 1.

28 *Id*. at 2.

29 *See* Areeda, *supra* note 25, at 1-2.

30 221 U.S. 1, 60 (1910). The case of *Standard Oil* tells the story of the famous John Rockefeller and the demise of his oil empire. *See id*. at 30-43. Standard Oil controlled the American oil industry at the time of this case, in the late 1800s to early 1900s. *See id*. at 32-33. It was alleged that Standard was engaging in unfair business practices because it was inducing competitors to purchase its products, and threatening those that did not. *See id*. at 33-37. Ultimately, it was found by the Court that Standard was acting in violation of trade and unfair competition. *See id*. at 77.

31 Fundakowski, *supra* note 23, at 2 (citations omitted).

concerned with, "the maximization of wealth or consumer want satisfaction."[32] This form of analysis used by the courts looks to protect consumers, considering fairness, and allowing activity which permits consumers to take self-serving action to maximize their wealth. This test is an all-inclusive form of analysis conducted by the courts, taking into consideration all market players, no matter how large or small these players may be.[33]

Professional sports in the United States have four major market players and each has a unique and complex relationship with federal antitrust law.[34] Although federal antitrust law is "designed to promote competition," its applicability to professional sports gives rise to "competing interests."[35] If more protection is provided to athletes, then competition will diminish; whereas, if teams and leagues are offered more protection, athletes become more limited in competing for positions on teams that can afford to pay higher salaries.[36] This conflict, as it relates to antitrust law between protections for the athletes versus protections for the franchise owners and league executives, is ongoing and snowballs into too many other issues outside the scope of antitrust law such as issues in employment law and disputes within the negotiations of collective bargaining agreements. Antitrust law is ever-present within the sports industry, and its implications are felt among both players and owners and team executives alike.

Antitrust law and professional sports are unique also because Major League Baseball contains the only exemption to antitrust among the major sporting leagues.[37] This exemption, largely a result of the case of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, grants baseball an exemption due to the argument that the business of putting on baseball games is a largely intrastate affair and therefore out of the reach of Congress (which can regulate only interstate activity).[38] The NFL has on multiple occasions tried to receive a similar exemption, but as explained in the next section, these attempts have failed.

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32 Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part II*, 75 YALE L.J. 373, 375 (1966).

33 *See id*. at 376.

34 *See* Catalano, *supra* note 10.

35 *Id*.

36 *See id*.

37 *See id*.

38 Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208-09 (1922).

B. The NFL and Antitrust Law

The NFL's relationship with antitrust law is not deeply rooted in the game's history, but arguably, the first issues arose in the mid-1950s.[39]

From the onset, it is important to establish that the NFL and the NFL Players Association ("NFLPA") are governed by a Collective Bargaining Agreement ("CBA").[40] The CBA is a legally binding document that establishes the rules and regulations regarding the conduct of NFL players, NFL franchise owners, and the interactions between these two very distinct groups of people.[41] The CBA is re-negotiated every few years, which often causes controversy, disputes, and even strikes by the players' union.[42] The CBA intertwines with antitrust law in a significant way, as it is a mechanism that encourages not only fair competition among the team owners and players, but also, it ensures that players are given a voice in deciding the rules and regulations that govern their conduct both on and off the field.

In 2011, the NFL players (represented by the NFLPA) conducted a strike, not agreeing to perform their contracts because of what they deemed to be unfair working conditions.[43] The players alleged that because the NFL was the primary employer of professional football athletes in the United States, the NFL "exerts monopoly power in the relevant market for professional football players services."[44] The restrictions in which the players' alleged the NFL owners were guilty of were: (1) a salary cap for individual franchises, thereby limiting the

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39 *See* Evan M. Rosing, *Congressional Antitrust for the National Football League*, ENT. & SPORTS L., Summer 2008, at 9 (explaining that the NFL established a basis to challenge federal antitrust law because of the case of *Federal Baseball Club*). The seminal case for the NFL's antitrust challenge was the case of Radovich v. NFL, 352 U.S. 445 (1957). In this case, the Supreme Court was faced with the question of whether to extend an antitrust exemption to the NFL; *Id*. at 446. The Supreme Court ultimately decided against an extension of this exemption, mainly because the NFL's business practices occur in interstate commerce and therefore remain subject to the Sherman Act; *See id*. at 452. The Court also decided against an exemption because previous decisions have limited *Federal Baseball Club* only to cases involving baseball. *See id*.

40 *See generally* Gregg Rosenthal, *The CBA in a Nutshell*, NBC SPORTS (Jul. 25, 2011, 2:03 PM), http://profootballtalk.nbcsports.com/2011/07/25/the-cba-in-a-nutshell/.

41 *See* NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT pmbl. xiv (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

42 *See, e.g.,* Patrick Rishe*, Who Won The 2011 NFL Lockout?*, FORBES: SPORTS MONEY (Jul. 21, 2011, 10:44 PM), http://www.forbes.com/sites/sportsmoney/2011/07/21/who-won-the-2011-nfl-lockout/#78344ab028c8.

43 *See id*.; *see also* Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN (Jul. 25, 2011), http://www.espn.com/nfl/story/_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say.

44 Christopher F. Branch, *An Antitrust Guide to the NFL Labor Dispute*, LAW360 (Apr. 19, 2011, 5:53 PM), https://www.law360.com/articles/238573/an-antitrust-guide-to-the-nfl-labor-dispute.

amount of money a player can receive in salary from their respective franchise; (2) the NFL draft, which "grants the drafting team exclusive negotiating rights for the player it selects in the annual NFL draft"; and (3) limits within the free agency structure, limiting a player's ability to sign with the team he so desires to play for.[45] Although this "lockout," as it was officially deemed by the media, did not result in any litigation, the work stoppage set precedent for future generations of players and owners, as the lockout harmed the NFL business, image, and the reputation of the commissioner, Roger Goodell. Although the players alleged conditions of unfairness, antitrust scrutiny was not necessarily applicable because each of these conditions are collectively bargained for by players and owners. The influence of the CBA and its role in determining the landscape of the business of football are important in understanding the ways in which the NFL has avoided antitrust scrutiny in its history.

In the early 1980's, the goal of the United States Football League ("USFL"), a spring football league meant to be an alternative to the NFL, was fairly straightforward as its main objective was to compete with the NFL.[46] The USFL saw great success in its first year in existence (although the league only lasted for three seasons), but the powerhouse that became the NFL was too strong for the USFL to compete with.[47] However, the USFL's claim to fame is arguably its multibillion-dollar antitrust lawsuit against the NFL.[48] Looking to maximize its viewing presence and increase television ratings among the American public, the USFL attempted to switch to a fall game schedule (rather than a spring one), in order to be in direct competition with the NFL, which played its games during the fall and winter

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45 *Id*.

46 *See* Drew Jubera, *How Donald Trump Destroyed a Football League*, ESQUIRE (Jan. 13, 2016), http://www.esquire.com/news-politics/a41135/donald-trump-usfl/. In 1983, Donald Trump purchased the New Jersey Generals of the then-developing United States Football League. *See id*. Trump purchased a premier team, not only because of the mass media market of the New York-New Jersey metropolitan area, but also, the Generals featured a premier running back out of the University of Georgia, Herschel Walker. *See id*. Trump is attributed with the destruction of the USFL because he pushed for the USFL to compete directly with the NFL by playing its games in the fall. *See id*. However, the USFL had succeeded by playing its games in the spring. *See id*. Trump ultimately caused the downfall of the USFL because he pursued a business plan and encouraged other owners to follow it, leading to the league's failure. *See id*.

47 *See generally* Boris Kogan, *USFL v. NFL: The Challenge Beyond the Courtroom* (2008) (unpublished manuscript) (on file with the University of California, Berkeley School of Law).

48 *See* U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1341-42 (2d Cir. 1988) (holding that "the jury's finding of illegal monopolization of a market of major-league professional football was based upon evidence of NFL attempts to co-opt USFL owners . . . These activities, however, were hardly of sufficient impact to support a large damages verdict . . . . T]he USFL candidly admits that 'at the heart of this case' are its claims that the NFL, by contracting with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival.").

seasons.[49] The reason for the change, proposed by Donald Trump, was to prove to the NFL that the USFL was so successful and popular that a merger between the two leagues would be beneficial for both parties.[50]

The USFL brought suit in the Southern District of New York alleging that the NFL was in violation of §1 and §2 of the Sherman Act by maintaining a monopoly over the American professional sporting industry.[51] The jury found that the NFL "had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States," but that this monopoly was not the direct cause of the USFL's failure as a league and awarded the USFL only $1.00 in damages.[52] On appeal, the United States Court of Appeals for the Second Circuit affirmed the lower court's decision.[53]

The jury's verdict was telling of the USFL's failure to gain any lucrative television contracts like that of the NFL (a principle issue in this case), and the nominal damages awarded reflect the USFL's incompetency in negotiating sound business deals.[54] Although the NFL came out successful here, the courts hinted that the NFL did in fact contain characteristics of a monopoly on the professional football market, though the NFL was not deemed a true monopoly. Over time, other leagues have also attempted to compete with the NFL, but ultimately none have been successful.[55]

More recently, the application of antitrust laws to the NFL was challenged in the context of licensing of intellectual property to third-party merchandising vendors in *American Needle, Inc. v. NFL*.[56] American Needle, the plaintiff in this action, was a manufacturer of NFL branded merchandise.[57] In December 2000, the NFL (the collective league and individual franchise owners) granted exclusive

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49 *See id*. at 1342.

50 *See* Jubera, *supra* note 46.

51 *See U.S. Football League*, 842 F.2d. at 1340-41.

52 *Id*.

53 *Id*.

54 *See generally* Kagan, *supra* note 47, at 17.

55 *See* Sean Keeley, *15 Years Later, the NFL Should Thank the XFL For All Those Innovations*, THE COMEBACK (Feb. 3, 2016), http://thecomeback.com/nfl/15-years-later-the-nfl-should-thank-the-xfl-for-all-those-innovations.html, (noting that the XFL was very progressive and experimental for its time and the NFL can thank the XFL for many aspects of the game that are present today). *See also* Michael David Smith, *Arena Football League Loses Its Fifth Team This Season*, PRO FOOTBALL TALK (Oct. 8, 2016), http://profootballtalk.nbcsports.com/2016/10/18/arena-football-league-loses-its-fifth-team-this-offseason/ (noting that after almost thirty years of operation, the AFL has continued to lose money, and franchises within the league have continued to disband).

56 *American Needle, Inc*., 560 U.S. at 186. *See also Antitrust Implications of American Needle v. NFL: Hearing on Serial No. 111-126 Before the H. Comm. on the Judiciary*, 111th Cong. 1 (2010).

57 PETER A. CARFAGNA, SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE "MAJOR LEAGUES", 141 (Thomson/West, 2nd ed. 2011).

licensing authority of intellectual property rights to an NFL subsidiary, NFL Properties.[58] NFL Properties, shortly thereafter, reached an agreement with the manufacturer, Reebok International Ltd., for a "ten-year exclusive license to manufacture NFL branded uniforms . . . and, notably, headwear."[59]

American Needle brought suit, alleging an illegal restraint on trade in violation of §1 of the Sherman Act,[60] but the NFL defended the allegation with a creative, yet well-known exception in antitrust law, the "single-entity doctrine."[61] This doctrine, "aims to sensibly divide defendant businesses . . . into 'single entities' immune from §1 liability and cooperative arrangements among multiple entities subject to §1 scrutiny."[62] Although the Northern District Court of Illinois, as well as the Seventh Circuit Court of Appeals, held that the NFL acted as a "single entity" in terms of its exclusive licensing structure and was therefore immune from antitrust scrutiny,[63] the Supreme Court of the United States reversed the lower court decision.[64] The Court concluded that the relevant inquiry was "whether there is a 'contract, combination . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests'" such that these agreements restrain the market, diversity, and "actual or potential competition."[65] The Supreme Court in *American Needle*, set a precedent not only for the NFL, but for all professional sports leagues in the U.S. in general. Individual NFL franchises, from a legal perspective, will be viewed as a collective unit, and therefore, the owners of each franchise must act together in order to make decisions that can affect the entire league (such as merchandise licensing).

In essence, the Court found that although the NFL may act collectively in promoting the game of football, the NFL's interests in terms of each franchise's individual intellectual property rights are distinct, and therefore, the league is not exempt from antitrust scrutiny for licensing purposes.[66]

Finally, the non-statutory labor exemption, which was established

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58 *Id*.

59 *Id*.

60 *American Needle*, *Inc*., 560 U.S. at 187.

61 J. Matthew Schmitten, *Antitrust's Single-Entity Doctrine: Formalistic Approach for a Formalistic Rule*, 46 COLUM. J.L. & SOC. PROBS. 93, 94 (2012). *See* Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo,*" 67 IND. L. J. 25, 27 (1991) (explaining that the single-entity doctrine immunizes those actors that do not act jointly to restrain trade. Therefore, actors that conduct activities individually, or as single actors are immunized from Sherman Act, §1).

62 *See Jacobs, supra* note 61*,* at 27.

63 *See* Carfagna, *supra* note 57, at 141-42.

64 *Id*. at 144.

65 *American Needle Inc*., 560 U.S. at 195.

66 Carfagna, *supra* note 57, at 144.

by the Courts in *Radovich*,[67] was most notably used in the case of *Mackey v. National Football League*.[68] First, a statutory labor exemption is one that is set forth by statute, like the Sherman Act or the Clayton Act, and these exemptions do not pose an unreasonable restraint on trade, and therefore, certain activities of a labor union are exempt from antitrust law.[69] A non-statutory labor exemption, on the other hand, is one that, although it derives from the statutory labor exemption, was ultimately developed through a line of case law not related to sports.[70] The non-statutory labor exemption provides antitrust exemption to certain activities of labor unions that engage in collective bargaining with a unified group of employees, like the NFL and NFL Players Association.

In *Mackey*, John Mackey, an American football tight end for the then Baltimore Colts filed suit against the NFL, alleging a violation of antitrust law.[71] Specifically, Mackey questioned then commissioner Pete Rozelle's,[72] "Rozelle Rule."[73] The Rozelle Rule, which is still in place today, allows the commissioner of the NFL to demand, as he sees fit, money, players, and/or draft picks, from a free agent's new franchise to be given to the former team of that same free agent (after he has signed with a new team). Mackey alleged that the Rozelle Rule restricted his movement as a free agent of the NFL to freely choose which franchise he most desired to work for based on contracts offered to him.[74] The NFL claimed that the non-statutory labor exemption, which often derives from collective bargaining, exempted the Rozelle Rule from antitrust law.[75] Ultimately this claim was rejected.[76] The court reasoned that because the Rozelle Rule was a rule that was created by the

67 *Radovich*, 352 U.S. 445.

68 *See* Rosing, *supra* note 39, at 10. *See also* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

69 *See Mackey,* 543 F.2d at 89.

70 *See* Lee Connell Constr. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676 (1965).

71 *See* Walter T. Champion Jr., *Looking Back to Mackey v. NFL To Revive the Non-Statutory Labor Exemption in Professional Sports*, 18 SETON HALL J. SPORTS & ENT. L. 85, 92 (2008).

72 *See* William N. Wallace, *Pete Rozelle, 70, Dies; Led NFL In Its Years of Growth*, N.Y. TIMES (Dec. 7, 1996), http://www.nytimes.com/1996/12/07/sports/pete-rozelle-70-dies-led-nfl-in-its-years-of-growth.html (Pete Rozelle is arguably the most influential, and arguably the most important, Commissioner in the history of the National Football League. In fact, many people attribute Rozelle to transforming the NFL into the powerhouse that it is today. Rozelle was Commissioner during the famous NFL-AFL merger, and expansion of NFL franchises, which has helped to transform the league into the familiar thirty-two team league structure that is present today. However, Rozelle's most important accomplishment to the history of the NFL was the addition of one championship game after the merger with the AFL, a game better known today as the Super Bowl.).

73 *See* Champion Jr., *supra* note 71, at 92.

74 *Id*.

75 *Id*.

76 *Id*.

management and executive member of the National Football League, this rule was not created through the equitable process of collective bargaining with the player union.[77] Therefore, the Court held that the Rozelle Rule was not protected by the non-statutory labor exemption and judgment was found for Mackey, which would benefit all NFL players for years to come.

C. An Introduction to Antitrust and Unfair Competition Law in the United Kingdom

Anti-competition law in the United Kingdom ("UK") is a relatively new concept, as the statutes that support this body of law were only developed and put into effect in the post-World War II era.[78] Legislators were slow in adopting antitrust legislation throughout the nation's history, as the policing of a fair marketplace was governed mainly by the British common law.[79]

The common law governance of this area of law in the United Kingdom stems from *Dyer's Case*, which established that "contractual limitations on parties' wider behaviour are *prima facie* void unless justified as reasonable."[80] *Dyer's Case*, which occurred in the year 1414 in the UK, involved a contractual relationship between an indentured servant and a master.[81] Within the contract was a trade restriction enforced upon the servant, which the English Bench ultimately held to be an unreasonable restraint of trade.[82] However, scholars note that from this decision it is unclear as to whether the English courts had a general attitude against restraints on trade or just those that were in contrast with the interests of the country as a whole.[83] This case, however, has provided a framework for the development and institution of UK anti-competition law today.

The common law principles of UK anti-competition law dominated the country's legal landscape until the late 1990's, when Parliament finally decided to establish a national and unitary law governing competition.[84] In 1997, the Conservative Government lost its first

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77 *Id*.

78 Andrew Scott, *The Evolution of Competition Law and Policy in the United Kingdom*, 2 London Sch. of Econ. & Pol. Sci., (2009).

79 *Id*. at 3.

80 *Id*. at 4. *See also* Gary Minda, *The Common Law, Labor and Antitrust*, 11 Berkeley J. Emp. & Lab. L. 461, 475 (1989) ("the English bench held that a six-month trade restriction in the indenture contract with the master was unenforceable.").

81 *See* Scott, *supra* note 78, at 4.

82 *Id*.

83 *Id*.; *See also* Minda, *supra* note 80, at 474.

84 Minda, *supra* note 80, at 463.

general election in eighteen years after being defeated by Tony Blair and the Labour Party.[85] Although the previous Conservative government resisted pressure to strengthen anti-competition law, Blair's administration immediately took charge and passed a piece of legislation that would change the face of British competition law from a national perspective and ultimately make it in line with the competition laws of the EU.[86] Blair's administration passed and enacted the first major national UK competition law in the Competition Act of 1998.[87]

The Competition Act of 1998 ("Act"), among other things, "prohibits anti-competitive agreements between businesses," by preventing fixing in price and trade, discrimination between customers, and abuse of a business of a dominant market position (usually businesses with a market share of at least 40%).[88] According to the United Kingdom's Office of Fair Trading (which enforces the Act), antitrust law (or anti-competition law as it is more commonly known in the UK) "bans anti-competitive agreements between firms . . . and it makes it illegal for businesses to abuse a dominant market position."[89] The effects and implications of the Act are two-fold and can be seen through Chapters One and Two of the Act. Chapter One discusses practices that are prohibited, mainly those that restrict competition; and Chapter Two enforces the prohibition on abuse of a dominant market position.[90]

In relevant part, Part I, Chapter I states, "agreements between undertakings, decisions by associations of undertakings or concerted practices which – (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction, or distortion of competition . . . are prohibited . . . ."[91] Whether an agreement is in restraint of trade will be decided on a case-by-case basis considering: price-fixing, collusive tendering, exchange of price information, and market share among other factors.[92] The most stringent Chapter One prohibition, according to The Office of Fair Trading, is that against cartels.[93] Cartels are agreements between businesses not to compete

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85 *The rise and fall of New Labour*, BBC NEWS, (Aug. 3, 2010), http://www.bbc.com/news/uk-politics-10518842.

86 *infra* note 90.

87 Minda, *supra* note 80.

88 *Id*.; *See also* Competition Act, (1998), c.41, Pt. I, c. I., 1.

89 *A quick guide to competition and consumer protection laws that affect your business*, Office of Fair Trading (2007) (providing an easy to understand guide for businesses in the UK to comply with the country's competition laws and avoid hefty fines).

90 David Parker, Occasional Paper 14, Ctr. for the Study of Regulated Indus., Reforming Competition Law in the UK: The Competition Act 1998, 1, 9 (2000).

91 Competition Act (1998), s*upra* note 88.

92 *See An Overview of the UK Competition Rules*, Slaughter and May, (June 2016), https://www.slaughterandmay.com/media/1515647/an-overview-of-the-uk-competition-rules.pdf.

93 *Id*. at 1.

with each other. The formation of a cartel can carry a maximum penalty of five-year imprisonment in addition to an unlimited fine.[94] The Chapter I prohibitions also contain exceptions which may apply depending on the circumstances.[95] Ultimately, Chapter One of The Competition Act of 1998 is similar to that of the Sherman Act, as it also looks to prohibit any unreasonable agreement that may be in restraint of trade.[96]

The prohibition in Chapter Two looks to prevent conduct which consumes a majority of market share by prohibiting abusive conduct [by a competitor], which by one or more acts, holds a dominant market position having a significant effect on the trade of the UK.[97] This Chapter Two prohibition on abuse of market power will also look to employ a balancing test to determine the meaning of "dominance," as it is not statutorily defined.[98] When evaluating "dominance" in the marketplace, factors considered are "market shares, the position of competitors, barriers to entry and the bargaining strength of customers."[99] Moreover, the abuse does not need to occur in a UK market, there must only be effects sensed on a UK market, or a substantial relation to a UK market.[100]

Finally, two exclusions from Chapter Two prohibitions are that of mergers and concentrations.[101] According to the Office of Fair Trading, mergers and concentrations may reduce competition, but the extent to which they may reduce the competition is evaluated on a case-by-case basis.[102] The prohibitions in Chapter Two are comparable to that of Section Two of the Sherman Act, which also looks to prevent abuse of market position, or abuse of the marketplace in general, by the creation of monopolies.[103]

The Enterprise and Regulatory Reform Act of 2013 ("ERRA"), an amendment to the Enterprise Act 2002, is another piece of UK legislation that governs competition law. This Act aimed to "level the

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94 *See* Office of Fair Trading, *supra* note 89, at 6. (The Office of Fair Trading provides a way for businesses to self-report whether their activities meet the characteristics of a cartel in order to obtain a more lenient penalty).

95 *Id*. *See also* Ashurst LLP, *Overview of EU and UK competition law* (March 2014), (Exceptions to the Chapter One prohibition might apply when, an agreement is anti-competitive in nature, but might have "countervailing benefits like improving production or distribution," which weigh in favor of applying an exception from the Act).

96 *See supra,* note 16.

97 *See* Slaughter and May, *supra* note 92, at 13.

98 *Id*.

99 *Id*.

100 *Id*.

101 *Id*.

102 *See* Office of Fair Trading, *supra* note 89, at 8. ("When two businesses merge or form a joint venture, it may reduce competition. Mergers that could substantially lessen competition *can* be prohibited or have certain conditions imposed.") (emphasis added).

103 *See* Sherman Act, *supra* note 16.

playing field" and make employers be accountable for mistreatment of employees and general abuse of the marketplace.[104] Although much of this law is aimed towards employment law and the rights of employees, the UK legislature ultimately looked to incentivize companies to establish jobs in the private sector by cutting the administrative costs of doing business in the UK and increasing consumer and nationwide confidence in the marketplace.[105] The ERRA, which came into effect in 2014, substantially altered the ways in which cartels could be prosecuted criminally, and loosened restrictions on prosecutions of individuals who violate the ERRA.[106]

In sum, although the United Kingdom has been hesitant in developing a national body of anti-competition law, the late 1990's saw the passage of the Competition Act by the UK Parliament. This Act, divided into two distinct sections, largely aims to prevent businesses from promoting unfair practices in the marketplace, which acts as a restraint on UK trade and competition. The Act also looks to prevent a business from retaining too large of a share on the UK market within any given industry.

Similarly, the Competition Act is comparable to that of the Sherman Act in the United States. Both laws look to police the marketplace and prevent anti-competitive behavior by the nation's industries, both large and small.

The governments of both the United States and United Kingdom respectively apply a hands-on approach in monitoring the sports marketplace. Although the United States has had a unique and controversial history with this area of law and its professional sporting leagues, the UK government has had little experience in this area of law thus far.[107] However, UK anti-competition law has been made complex by the nation's apparent exit from the European Union ("EU"), and the following section will explore various issues that the NFL might face in relocating a franchise abroad.

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104 *See* Paul Donnelly, *The Enterprise and Regulatory Reform Act 2013 – One Year On . . .* , DWF LAW, (April 12, 2014), https://www.dwf.law/news-events/legal-updates/2014/12/enterprise-and-regulatory-reform-act-one-year-on/.

105 *Id.*

106 Richard Ellison and Kevin Robinson, *Provisions of UK Enterprise and Regulatory Reform Act Take Effect*, MORGAN LEWIS, (Apr. 04, 2014), https://www.morganlewis.com/pubs/whitecollar_lf_ukenterpriseregreformacttakeeffect_04april14 .

107 *See infra* section III.C for a discussion on sports broadcasting rights in the UK, as it applies to antitrust law. Much of the discussion thus far in the UK courts has been centered on the rights of sports broadcasters in the UK.

III. AN OVERVIEW OF US AND UK ANTITRUST LAW AS IT APPLIES TO AN INTERNATIONAL NFL FRANCHISE

Antitrust law of the United States is governed by the Sherman Act, which primarily looks to guard against unfair contracts, combinations, conspiracies, and monopolies in restraint of trade.[108] Anti-competition law in the United Kingdom primarily aims to prohibit anticompetitive agreements between businesses that affect the commerce of the UK.[109] Although each body of law has the same goal, promoting fair competition, anti-competition law of the UK applies to sports in a sometimes unique, yet often times very similar way to that of the United States.[110] Antitrust law in the United States, for example, is largely applied to individual sporting leagues, – NFL, NBA, MLB, to name a few – however, in the United Kingdom "parties most often facing antitrust scrutiny . . . are not leagues, but [sports] governing bodies."[111]

Sports governing bodies in the UK are the main source of governance for professional sporting leagues; these governing bodies create laws and policies that affect how Europe's professional sporting leagues operate in the marketplace.[112] Sports governing bodies, a structure unfamiliar to the US sporting scene, are independent organizations that monitor various leagues within a home country, in the UK, and in general, all of Europe.[113] Governing bodies also must receive recognition from the UK government, mainly through government bodies such as Sport England, for example.[114] For instance, within the UK exists the Football Association, and within the Football Association is the England national team for both men and women.[115] The Football Association will monitor various competitions that the national teams play in, and even set rules and regulations for the field of play.[116] By contrast, in the United States, sports are governed by privately held organizations, with little or no government influence in regards to league structure and governance of internal rules and

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108 *See* Sherman Act, *supra* note 16.

109 *See* Slaughter and May, *supra* note 92.

110 *See* Farzin, *supra* note 11, at 76.

111 *Id.*

112 *Id.* Note that sports governing bodies are found in various nations throughout Europe. These governing bodies are subject to the competition laws of the European Union. The UK too, at this time, is subject to the laws of the EU. However, how EU law will affect the UK, post "Brexit," is yet to be determined. For a further analysis of the UK's decision to leave the European Union and its implications, *see Brexit Britain: What Has Actually Happened So Far?*, BBC, http://www.bbc.com/news/business-36956418.

113 *See Sports That We Recognize*, SPORT ENGLAND, https://www.sportengland.org/our-work/national-governing-bodies/sports-that-we-recognise.

114 *Id.*

115 *See* The FA, http://www.thefa.com.

116 *Id.*

regulations.[117]

Although sports organizations in the US and UK may differ in terms of structure and governance, the national governments of both countries subject sports league to antitrust law, and the leagues are constantly under individual scrutiny from the government as sports as a business continues to grow and dominate popular culture. The following sections will explore three key issues that the NFL must be aware of in European expansion in order to avoid potential scrutiny.

A. The Effects of "Brexit": A Great Britain post-European Union

Although the UK historically has been subject to the laws of the European Union, its decision to leave the EU in June of 2016, by referendum vote,[118] has led commentators, academics, and analysts alike, to speculate as to how a new system of nationalized laws will affect the sporting scene of Great Britain.[119] Fundamental to the law of the European Union, found within the Treaty on the Functioning of the European Union ("TFEU"), is Article 54, which secures the right to "free movement" for all "workers" within the EU.[120] The implications of Britain's exit from the EU is that athletes, who are considered "workers" within the meaning of the TFEU, might not have free and non-discriminatory access to Great Britain if not British-born nationals.[121] Abandoning this law would have drastic effects on the English Premier League ("EPL"), for example, as nationals from France and Spain make up the second and third largest player demographics in the league, respectively.[122]

The effects of restraining free movement could be detrimental to England's top sporting league, the EPL, and ultimately trickle down to

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117 *See generally* Helmut Dietl, Egon Franch, Markus Lang, & Alexander Rathke, *Organizational Differences Between US Major Leagues and European Leagues: Implications for Salary Caps*, 2-16 (N. Am. Ass'n of Sports Econ., Working Paper No. 11-05, 2011), http://repec.business.uzh.ch/RePEc/iso/ISU_WPS/122_ISU_full.pdf.

118 *See* Brian Wheeler & Alex Hunt, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC (March 3, 2018), http://www.bbc.com/news/uk-politics-32810887.

119 *See* Ed Aarons, *Brexit Vote: What Does It Mean for Professional Sport in the UK?*, GUARDIAN, (June 24, 2016), https://www.theguardian.com/uk-news/2016/jun/24/brexit-vote-what-does-it-mean-professional-sport-eu.

120 2008 O.J. (C 115) 01, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

121 Marine Montejo, *Brexit and EU Law: Beyond the Premier League (Part 1)*, ASSER INT'L SPORTS L. BLOG (July 21, 2016), http://www.asser.nl/SportsLaw/Blog/post/brexit-and-eu-law-beyond-the-premier-league-part-1-by-marine-montejo.

122 ESPN Staff, *Premier League Features Most Nationalities in Europe's Top Leagues*, ESPN FC (Aug. 11, 2015), http://www.espnfc.com/english-premier-league/story/2558407/premier-league-has-most-nationalities-in-europe-top-leagues.

subsidiary industries within the sporting market such as media, merchandising, and even ticketing, therefore having a great effect on competition law in the UK. At the time of writing, 96.5%, of NFL players are American-born; while as of 2011 there were only four NFL players that were born in England.[123] As Britain begins its procedures to official withdraw from the EU, one suggestion is that there should be some exception or waiver for those players traveling from America into the UK to play foreign-based games.

From an antitrust perspective, one could speculate that the creation of a law that favors British-born nationals is a form of collusion between the British government and the individual sporting leagues.[124] The British government not only controls immigration policies for the nation, but also, it is indirectly the governing body for British sports, including the Premier League, which is a member of The Football Association ("The FA").[125] UK anti-competition law, of course, strictly prohibits collusion, and this law favoring British-born nationals could call many ethical and practical considerations of the government into question. This obstacle that the NFL will have to face is greatly entangled with the British political scene, and could certainly put a damper on NFL relocation efforts.

On the other hand, the Collective Bargaining Agreement, between the NFL and its players, may present an opportunity for the NFL to skirt UK laws on immigration and free movement.[126] The NFL, in its Collective Bargaining Agreement, contains restrictions on the movement of players as it currently exists, and because these restrictions were collectively bargained between the league and the players' union, it is not in violation of US antitrust law.[127] The NFL does have foreign-born players, including those born outside of the United Kingdom, and UK free movement laws could have an impact on those players once Britain completely withdraws from the EU.[128] However, it is yet to be decided whether the CBA of the NFL, as it currently exists under US law, can legally be applied to a UK franchise operating in a foreign country. The NFL, NFLPA, and players on an international franchise might have to consider drafting a new CBA that is in compliance with the laws of a new and independent Great Britain.

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123 Cork Gaines, *SPORTS CHART OF THE DAY: The International Origins of NFL Players*, BUSINESS INSIDER (Nov. 17, 2011), http://www.businessinsider.com/chart-international-origins-of-nfl-players-2011-11.

124 Aarons, *supra* note 119.

125 *Id.*

126 Kristi Dosh, *U.K. Vote To Exit EU Removes Hurdle For NFL Expansion In London*, FORBES (June 24, 2016 9:04 AM), http://www.forbes.com/sites/kristidosh/2016/06/24/u-k-vote-to-exit-eu-removes-hurdle-for-nfl-expansion-in-london/#67fe7925f535.

127 *Id.*

128 *Id.*

The specific effects of the United Kingdom's withdrawal from the EU are yet to be determined, but one can speculate as to how previous EU laws will either be maintained in an independent Britain or abandoned. Ultimately, the absence of EU laws, although many closely parallel that of British national law, might have a substantial effect on the British government's regulation of sport. Many of these effects are dependent upon the NFL's drafting of a potentially new, and independent CBA from the one that currently exists, as well as its handling of the movement of its players without violating British national law.

B. Maurice Clarett and the Non-Statutory Labor Exemption

The NFL has had an extensive and complicated history of interactions with antitrust law, highlighted by the cases of *USFL* and *American Needle*, as discussed previously.[129] However, when applying antitrust law to sports, the US courts have crafted a judicially made doctrine, a "non-statutory labor exemption," which helps to explain the NFL's unique unionization of its athletes.[130]

During the 2002-2003 college football season, Maurice Clarett blossomed into a star running back at the Ohio State University.[131] Clarett not only led Ohio State to a perfect, undefeated season in his first year, but the Buckeyes also won a National Championship, college football's highest honor.[132] Fame and success however seemed to get the best of Clarett, however, as he suffered numerous setbacks off the field related to drugs and violence.[133] The National Collegiate Athletic Association subsequently suspended Clarett for the 2003-2004 season, thus causing him to attempt to declare for the NFL Draft earlier than allowed by the NFL rules.[134] Although the NFL and the National

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129 *Am. Needle, Inc*., 560 U.S. 183; *U. S. Football League*, 842 F.2d 1335.

130 Christian Dennie, *Is Clarett Correct? A Glance at the Purview of the Antitrust Labor Exemption*, 6 TEX. REV. ENT. & SPORTS L. 1, 10 (2005). *See also Clarett v. NFL*, 369 F.3d 124 (2d Cir. 2004).

131 *Id*.

132 *Id*. at 3.

133 *See Maurice Clarett makes life comeback*, ESPN (Dec. 14, 2012), http://www.espn.com/college-football/story/_/id/8747028/maurice-clarett-formerly-ohio-state-buckeyes-talks-drugs-jail-football; *see also* Clarett v. NFL, 306 F. Supp. 2d, 379, 414 (S.D.N.Y. 2004) (holding that "if a stay is granted Clarett will miss the 2004 draft. He will not be eligible to play in the NFL until the 2005 draft . . . . If the stay is granted, Clarett will have effectively lost his lawsuit. [A]t worst, the NFL will be forced to tolerate the handful of younger players who are selected in the 2004 draft.").

134 Dennie, *supra* note 130, at 3-4; *see also* NFL Football Operations, *The Rules of the Draft*, NFL, http://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/. ("The annual NFL Draft gives the teams [of the NFL] the opportunity to infuse their rosters with new talent . . . To be eligible for the draft, players must have been out of high school for at least three years and

Football League Players Association negotiated over, and agreed to, a collective bargaining agreement upon the expiration of the prior agreement, the NFL Constitution and bylaws are not a matter for negotiation and are not included in the CBA.[135] The problem for Clarett was that the NFL Bylaws do not allow for underclassmen to enter the NFL draft.[136]

Clarett brought suit, arguing that the NFL was not subject to antitrust laws and not subject to the non-statutory labor exemption.[137] This exemption, which was crafted by the courts, states that the activities and decisions of an employee labor union are not subject to antitrust law.[138] This rule supports the court's public policy perspective that the promotion of labor unions has a positive contribution to society as a whole and unions should be encouraged.[139]

Although the Southern District of New York found that the rule disallowing underclassmen to enter the draft, and its absence from collective bargaining, violated antitrust laws, the Second Circuit overruled the District Court decision, holding that this case reflects "a prospective employee's disagreement with criteria, established by the employer and that the labor union must meet in order to be considered for employment,' this falling solely under the scope of labor law."[140] Clarett's case changed the landscape of the NFL in terms of how the league managed players coming out of college, and declaring eligibility for the NFL draft. The changes that the NFL made in its bylaws have become binding on all college football players, and underclassmen are no longer considered to be draft eligible.

The non-statutory labor exemption, not just in the NFL, but in all US professional sports, finds its roots at the intersection of antitrust law and labor law.[141] This special set of circumstances provides that labor unions are not combinations or conspiracies, as defined in the Sherman Act, unreasonably restraining trade so as to violate the laws of antitrust.[142] The effects of this exception on the NFL is that the National

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must have used up their college eligibility before the start of the next college football season.").

135 Dennie, *supra* note 130, at 4-5.

136 *Id*. at 5. ("[I]n 1990 the "Rule" was changed to allow a player to enter the draft after he was only three seasons removed from high school graduation." Clarett was not yet three years removed from high school, and therefore, he was ineligible to enter the NFL Draft at that time).

137 *Id*. at 6.

138 *Id*. at 3.

139 *Id*.

140 *Id*. at 7-8.

141 15 U.S.C. §17 (1914) (providing that labor unions are a permissible organization of workers under the laws of antitrust and not in violation of the Sherman Act's prohibition on illegal contracts or conspiracies); 29 U.S.C. §104 (1932) (providing that, "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . ").

142 *See* Johnathan S. Shapiro, *Warming the Bench: The Nonstatutory Labor Exemption in the*

Football League Players' Association ("NFLPA"), the organization that would have represented Clarett in his petition to receive entrance to the NFL Draft, was exempt from antitrust laws.[143] However, because this exemption does not "exempt concerted action or agreements between unions and non-labor parties," and Clarett was not yet a party, he therefore could not rely on this exemption to gain entrance to the NFL.[144]

How could an exemption, such as this one, apply to an NFL franchise in the UK? Labor unions, although present in the UK's marketplace, do not have as profound of an impact in the UK as they do on the American sporting scene. Historically, "British labor and employment law has traditionally been based upon the notion that employers and employees should be free to bargain over terms and conditions of employment without any legal interference."[145] The NFL might have to consider establishing a new foreign labor union in order to negotiate terms and policies for its international players. The effects of a UK-move are yet to be determined from a legal standpoint, but whether a new union would need to be formed, or whether the existing US structure could suffice, is certainly an implication that the NFL must consider moving forward if it would like to avoid antitrust scrutiny from the British government.

C. Television and Broadcasting Rights

By 2017, the NFL's broadcast rights revenue is expected to exceed $7 billion.[146] This number reflects the amount of revenue received from television networks in exchange for the right to broadcast NFL games during the regular and post-seasons. The NFL hosts a bidding process, in which major American television networks compete to broadcast NFL games. In any given season, the NFL has games broadcast on as many as five major television stations, aired across the United States, and some international markets.[147]

National Football League, 61 FORDHAM L. REV. 1203, 1205 (1993). *But see* Chris Gelardi, *A Certifiable Mess: Antitrust, the Non-Statutory Labor Exemption and the Tactic of Decertification in Brady v. NFL*, Law School Student Scholarship, Paper 104 (2012) (providing an analysis of the NFLPA's decertification of its union status to classify instead as a trade association).

143 *Id*. at 1206.

144 *Id*. (quoting *Connell Contr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)).

145 Jared S. Gross, *Recognition of Labor Unions in a Comparative Context: Has the United Kingdom Entered a New Era?*, 78 CHICAGO-KENT L. REV. 358 (2003).

146 Cork Gaines, *The amount networks are paying to broadcast NFL games is skyrocketing*, BUSINESS INSIDER, http://www.businessinsider.com/nfl-tv-rights-revenue-2015-11.

147 Sports Media Watch, http://www.sportsmediawatch.com/nfl-tv-schedule-fox-cbs-nbc-sunday-night-football-espn-mnf-nfln-tnf/.

Enacted by Congress in 1961, the Sports Broadcasting Act is one of the few sports-specific statutes passed by the United States federal legislature and has been adopted by some state legislatures.[148] The Sports Broadcasting Act provides an antitrust exemption for US sporting leagues and teams, who enter into joint agreements with each other, to pool and ultimately transfer their television broadcasting rights to a purchaser, who will in exchange broadcast the games of the league.[149] Some critics of the legislation, including some courts, have viewed it as a violation of antitrust law because it essentially controls the distribution of media rights of America's professional sporting leagues.[150]

Television rights are essential to the NFL and any sporting league in general.[151] Television rights are how consumers mainly interact with sporting properties.[152] The price to attend the average professional sporting match has been steadily increasing, and as technology becomes more advanced, companies come up with new and innovative ways for fans to interact with sports.[153] By allowing a variety of networks to bid for NFL games, the NFL is promoting competition, and not restraining it; therefore, the league would likely not be in violation of the US antitrust laws.[154] However, NFL expansion into the UK would likely require a major network to agree to broadcast NFL games. This could possibly lock out other smaller cable networks that may not be able to compete with major market players.

In the summer of 2016, the EPL agreed to one of the most lucrative

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148 15 U.S.C. §1291.

149 *See* Catalano, *supra* note 10, at 16.

150 *Id*.

151 *See* Frank Pallotta and Brian Stelter, *NFL makes enormous 'Thursday Night Football' deal with NBC and CBS*, CNN (Feb. 1, 2016), http://money.cnn.com/2016/02/01/media/thursday-night-football-nbc-cbs-deal/.

152 *See* Robert Dvorchak, *How television took control of sports*, PITTSBURGH POST-GAZETTE (Dec. 3, 2006), http://www.post-gazette.com/sports/steelers/2006/12/03/How-television-took-control-of -sports/stories/200612030262.

153 *See* Andrew Brennan, *The American Big Four Need To Stop Pushing Up Ticket Prices Like English Football Has*, FORBES (Jan. 31, 2017), http://www.forbes.com/sites/andrewbrennan/2017/01/31/the-american-big-four-need-to-stop-pushing-up-ticket-prices-like-english-football-has/#43226f635920; *see also* Andrew K. Raymond, *With Virtual Reality, Major Sports Are Bringing the Stadium to You*, NBC NEWS (Feb. 4, 2017), http://www.nbcnews.com/mach/innovation/virtual-reality-major-sports-are-bringing-stadium-you-n716506.

154 NFL Communications, *2016 'Thursday Night Football' Broadcast Schedule* Announced, https://nflcommunications.com/Pages/2016-'Thursday-Night-Football'-Broadcast-Schedule-Announced.aspx. (In 2016, the NFL forged a partnership with the social media website, Twitter, to allow Twitter to broadcast ten NFL "Thursday Night Football Games." By becoming one of the first major American league to showcase its product on a social media site, the NFL has forged a path to open up avenues of broadcast of sports that have yet to be explored. The NFL's efforts in this arena further show how it is not seeking to allow one major network to retain a monopoly on the airing of NFL games).

media deals in the history of British sports, £10.4 billion, through the end of the 2018-2019 season.[155] However, unless the national law of the UK runs completely counter of that of the EU, it appears as though EU competition law will continue to apply to media rights within the national sporting scene.[156] The EU had put procedures in place to prevent the Premier League from selling its collective media rights to a single buyer and creating an unfair and discriminatory monopoly.[157]

In a decision published by the European Commission ("EC"), the EC expressed concern over the Premier League having the sole authority to negotiate and sell media rights on behalf of all member franchises. The EC was fearful that the Premier League would sell all media rights to the highest bidder, rather than giving other outlets a chance to carry broadcasts of games on television or radio.[158] Ultimately, the EC, through this decision, "ensure[d] that all rights to Premier League matches will not be sold to the same purchaser."[159]

The European Commission has stated that the desire to view soccer events in Europe is the sole factor that drives many consumers to purchase a cable subscription.[160] The EC has historically identified a product market for television rights for sporting events; therefore, this sector of the market is subject to antitrust scrutiny (again, assuming that the UK is to remain in the EU).[161] The English Premier League, Britain's preeminent soccer league, primarily sells sports media rights in the UK.[162] On the buying side of this transaction is the media

155 Vivek Chaudhary, *How the Premier League's record TV deal will impact football in England*, ESPN FC, http://www.espnfc.us/english-premier-league/23/blog/post/2917119/how-premier-league-record-tv-deal-will-affect-english-football; *see also* Ryan Rosenblatt, *What does the United Kingdom's exit from the European Union mean for the Premier League?*, FOX SPORTS (June 24, 2016), http://www.foxnews.com/sports/2016/06/24/what-does-united-kingdom-exit-from-european-union-mean-for-premier-league.html.

156 Marine Montejo, *Brexit and EU law: Beyond the Premier League (Part 2)*, ASSER INT'L SPORTS L. BLOG (July 25, 2016), http://www.asser.nl/SportsLaw/Blog/post/brexit-and-eu-law-beyond-the-premier-league-part-2-by-marine-montejo. (Montejo explains, "EU competition law applies to sport as long as an economic activity appears to have an impact on the European market. In the field of sport this is particularly true for the media sector, a key source of economic revenue for professional sport.").

157 Summary of Commission Decision COMP/38.173, art. 81, 2008 O.J. (C 7/18) 1 (EC).

158 *Id*.

159 *Id*.

160 Jen Alms Geeraert, *Action for Good Governance in International Sports Organizations*, 28 DANISH INSTITUTE FOR SPORTS STUDIES, http://www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS_Final_report.pdf.

161 *Id*. at 29.

162 Office of Communications, *Summary of UK Sports Rights*, 18 December 2007. (Based upon these facts, recorded in 2007, the Premier League accounts for 52% of the British sports market place, six times the size of the second largest event, the World Cup (which is international)). The argument can be explored that the EPL contains a monopoly over the British sports television market.); *See also* Christopher Harris, *NBC Sports breaks record for most successful season of Premier League coverage* (May 19, 2016),

company known as Sky Sports. Sky Sports is the primary broadcast network for Premier League games, arguably holding a monopoly over the league.[163] Although minor broadcast networks do have some rights to Premier League games in the United Kingdom, Sky Sports has become such a dominant market player in the sports broadcasting arena that it is often difficult for other smaller networks to compete. This potentially raises the issue of anti-competition law, and suggests that Sky Sports has retained such a dominant hold on the market that no other network can gain access.

In response to Sky's dominance in the sport market place, the United Kingdom passed the Broadcasting Act of 1996.[164] Through this act, the United Kingdom has looked to take a similar approach to that of the United States by aiming to establish a competitive balance in the broadcasting marketplace.[165] The United Kingdom sought to prevent a single communications network from holding a majority share of the marketplace, thus preserving the aims of UK anti-competition law.[166]

However, a key distinction that the UK makes from the broadcasting legislation of the US is through its categorization of major sporting events based upon how the broadcasting companies decide to make sporting content available. Broadcasting companies make content available to consumer in two different forms: "free-to-air . . . or pay-TV."[167] Through this Act, the UK seeks to make pay-TV channels more available to those consumers that may not necessarily subscribe to pay-TV channels as a whole package, rather then, those consumers that only subscribe to free-to-air channels (i.e. those available without a paid cable subscription).[168] By establishing this general rule, the UK has sought to preserve a free and open marketplace by allowing potential up-and-coming networks to compete with established networks. The UK models allows for new broadcast companies to make their content

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https://worldsoccertalk.com/2016/05/19/nbc-sports-premier-league-record-breaking/ (explaining the Premier League deal with NBC Sports, to broadcast English soccer in the United Kingdom).

163 Ben Rumsby, *Premier League TV deal: Sky Sports break bank to dominate £5.136bn contract*, THE TELEGRAPH, http://www.telegraph.co.uk/sport/football/11403761/Premier-League-TV-deal-Sky-Sports-break-bank-to-dominate-5.136bn-contract.html. (The Sky Sports-Premier League deal reach in 2015 only further increased Sky's dominance of the Premier League market share in the television arena. Sky has been the primary broadcast outlet for the Premier League since 1992, and each time a contract expired, new deals were reached that increasingly increased the value of the League while simultaneously raising the cost for Sky. However, debate has been raised in the area of subscriber fees, as consumers have been forced to pay more for a Premier League subscription through Sky due to the rising valuation of the League).

164 Broadcasting Act 1996, 1996 Chapter 55 (Nov. 7, 2013).

165 *See* Smith, et. al., *The regulation of television broadcasting: a comparative analysis*, 37(5) MEDIA, CULTURE, & SOC'Y, 720, 731 (2015).

166 Tony Prosser, *United Kingdom Broadcasting Act*, (1996), http://merlin.obs.coe.int/iris/1996/8/article18.en.html.

167 Smith, supra note 165, at 731-32.

168 *Id*.

available to all consumers, not just prioritize the pay-TV subscribers.

The NFL's expansion efforts would require a major television provider to broadcast its product, and Sky is arguably the ideal fit for this role. However, this could potentially lead to a further monopolization of the sports television market in the UK and rising costs for consumers paying for these products. The NFL should also hold a bidding procedure in the UK, similar to that of the US, in order to give all UK broadcast networks a fair and reasonable chance to own the exclusive right to broadcast NFL contests. The NFL has multiple considerations to dissect in order to preserve a free and open marketplace in the UK in terms of broadcasting rights, to thereby comply with UK antitrust law.

IV. ANTITRUST IMPLICATIONS IN LIGHT OF FRANCHISE RELOCATION OF AN NFL FRANCHISE IN THE UNITED KINGDOM

Soccer, better known as football in the United Kingdom, is arguably the world's most popular sport. Soccer draws both athletes and fans alike from all over the world, no matter a person's race or nationality.[169] The United Kingdom's most popular professional football league, the English Premier League ("EPL"_, dominates the sporting market and attracts players on both a national and international level.[170] Smaller leagues within the UK, such as the Championship League or League One are almost made insignificant by the Premier's League's dominance.[171] For example, as of 2016, the English Championship league averaged only around 20,000 viewers per game, while the EPL is averaging more than double that with 514,000 viewers per game – an almost 10% increase from the previous season.[172] Even Major League Soccer ("MLS"), which has only gained popularity in recent years, has been able to retain a higher viewership than the Championship League.[173]

In light of the Premier League's dominance of the British market place, in conjunction with the NFL's dominance in the US, the question

169 *See* Todd Henderson, *The English Premier League's Home Grown Player Rule Under the Law of the European Union*, 37 BROOK. J. INT'L L. 259 (2011-12).

170 *Id*.

171 *Id*. at 264 ("The Premier League – along with Germany's Bundesliga, Italy's Serie A, and Spain's La Liga – is one of the four most highly regarded and lucrative football leagues in Europe and the world.").

172 Christopher Harris, *Most popular soccer leagues on US television ranked,* WORLD SOCCER TALK, (Aug. 2, 2016), http://worldsoccertalk.com/2016/08/02/popular-soccer-leagues-us-television-ranked/.

173 *Id*.; *See* Thomas Barrabi, *Is Major League Soccer Scoring With Fans?*, FOX BUSINESS, (June 2, 2016), http://www.foxbusiness.com/features/2016/06/02/is-major-league-soccer-scoring-with-fans.html.

to be considered is whether these two leagues will retain such a dominant share of the marketplace, that they in fact will create a monopoly and therefore be in violation of antitrust law. This type of scheme could certainly be a possibility as both the EPL and the NFL dominate their respective sports. The EPL arguably has the most passionate fan base in professional soccer,[174] while the NFL has become a spectacle in the UK, as it is a one-of-a-kind event.[175] If the two leagues were to co-exist in the same marketplace, it would be important to monitor whether newer, or even existing leagues, could compete with the EPL and NFL in terms of revenue, attendance, and television viewership in general.

A. Antitrust Implications of Franchise Relocation From a US Perspective

Although international relocation is a concept that the NFL has yet to explore in full depth, the US courts first tackled the antitrust issues regarding franchise relocation in the late 1980s. In *Los Angeles Memorial Coliseum Commission v. NFL*,[176] the US Court of Appeals for the Ninth Circuit ultimately struck down a restriction on an attempt by an NFL franchise to relocate within the United States.[177]

In 1978, the then owner of the Los Angeles Rams made an attempt to relocate the Rams to Anaheim, California, thereby vacating their tenancy at the Los Angeles Coliseum ("Coliseum").[178] This left the Los Angeles Coliseum without a franchise, and the stadium commission began a search effort, through then NFL Commissioner Pete Rozelle, to attract a team back to Los Angeles.[179] However, a section of the NFL Constitution prohibited the Coliseum from attracting a new franchise because any relocation attempts by an NFL franchise required unanimous approval by all twenty-eight league owners if a franchise aims to exist in the same geographical territory as another existing team (at that time there were only twenty-eight teams, not the standard thirty-

174 *See* Alex Shaw*, Anfield atmosphere among worst in Premier League as fans give verdicts*, ESPN FC, (Nov. 13, 2015).

175 *See* Will Brinson, *The NFL will play more games in London in 2017 than ever before*, CBS SPORTS, (Dec. 9, 2016), http://www.cbssports.com/nfl/news/the-nfl-will-play-more-games-in-london-in-2017-than-ever-before/.

176 Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381 (9th Cir. 1984).

177 *See* Daniel E. Lazaroff*, The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports,* 53 FORDHAM L. REV. 157, 161 (1984-85).

178 *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1384; *see also Los Angeles Memorial Coliseum: The Story of an L.A. Icon*, (Dec. 23, 2016), http://www.discoverlosangeles.com/blog/los-angeles-memorial-coliseum-story-la-icon.

179 *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1384.

two teams that exist today in the NFL).[180] The Coliseum alleged that this rule within the NFL Constitution was a violation of §1 of the Sherman Act because it restricted trade.[181] Shortly thereafter, the NFL amended the rule in its constitution so that there only be a three-quarters approval of team owners prior to a relocation (a rule that is still in effect today).[182]

Al Davis, the then owner of the Oakland Raiders, had inquired into moving his franchise into Los Angeles, upon the planned exit of the Rams from the LA marketplace.[183] Davis too thought that the NFL rule requiring three-fourths approval before relocation violated antitrust law. Davis essentially argued that by preventing the Raiders from relocating, the franchise was being restricted from exercising its right to pursue, and ultimately establish a presence in a new marketplace. Ultimately, the Ninth Circuit reversed the decision of the District Court, which found for the NFL, and it determined that the NFL rule requiring unanimous approval was unlawful as it caused a restraint in trade.[184] The court reasoned that, "a relocation restriction violates section 1 of the Sherman Act, and in view of the fact that this issue continues to surface in professional sports, further discussion of the antitrust issues raised by such restraints is warranted."[185]

As both facts and news indicate today, the NFL's only intention of European expansion is aimed at the United Kingdom.[186] However, this may present problems if, for example, the NFL were to eventually establish a competitor franchise abroad. A situation such as this one, with two teams in Britain (or in Europe in general), could create a paradoxical situation in which the NFL would be violating its own Constitution. The NFL rules call for a three-fourths approval from the franchise owners before relocating a team, and the NFL typically looks to keep franchises in distinct territories, with very little overlap other than the US's major cities (i.e. New York and Los Angeles). However, due to game scheduling, travel, and competitive balance concerns, the NFL will likely be faced with the decision of establishing a second international franchise abroad one day. The burden on the international

180 *Id*. NFL Constitution Rule 4.1 defines a "home territory" as, "the city in which [a] club is located for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city.").

181 *Id*. at 1385.

182 *Id*.

183 *Id*.

184 *Id*. at 1410.

185 *See* Lazaroff, *supra* note 177, at 161.

186 *See* Luke Kerr-Dineen, *The NFL expanding across all of Europe is a very real possibility*, FOR THE WIN, (March 4, 2016), http://ftw.usatoday.com/2016/03/the-nfl-london-european-division.

team players for travel is high, as they would constantly have to travel to the US in order to play at least half of their regular season games. By establishing a second international franchise, or even a third, the NFL can fix much of the travel and competition concerns, but still runs the risk of scrutiny from the initial franchise of another team invading its territory.

B. Antitrust Implications of Franchise Relocation From a UK Perspective

With soccer being a dominant force in the United Kingdom, as the sports landscape currently exists, the addition of an NFL franchise to the UK market can bring about potential antitrust lawsuits and antitrust scrutiny. In essence, it would appear as though both the NFL and the English Premier League would hold a monopoly over the professional sports marketplace.

At this point, the EPL leaves very little room for other dominant soccer leagues. If the NFL were to establish a franchise in the UK, this could leave even less room for another professional sporting league to develop. Those who scrutinize antitrust must consider this possible disparity on both a macro and micro level. A macro level would include an examination of whether two dominant sporting leagues could in fact exist in the UK, while at the same time leaving room for newer, or smaller leagues to develop. On a micro level, additionally, one must consider antitrust implications from the perspective of television broadcasting rights and merchandise licensing rights among other things.[187] If for example, the NFL and EPL were to sign contracts with the same broadcast network, this could raise potential red flags regarding collusion or conspiracies among the networks and leagues. The result of such a contract would be a dominant force in the British sports industry. Therefore, the argument can be made that such a force is unreasonable in light of antitrust law.

The main way in which individual franchises can limit competition through the television market is "where they engage in the collective sale of television rights that reduce output and raise the price of games to the ordinary sports fan."[188] A major decision that the NFL would have to decide is whether they move to the free-to-air television model used in the United States[189] (as discussed previous in this note),

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187 *See generally* Stephen F. Ross, *Anti-competitive aspects of sports*, 7 COMPETITION AND CONSUMER L. J. 1 (1999).

188 *Id.*

189 *See* Chicago Professional Sports Ltd. v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992).

or whether it will follow the European model of prioritizing broadcasting based on a "pay-to-watch" model.[190] Being that the NFL would be the primary professional American football league in the UK, naturally, the NFL may look to capitalize on this opportunity. The NFL can, under a European model, prioritize content and charge consumers a fee for viewing this premier content.

V. CONCLUSION

As the 2017-2018 NFL season approaches, the landscape of the league in terms of expansion has been at the forefront of the public eye. The 2017 – 2018 season will see two teams in Los Angeles and more international games played than ever before.

NFL expansion into Europe, specifically the United Kingdom, raises a wide variety of legal issues, especially in the field of antitrust law. Should the NFL establish a franchise in the United Kingdom, it must consider being scrutinized from an antitrust perspective regarding the free movement of athletes, media and television rights, and finally the implications of franchise relocation. Although antitrust scrutiny looms large in NFL expansion efforts, the NFL should ultimately be able to avoid antitrust issues by following the business model established by the Premier League in the UK, offering content to all consumers, and not discriminating based upon those that can afford to consume NFL content and those that cannot. With a permanent presence in the UK, the NFL threatens to dominate the sporting marketplace through popularity, and being the sole home of American football abroad. However, these are considerations that the UK must take into account if it ever had to reach a conclusion on whether the NFL would be in violation of UK antitrust.

With the NFL's recent efforts to establish a presence in the British sports market, many believe that the NFL will look to place a permanent franchise within the UK in the coming years. Ultimately, the NFL should be able to avoid antitrust scrutiny if expanding abroad; this can be done by following the business models of professional soccer leagues in the UK, and by learning from its previous antitrust mistakes.

190 *Id*. at 6.