NOTE

BCS EUROPA: AN ANALYSIS OF THE BOWL CHAMPIONSHIP SERIES UNDER THE EUROPEAN COMMISSION WHITE PAPER ON SPORT

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TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 305

II. THE BOWL CHAMPIONSHIP SERIES ........................................... 307
    A. What is the BCS? .............................................................. 307
        1. Selection Procedures ................................................. 307
        2. Standards for Future Automatic Qualification .................... 309
        3. Television Contracts .................................................. 309
    B. Problems with the BCS .................................................... 310
        1. The Mid-Majors are Excluded from the BCS ....................... 310
        2. Selection to Play in a Bowl Is Not Based Wholly on Merit .......... 311
        3. Bigger Schools Obtain More Revenue from the BCS Bowls and Television Contracts .................................................. 312
        4. Is a National Champion Really Produced? .......................... 314
        5. Recent Developments Promoting Fairness ............................ 315
    C. The BCS Under the Sherman Antitrust Act ......................... 316

III. ANALYSIS OF THE BCS SYSTEM UNDER EUROPEAN UNION ANTI-COMPETITION LAWS .................................................. 319
    A. Benefits of Analyzing the BCS System Under European Commission Laws .................................................. 320

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B. Why the BCS Fits Within a European Commission
Sport Analysis........................................................................... 321

IV. ARTICLES 81 AND 82, CASE LAW, AND THE WHITE PAPER ON
SPORT OF THE EUROPEAN COMMUNITY ........................................ 321
A. Articles 81 and 82 of the European Community .................. 321
B. Application of Articles 81 and 82 to Sporting Rules ............ 323
C. Application of the Commission Three-Part Test to Sporting
Rule Cases ................................................................................... 326
D. Application of Articles 81 and 82 to BCS Media Contracts........ 328

V. ANALYSIS OF THE BCS UNDER THE EUROPEAN COMMISSION
WHITE PAPER ON SPORT ................................................................ 330

VI. RELEGATION: A LESS RESTRICTIVE ALTERNATIVE TO THE
BCS .................................................................................................. 335
A. What Is Relegation? ................................................................. 336
B. How Can Relegation Be Applied to College Football? ....... 336
C. What Are the Pros and Cons of Using Relegation in NCAA
Football? ..................................................................................... 337

VII. CONCLUSION .............................................................................. 339
I. INTRODUCTION

"There is no shortage of opinion and ideas on how the BCS system should be changed," stated Senator Orrin Hatch, ranking member of the Senate Antitrust Subcommittee, to the subcommittee during a hearing on the legality of the Bowl Championship Series (BCS). Senator Hatch stated further:

Indeed, I think any time college football fans gather together to watch a game, one of them has a playoff idea that they believe will solve all of college football's problems. For today, I think our time would be best served by leaving the debate over such alternatives in the living rooms of our country and, instead, focus on answering one question: Does the BCS comply with the law? The law requires that all business enterprises meet certain standards with regard to pro- and anti-competitive behavior. Our focus should therefore be on comparing the current system with the standards required by our nation's antitrust laws. Personally, I believe there are enough antitrust problems with the current BCS system that we'll have more than enough material to cover in the course of this hearing.

While Senator Hatch believed that the BCS constitutes an antitrust problem under the Sherman Antitrust Act (Sherman Act), the Subcommittee has taken no further action since the hearing in July 2009. In early 2010, the U.S. Department of Justice stated, in a letter addressed to Senator Hatch, that they may investigate the legality of the BCS, but no investigation had begun. Additionally, some believe that it is questionable whether the outcome of the investigation would result in any changes to the BCS, and

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2 Id.
that the investigation is simply an attempt by President Obama to regain popularity with the public in the face of controversial foreign war and health care reform.\(^6\)

This Note argues that, because it is unclear whether the BCS constitutes an antitrust violation under the Sherman Act, Congress and the executive branch have stalled on further action to dismantle and replace the organization with a different system to determine the college football national champion. This Note considers the BCS in a different antitrust context—one that will provide more insight into the legality of the BCS by using a more detailed analysis with specific inquiries regarding sports.

An evaluation of the BCS under the competition laws established by the European Commission will expose the competition problems that the BCS would face if it applied the laws of the European Union. Because the European Union laws inquire further into the "specificity of sport" than do the antitrust laws of the United States, Congress would benefit from looking at the BCS from this perspective to understand the BCS’s anticompetitive nature and need for replacement. This Note concludes with what Senator Hatch called a “living room debate” about a less restrictive alternative to the BCS, which would be similar to the system of promotion and relegation used in European professional football.

Part II introduces the BCS how the BCS system operates, the problems and challenges the BCS faces, and how the BCS would be evaluated under the Sherman Act. Part III analyses the BCS under application of the European Commission laws and describes the logistics and benefits of examining the BCS under these laws. Part IV discusses specific aspects of sports-related competition law and case law in the European Union. Part V then evaluates the BCS according to the European Union laws and policies, and hypothesizes the outcome if the BCS were to be challenged under the European Union laws. Finally, Part VI proposes a less restrictive alternative to the BCS based on the system employed by European professional football and asserts why a professional sports league system of determining a championship can be applied to, and can benefit, the BCS.

\(^6\) Id.
II. THE BOWL CHAMPIONSHIP SERIES

A. What is the BCS?

Under the current system of collegiate football, the BCS rankings determine which teams play in designated postseason games and which two teams play in the National Championship Game. The BCS is an annual event, consisting of a series of five post regular season games, designed to match the top two ranked college football teams in the United States in the BCS National Championship Game, and create four other meaningful matchups among eight highly-ranked football teams. The eleven conference Commissioners of the National Collegiate Athletic Association (NCAA)—which is the organization that establishes rules and standards for all collegiate athletics and whose members comprise the Football Bowl Subdivision (FBS)—and the Athletic Director at the University of Notre Dame, who is not a member of a conference, manage the BCS. The eleven conferences are the Atlantic Coastal Conference, the Big East, the Big 10, the Big 12, Conference USA, the Mid-American Conference, the Mountain West Conference, the Pac-12 (formerly known as the Pac-10), the Southeastern Conference, the Sun Belt Conference, and the Western Athletic Conference. The games that comprise the BCS event are the Sugar Bowl, the Rose Bowl, the Fiesta Bowl, the Orange Bowl, and the BCS National Championship Game.

1. Selection Procedures

Teams are ranked during the regular college football season through the BCS standings, and determine which teams will play in the national championship title game, which teams automatically qualify to play in the BCS bowls, and which teams are eligible for at-large bids. An at-large bid is the selection of a team to play in a BCS bowl where a slot for that particular

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9 Id.
10 BCS Standing, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/Story?id=4819686 (last updated Jan. 21, 2010, 3:34 PM) ("Since the 2000 regular season, the BCS standings have been compiled by the National Football Foundation and College Hall of Fame.")
game is not occupied by an automatic qualifying team. Teams that automatically qualify to play in a BCS bowl must be selected by one of the BCS bowls to play. Teams eligible for an at-large bid may be selected to play in a BCS bowl game if any matches have open spots once the automatically qualifying teams are selected. The top two-ranking teams in the BCS standings at the end of the regular college football season play in the BCS National Championship Game. The champion team of each of the Atlantic Coast, Big East, Big Ten, Big 12, Pac-10, and Southeastern Conferences (collectively, the Majors) automatically qualifies to play in one of the BCS bowl games every year. Only one champion team from the other conferences, including the Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, or the Western Athletic Conference (collectively, the Mid-Majors), can automatically qualify for a BCS bowl game if its among the top twelve teams in the final BCS Standings, or alternatively, if it is ranked within the top sixteen teams in the final BCS Standings and its BCS ranking exceeds that of a champion from a Major conference. Only the top team in the Mid-Majors automatically qualifies if more than one Mid-Major champion meets the eligibility requirements for automatic qualification to a BCS Bowl game. Additionally, the University of Notre Dame, which is not a member of any NCAA conference, will automatically qualify for a BCS bowl game if it is ranked among the top eight teams in the final BCS standings. Any team, whether in a Major or Mid-Major conference, may qualify for an at-large bid to play in a BCS bowl game if it wins at least nine regular season games and finishes within the top fourteen teams in the final BCS standings.

11 BCS Selection Procedures: Automatic Qualification, At-Large Eligibility and Team Selection, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4819597 (last updated July 21, 2011, 1:30 PM) (explaining that the BCS Standings are a combination of rankings: one-third from computer rankings one-third from the Harris Interactive College Football Poll, a human poll, and one-third from the USA Today Coaches' Poll, another human poll).
12 See id. (explaining that the BCS bowls must select all automatic qualifiers).
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id.
2. Standards for Future Automatic Qualification

However, the BCS is making changes to the way it determines which conference champions automatically qualify to play in a BCS bowl game. The Major conferences will continue to have their champion automatically qualify to play in a BCS bowl game because they have a contract with the BCS securing the automatic qualification. However, there is an established procedure for a Mid-Major team (not a Mid-Major champion) to achieve automatic qualifying status based on its performance over a four-year period. By the end of the 2011 regular season, all conferences will be evaluated according to team performance during the 2008 through 2011 regular season period, pursuant to new BCS rules. If one of the Mid-Majors satisfies three performance criteria, outlined by the BCS, that Mid-Major conference will automatically qualify for a BCS bowl game during the 2012–2013 seasons. The conferences will continue to be evaluated on a four-year basis for as long as the BCS is in place.

3. Television Contracts

The BCS has contracts with certain television networks to broadcast certain BCS bowl games, and these contracts are renegotiated on a regular basis. The BCS currently has a television contract with the ESPN television network to broadcast all BCS bowl games except for the Rose Bowl. The ABC television network has a contract to televise the Rose Bowl through 2014.

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19 Id.
21 Id.
22 Id.
23 Id. (providing that the three performance criteria are: “1. [t]he conference must finish among the top six [conferences] in a listing of the average of each conference’s highest ranked team at the end of the season[;] 2. the conference must finish among the top six [conferences] in average computer rankings of every conference’s full roster of teams at the end of each regular season[;] 3. [and] [t]he conference must accumulate a score of at least 50 percent of the highest ranking conference’s score in [a poll that] measures how many teams each conference placed in the BCS top 25 teams and adjusts for conference size.”).
24 Id.
26 Richard Sandomir, ABC to Keep Rose Bowl Until 2014, N.Y. TIMES (Aug. 4, 2004),
B. Problems with the BCS

Despite its claim of creating an annual football match between the top two teams in the United States for the National Championship Game, and to "create exciting and competitive matchups among eight other highly regarded teams in four other bowl games,"\(^{27}\) the BCS has drawn sharp criticism for unfairness since its inception in 1998.\(^{28}\) This Note examines five criticisms with the BCS, including that the Mid-Major conferences are excluded from the BCS, the selection to play in a BCS bowl game is not solely based on merit, larger schools obtain more revenue from the BCS and from television contracts, the system does not always produce a true national champion, and that the recent developments intended to promote fairness have not gone far enough to accomplish that goal.

1. The Mid-Majors are Excluded from the BCS

In the early years of the BCS, only the Majors and the University of Notre Dame were parties to the BCS Agreement.\(^{29}\) Although these conferences still have their exclusive automatic qualifying agreements with the BCS, 2007 amendments added the Mid-Majors to the BCS Agreement.\(^{30}\) However, the BCS Agreement regularly produce unfair BCS bowl game selections that adversely affect the Mid-Majors.\(^{31}\) For example, no team from a Mid-Major conference has had an opportunity to play in the National Championship Game, despite many undefeated seasons.\(^{32}\)

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\(^{27}\) The BCS Is . . ., supra note 8.

\(^{28}\) See Jude D. Schmit, A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act, 14 SPORTS LAW. J. 219, 233–34 (2007) (discussing several undefeated teams that were denied an opportunity to play in the national championship game).

\(^{29}\) C. Paul Rogers III, The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome, 18 MARQ. SPORTS L. REV. 285, 288–89 (2008) (stating that the BCS agreement was the agreement by the FBS schools to participate with the BCS bowl system in order to determine a national champion).

\(^{30}\) Id.

\(^{31}\) Id.

2. Selection to Play in a Bowl Is Not Based Wholly on Merit

It is arguable that selection to play in a BCS bowl game is not based upon a team’s credentials and success during the regular season, but instead, is more related to conference ties, fan bases, and contracts. In 2004, the University of Pittsburgh, which ended its regular football season ranked twenty-first in the nation, won the Big East Conference championship, becoming a Major champion and was automatically selected to play in the BCS Fiesta Bowl. The University of Utah (Utah), which ended its regular football season undefeated and ranked sixth in the BCS standings, was also selected to play in the BCS Fiesta Bowl. Utah trounced Pittsburgh with a score of 35 to 7 in the bowl game. Often, Mid-Major schools are denied an opportunity to play in a BCS bowl game because of a perceived lack of marketability and a smaller fan base, and would personally generate less revenue for the bowl games and their host cities. The BCS bowls and the cities that host the games rely mainly on ticket sales and fan travel for revenue. The cities that host the bowl games encourage fans to stay in hotels and visit other attractions while in town for the game. If a team is from a smaller conference, the bowl game and the host city might infer that the team has a smaller fan base and use that belief as a factor in deciding whether to select the team.

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33 Rogers, supra note 29, at 2, 89–90.

34 See Game History: 34th Annual Tostitos Fiesta Bowl, FIESTABOWL.ORG, http://www.fiesta bowl.org/index.php/tostitos/history_display/34th_annual_tostitos_fiesta_bowl (last visited Mar. 20, 2011) (“People were calling them BCS Busters. Others were calling them Cinderella. Regardless of the title, Utah proved that it was simply one of the best teams in the nation, capping its perfect season with an exclamation point on the bright BCS stage.”).

35 Id.

36 Schmit, supra note 28, at 233–34 (discussing how in 2001, the BCS failed to select Brigham Young University (BYU) to play in a BCS Bowl despite its undefeated regular season and twelfth ranking the BCS standings; other Mid-Major teams such as Miami University of Ohio, Boise State University, and Texas Christian University (TCU) were similarly not selected in other years. Although the rules have since changed to allow one team from a Mid-Major to automatically qualify for a BCS bowl, other Mid-Major teams are systematically passed over for at-large bids because of the larger fan base greater marketability, and potential for increased revenue by the Major teams).
3. Bigger Schools Obtain More Revenue from the BCS Bowls and Television Contracts

Because the Major conferences have individual contracts with the BCS, each automatically derives significant sum of money by having a team participate in the bowl games every year. In contrast, while the Mid-Major conferences lack individual contracts with the BCS, and split the revenue generated from either the less profitable, non-BCS bowls or the revenue generated from a BCS bowl if any Mid-Major team is selected to play. For example, the revenue payout to a conference selected to play in a BCS bowl game or the National Championship Game, after the 2009 regular season, was $17.7 million. With the Major conferences, the school playing in the game retains approximately half of this payout, while the other half is split among the other conference members. For the 2009 season, The Big Ten and the Southeastern Conference (SEC) each split $22.2 million dollars because each had two teams in BCS bowls. However, in comparison, the Mid-Majors split any BCS bowl game revenue, in the event a Mid-Major team is selected to play in a BCS bowl game, the Mid-Major conference splits the payout, among all five conference members. Thus, even though both Texas Christian University (TCU) and Boise State University, two Mid-Major conference teams, played in the 2010 Fiesta Bowl, all five of the Mid-Major conferences split the $24 million payout, such that the Mountain West conference and the Western Athletic conference received $9.8 million and $7.8 million, respectively. In contrast to BCS bowl game payouts, the total payout for non-BCS bowl games in 2009 through 2010 was just over $82 million. While the popular non-BCS bowl games, such as the Capital One Bowl, have a larger revenue payout of $9 million, most of the non-BCS bowls have only a modest revenue payout per team of $1 to $2 million.

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37 Id. at 244-45.
39 Rogers, supra note 29, at 288.
40 2009–2010 Revenue Distribution Data, supra note 38.
41 Id.
42 Id.
44 Id.
The BCS system produces a situation where schools in the Major conferences continue to proper while the Mid-Major conferences lose an equal opportunity to reap the BCS rewards.\textsuperscript{45} Thus, while the BCS selected two Mid-Major teams in 2009 to play in BCS bowl games, and increased the revenue for the Mid-Majors,\textsuperscript{46} the Mid-Majors still face diminished opportunities for BCS bowl revenue because of the limited access to the BCS bowls.

The Major conferences typically generate lucrative contracts with television networks to broadcast regular season games because of the increased likelihood of a BCS Bowl game appearance. Therefore, the Major conference teams gain more exposure and more revenue than the Mid-Major conference teams.\textsuperscript{47} For example, the ESPN television network, a partner with the ABC television network, will televise the BCS National Championship Game beginning in 2010.\textsuperscript{48} In 2008, ESPN signed a fifteen-year contract with the SEC to televise its regular season football games; the contract was called “the most expensive college conference agreements ever.”\textsuperscript{49} The ESPN-SEC contract is worth an estimated $2.25 billion over the contract term.\textsuperscript{50} In 2008, the SEC also negotiated a fifteen-year contract with the CBS television network that is worth an estimated $55 million per year.\textsuperscript{51} In contrast, the Mountain West Conference, comprised of consistently successful football teams such as BYU, Utah, and TCU, has television contracts with smaller television networks such as The Mountain West Sports Network, VERSUS, and CBS College Sports (a division of CBS devoted exclusively to college sports).\textsuperscript{52} With such disparity in major network exposure, due in part to the exclusivity of the BCS system, it is difficult for Mid-Major teams to compete for human poll votes in the BCS standings, and consequently, for a bid to a BCS bowl.

\textsuperscript{45} Schmit, supra note 28, at 244–45.
\textsuperscript{46} 2009–10 Revenue Distribution Data, supra note 38.
\textsuperscript{47} Schmit, supra note 28, at 244–45.
\textsuperscript{51} Id.
4. Is a National Champion Really Produced?

From inception, the BCS asserted that its system was designed to annually match the top two college football teams in the BCS standings to produce a true college football national champion. However, as a function of multiple conferences, there may be multiple undefeated teams at the end of the regular season. Some critics argue that the BCS excludes undefeated teams from the Mid-Majors from the BCS National Championship game, not because they are undeserving of the honor, but rather because Mid-Major teams typically have fewer fans and receive less media exposure than bigger schools; thereby, generating less revenue from a bowl game appearance. For example, in 2006, Boise State University (Boise State) finished its regular season undefeated. The only other undefeated team to play in a 2006 BCS Bowl game was Ohio State University, who played the University of Florida, an SEC team with a single loss, in the National Championship Game. Despite its undefeated season, Boise State, a Mid-Major team, finished its regular season with only an eighth-place BCS ranking and played in the Fiesta Bowl as an at-large bid team against the tenth-ranked, University of Oklahoma, with two regular-season losses. Boise State defeated the University of Oklahoma with a score of 43 to 42. In 2008, Utah, a Mid-Major team, finished its regular season undefeated, yet ranked only sixth in the final BCS standings, behind several teams with losses from the Major conferences. Utah, a Mid-Major team ranked sixth in the BCS standings, received an at-large bid to play against the fourth-ranked BCS team and SEC runner-up, the University of Alabama, in the BCS Sugar Bowl. Although the University of Florida, with its single-loss season, won the National Championship game, Utah finished its season with a total of thirteen wins and no losses after it defeated the University of Alabama with a

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53 The BCS Is ..., supra note 8.
54 BCS, Alliance & Coalition Games, Year-by-Year, supra note 32.
55 See Schmit, supra note 28, at 233–34 (explaining that a lack of marketability influences BCS decisions regarding the selections for the BCS National Championship Game).
56 See BCS, Alliance & Coalition Games, Year-by-Year, supra note 32 (showing that Boise State finished its regular season with twelve wins and zero losses).
57 See id. (showing that the University of Florida finished its regular season with twelve wins and a single loss).
58 See id. (showing that the University of Oklahoma finished its regular season with eleven wins and two losses).
59 Id.
60 Id.
score of 31 to 17, but without an opportunity to play for the National Championship title. In 2009, TCU and Boise State, both Mid-Major teams, finished their respective regular seasons undefeated. While TCU ranked third, at the end of their regular season behind the undefeated University of Alabama and undefeated University of Texas, Boise State only ranked sixth, behind two Major teams, each with single losses.

5. Recent Developments Promoting Fairness

Recently, there has been development regarding access to BCS games by Mid-Major teams in a movement that many believe increased the fairness of the BCS system. However, a closer look reveals that, these developments are not sufficient to alleviate the problems with the BCS system.

For example, in 2010, TCU and Boise State, two Mid-Major teams, who each finished the regular season undefeated, were both selected to play in a BCS bowl game. TCU finished its season with a third-place BCS ranking; thus, it automatically qualified for a BCS bowl game as the highest-ranked Mid-Major team among the top twelve teams in the final BCS standings. Boise State qualified for an at-large bid to a BCS bowl game because it was ranked sixth and won nine or more regular season games. Some proponents of the BCS proclaimed that this development showed that the BCS did not systemically exclude teams based upon their Mid-Major conference status. However, TCU and Boise State played in the Fiesta Bowl—against each other! Some critics suggested that the BCS created this match-up to intentionally protect a lower-ranked Major team from defeat by a more talented Mid-Major team in a widely televised BCS bowl game. Additionally, BCS critics argued that, since both TCU and Boise State

61 Id.
62 See id. (showing that both TCU and Boise State finished their respective regular seasons with thirteen wins and no losses).
63 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 See id. ("Others went so far as to suggest a conspiracy on the part of BCS organizers . . . ").
finished the regular season undefeated, yet still failed to be selected for the National Championship game, the match-up perpetuates the unfairness of the BCS system.\textsuperscript{71}

C. The BCS Under the Sherman Antitrust Act

While the United States Supreme Court proclaimed that the Sherman Act applies to the NCAA,\textsuperscript{72} there has never been a judicial determination of the BCS system’s legality under United States antitrust law.\textsuperscript{73} However, courts consistently apply the Sherman Act to NCAA revenue matters, and the NCAA includes the BCS system.\textsuperscript{74}

Congress passed the Sherman Act in 1890 under its authority to regulate interstate commerce.\textsuperscript{75} Thus, federal courts only have jurisdiction to sanction a violation of the Sherman Act that substantially affects interstate commerce.\textsuperscript{76} Section 1 and 2 of the Sherman Act are applicable to the BCS system.\textsuperscript{77} Section 1 states that “[e]very contract, combination . . . , or conspiracy, in restraint of [interstate] trade or commerce . . . is declared to be illegal.”\textsuperscript{78} Section 2 states that there is a violation of the Act if an entity or person has power in a relevant market that is not the result of growth or development due to superior products, business skills, or by historic accident.\textsuperscript{79}

The Sherman Act sets forth two alternative tests to determine whether an activity constitutes an antitrust violation.\textsuperscript{80} First, the “per se” test applies when the “surrounding circumstances make the likelihood of anticompetitive

\textsuperscript{71} Id.
\textsuperscript{73} Schmit, supra note 28, at 240.
\textsuperscript{74} Id. at 236.
\textsuperscript{75} WILLIAM L. SNYDER, SUPPLEMENT TO THE INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS INCLUDING THE SHERMAN ACT, at iii (1906).
\textsuperscript{76} See 15 U.S.C. § 4 (2009) (“The several district courts . . . are invested with jurisdiction to prevent and restrain violations of Section 1 to 7 of [Title 15].”).
\textsuperscript{77} See Rogers, supra note 29, at 291–98 (arguing that the BCS could be subject to the per se rule, or the rule of reason under the Sherman Act).
\textsuperscript{79} United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); see also 15 U.S.C. § 2 (2009) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the [interstate] trade or commerce . . . shall be deemed guilty . . . ”).
conduct so great as to render unjustified further examination of the challenged conduct.\(^{81}\)

The "per se" solely applies in cases where it is facially clear that the activity is anticompetitive.\(^{82}\) Since the BCS system maintains some precompetitive justifications the "per se" test likely would be inapplicable; instead, the Rule of Reason test, the second test, likely would apply.\(^{83}\)

The Rule of Reason test is a two-step balancing test: after determining that an activity is restrictive, the test then determines whether that activity violates the Sherman Act by comparing its procompetitive benefits with its anticompetitive effects.\(^{84}\) If the procompetitive benefits outweigh the anticompetitive effects, courts generally hold that the restrictive activity does not violate the Sherman Act.\(^{85}\)

Based on separate analysis performed by Jude D. Schmit and C. Paul Rogers, III, it is not clear whether the BCS system would pass a Rule of Reason test if a formal challenge was actually brought under the Sherman Act.\(^{86}\) The agreement creating the BCS is a form of cooperation that restricts competition, so the courts would have to balance the anticompetitive harms of the BCS system with the procompetitive benefits.\(^{87}\) The anticompetitive effects of the BCS system include damage to recruiting efforts, and reduced access to qualified coaches when Mid-Major teams lack an equal opportunity for "fame and fortune," in the BCS bowl system.\(^{88}\) Additionally, Mid-Major conferences cannot compete financially with larger schools in the Majors,

\(^{81}\) Id. at 103–04.

\(^{82}\) Schmit, supra note 28, at 240–41.

\(^{83}\) Id. at 242.

\(^{84}\) See Bd. of Regents, 468 U.S. at 113 (stating that some activities can only be carried out with joint cooperation, and the analysis as to whether these activities are anticompetitive must depend on how restrictive the activity is versus how the cooperation is beneficial).

\(^{85}\) Id. at 113–14 (stating that the anticompetitive effects could only be balanced out by equally-weighted procompetitive justifications).

\(^{86}\) Compare Schmit, supra note 28, at 252 (stating that, if the BCS system was challenged under the Sherman Act, the judgment likely would be against the BCS; however, it is unlikely that a party is both financially capable and willing to bring suit exists), with Rogers, supra note 29, at 296–300 (stating that, because of the recent modifications, regarding increased inclusion and equality of Mid-Major teams, to the BCS system, it likely would not violate Section 1 or Section 2 of the Sherman Act).


\(^{88}\) Schmit, supra note 28, at 243–44.
particularly because of a lack of BCS payout revenue, the disparity between
the Majors and Mid-Majors. The procompetitive benefits of the BCS
system remain minimal, but the recent changes to the BCS system have
neutralized some of the anticompetitive effects. The BCS argues that the
bowl system is the best procedure to enable the most talented college football
teams in the United States in a given season to compete for the national
championship title. The BCS system also operates such that it preserves
the drama and excitement of traditional college football rivalries. With the
addition of rules that provide for a reevaluation of both Majors and Mid-
Majors to determine qualification for an automatic bid based on merit, each
conference has a greater chance to participate in the BCS bowls and thus
benefit from the resulting revenue and recognition.

Another factor in a Rule of Reason analysis is whether a less restrictive
alternative exists such that the goals and objectives of the activity are still
achieved. Procompetitive benefit cited by Proponents of the BCS assert
that a primary is that a less restrictive alternative system that accomplishes
the same goal of establishing a national college football champion currently
does not exist. Opponents of the BCS system suggest that the conferences
should institute a playoff system to determine a national champion, yet
proponents of the BCS system vehemently counter that a playoff system is
unfeasible for college football, and undesirable.

A lawsuit initiated by a Mid-Major conference school could commence
an antitrust challenge to the BCS system. Alternatively, the antitrust issue

89 Id.
90 Harvey S. Perlman, Testimonial Statement at the Hearing Before the Subcommittee on
Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee (July 7,
2009) [hereinafter Perlman Testimonial Statement], available at http://judiciary.senate.gov/heari-
ngs/testimony.cfm?id=e655f9e2809e5476862f735da14e6156&wit_id=e655f9e2809e5476862f7
35da14e6156-1-3 (discussing the "structure of the BCS").
91 See id. ("There is no reason to believe that any alternative structure is going to produce
any less controversial selections . . . .").
92 Id.
93 Schmit, supra note 28, at 246.
94 Id. at 250.
95 See Perlman Testimonial Statement, supra note 90; Monts Testimonial Statement, supra
note 87 (stating that a playoff would diminish the importance of the regular season in college
football, would ignore the bowl tradition that fans and players have come to appreciate, and
would present the same revenue issues and problems with exclusivity).
96 Perlman Testimonial Statement, supra note 90 (pointing out that a playoff system
potentially would cause damage to the relationships between the bowls and the NCAA, would
hamper fan attendance at earlier playoff games, and would lengthen the college football
season).
could be brought before Congress.\textsuperscript{97} However, Congress recently heard arguments both condoning and condemning the BCS system and has yet to respond to these hearings.\textsuperscript{98} Thus, the legality of the BCS system under the Sherman Act antitrust laws has yet to be determined.

III. ANALYSIS OF THE BCS SYSTEM UNDER EUROPEAN UNION ANTI-COMPETITION LAWS

The European Commission (the Commission) is the branch of the European Union that proposes and enacts legislation.\textsuperscript{99} In the European Union, two laws generally govern competition issues: Articles 81 and 82, which are similar to the provisions contained in Sections 1 and 2 of the Sherman Act. The distinctions between Articles 81 and 82, the Sherman Act are outlined in the White Paper on Sport, adopted by The Commission in 2007.\textsuperscript{100} The White Paper on Sport discusses the role of sport within the European Union and its useful but lengthy annex (the Annex) provides a discussion of Sport and European Union Competition Rules and an explanation of how Articles 81 and 82 apply to sports in the European Union.\textsuperscript{101} The European Competition Policy newsletter states that “the Annex provides an overview regarding the principal case law of the Community Courts and the decisional practice of the Commission with respect to the application of Articles 81 and 82 EC in the sport sector.”\textsuperscript{102}

\textsuperscript{97} Schmit, supra note 28, at 252.

\textsuperscript{98} See Clifford, supra note 4 (“[I]n the ten years the BCS has been in existence, numerous congressional committees have held hearings to examine the legal and consumer-protection issues associated with the BCS system.”).


\textsuperscript{101} See Commission White Paper on Sport, at Annex I: Sport and EU Competition Rules, COM (2007) 391 final (July 11, 2007) (“The purpose of this annex is to provide an overview regarding (i) the commission’s decision-making and administrative practice and (ii) the relevant judgments of the Community Courts concerning the application of Articles 81 and 82 EC in the Sport sector.”), available at http://ec.europa.eu/sport/white-paper/swd-annex-i-sport-and-eu-competition-rules_en.htm.

\textsuperscript{102} Kienapfel & Stein, supra note 100.
A. Benefits of Analyzing the BCS System Under European Commission Laws

It is difficult to analyze the BCS system under the Sherman Act as an antitrust violation because of a lack of legislative guidelines providing guidance as to how the Act should be applied to the BCS system, or to generally college sports. While there are several legislative decisions that address antitrust sports issues, no direct legislative action indicates how courts and legislators would evaluate antitrust issues in sports. In addition, many of the judicial decisions that addressed antitrust issues in college and professional sports have decided very narrow issues. Because there is no system comparable to the BCS, it is difficult to determine which factors should be evaluated when looking at the system in an antitrust context and what the outcome would be in an antitrust challenge.

It is informative to examine the BCS system, as a sporting and economic entity itself, from a perspective applying the detailed, sports-specific directives of the Commission because such specific application of the rules provides a more helpful analysis of the BCS system than the Sherman Act and various vague and generalized judicial determinations of U.S. courts. By applying the established rules of the Commission, it appears that the BCS

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103 See Schmit, supra note 28, at 252 (suggesting that the most effective way to establish whether the BCS complies with antitrust laws is for Congress to formally address the issue; while there are many Congress members who express discontent with the BCS system and held hearings to inquire into its legality, Congress has not yet provided any directives on the application of the Sherman Act to the BCS).

104 See Toolson v. New York Yankees, Inc., 346 U.S. 356, 357–58 (1953) (explaining that, because Congress failed to act after Fed. Baseball Club v. Nat'l League of Prof'l Clubs, 259 U.S. 200 (1922)—where the Court held that professional baseball was exempt from antitrust law—the Court construes such inaction as support of the judicial determination and would apply antitrust laws to all other sports, and if Congress no longer wanted baseball to be exempt, or if it wanted to exempt other sports, it should enact legislation).

105 See, e.g., Toolson, 346 U.S. at 357–58 (holding that the reserve clause in professional baseball are exempt from antitrust scrutiny because baseball itself is exempt from antitrust scrutiny); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 85 (1984) (holding that antitrust laws apply to the NCAA's practice of preventing individual teams from directly negotiating with television networks for contracts, and while the Court broadly reaffirmed that the Sherman Act applied to the NCAA insofar as a practice constitutes economic activity, the case primarily holds that the Sherman Act should be narrowly applied to television contracts).

106 Compare Schmit, supra note 28, at 240–41 (dismissing consumer preferences as a procompetitive justification for the BCS system, and ultimately concluding that the BCS likely would be struck down as anticompetitive if challenged under the Sherman Act), with Rogers, supra note 29, at 297 (focusing on how both consumer preferences and consumer demand factor into the procompetitive benefits of the BCS system, and ultimately concludes that the BCS system likely would survive an antitrust challenge).
system fails to satisfy the standards set forth in the White Paper on Sport. As such, this Note posits that the BCS system should be subject to greater scrutiny by Congress, focusing on direct application of the Sherman Act to the BCS.

B. Why the BCS Fits Within a European Commission Sport Analysis

Articles 81 and 82, and consequently, the directives contained in the White Paper on Sport, only apply to sports teams and associations insofar as they perform "economic activity."\(^{107}\) While most judicial decisions that determine the application of Articles 81 and 82 to professional sports teams, the White Paper on Sport equally applies to amateur sports, as long as they perform an "economic activity."\(^{108}\) Consistent with the White Paper on Sport, United States' courts hold that the NCAA is subject to antitrust laws to the extent that the NCAA performs an economic activity.\(^{109}\) The agreement between the Major conferences, the BCS Bowls, and the television networks, constitutes an economic activity—which the White Paper on Sport defines as any activity offering goods or services on the market—and therefore, would be subject to Articles 81 and 82 of the European Commission.

IV. ARTICLES 81 AND 82, CASE LAW, AND THE WHITE PAPER ON SPORT OF THE EUROPEAN COMMUNITY

A. Articles 81 and 82 of the European Community

The European Commission focuses on the application of Articles 81 and 82 to the sports industry in the European Union.\(^{110}\) Article 81 deals with agreements between undertakings\(^{111}\) that affect EU Member States and "have as their object or effect the prevention, restriction or distortion of

\(^{107}\) Commission White Paper on Sport, supra note 101, at 2.1.2.

\(^{108}\) See id. at 2.1.3 (stating that a sports team is an association of undertakings such that Articles 81 and 82 apply to the extent that the sports team carries out economic activities, and that a sports association is comprised of amateur players "is of no importance as far as the classification as an association of undertakings is concerned"; the only issue is whether the association constitutes economic activity).

\(^{109}\) See Bd. of Regents, 468 U.S. at 98–102 (stating that the NCAA intendeods to market college football and the products associated with it).

\(^{110}\) Commission White Paper on Sport, supra note 101.

\(^{111}\) Id. at 2.1.3.
competition within the common market.... In particular, Article 81 applies to agreements that directly or indirectly set prices or trading conditions, place limitations on the market, share markets, or “apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”

In the White Paper, the Commission defines the term undertaking to include all organizations engaged in economic activities, regardless of the organization’s business or method of financing. Further, the Commission provides that sports associations are undertakings insofar as they create economic activities, such as selling tickets. Sports associations are associations of undertakings to the extent that they “constitute groupings of sport clubs/teams or athletes for which the practice of sport constitutes an economic activity.”

Article 82 of the European Community addresses abuse of a dominant position by undertakings within a common market, stating that such abuse shall be prohibited to the extent that it affects trade with Member States. Article 82 provides that abuse of a dominant position may take the form of (1) imposing unfair prices or unfair trading conditions, (2) limiting production or markets to the detriment of consumers, or (3) “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”

Unlike Article 81, Article 82 only applies to undertakings, and not to associations of undertakings, but, as stated above, the Commission still applies Article 82 to sports associations when they carry out economic activities. Additionally, the Commission explains that, for purposes of Article 82, a relevant market must be determined because sports associations tend inherently maintain a practical monopoly over a given sport, and usually hold a dominant position in sporting events under Article 82. A sports club or team may have a dominant market position, within the meaning of

113 Id. art. 82.
114 Commission White Paper on Sport, supra note 101, at 2.1.3.
115 Id.
116 Id.
117 Treaty of Amsterdam art. 82.
118 Id.
120 Id.
Article 82, if it presents itself as a single, collective entity to other competitors, trading partners, or consumers as a result of rules adopted by the sports association.\textsuperscript{121}

\textbf{B. Application of Articles 81 and 82 to Sporting Rules}

The Commission provides a test to determine if a sporting rule violates Articles 81 or 82, and thus whether the sporting rule constitutes an anticompetitive activity.\textsuperscript{122} A sporting rule is any rule adopted by a sports association.\textsuperscript{123} By applying this sporting rule test to the BCS system, the anticompetitive nature of the BCS becomes apparent. To avoid antitrust violations by the BCS system, and in order to remedy the unfairness that the BCS has shown it is unwilling to do through self-regulation, Congress should establish a similar test in the United States for determining when a sporting rule constitutes an antitrust violation.

In \textit{Meca-Medina v. Commission}, the European Court of Justice concluded that, while Articles 81 and 82 only apply to sports if they constitute economic activity, there is no immunity from competition law simply because the rule in question is a sporting rule.\textsuperscript{124} The court stated that, despite the context of a rule, it must be determined "whether the rules which govern the [sport] activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States."\textsuperscript{125}

The court in \textit{Meca-Medina} based its decision on the court's previous determination in the \textit{Wouters} judgment.\textsuperscript{126} In \textit{Wouters}, the court outlined several factors to determine whether a sporting rule constitutes anticompetitive activity.\textsuperscript{127} The factors include: the overall context in which the rules were taken and what effects the rules have, the objectives of the rules, whether the rules are inherently restrictive in pursuit of the objective of the rules, and whether the restrictive effects are in proportion to the objective of the rules.\textsuperscript{128}

\begin{thebibliography}{99}
\bibitem{id} Id.
\bibitem{id1} Id. at 2.1.2.
\bibitem{id2} Id. at 2.1.1.
\bibitem{id3} Case C-519/04, Meca-Medina v. Comm'n, 2006 E.C.R. I-6991.
\bibitem{id4} Id.
\bibitem{id5} Id.
\bibitem{id7} Id. para. 97.
\end{thebibliography}
Based on the decisions in Meca-Medina and Wouters, the Commission was able to set forth a three-part test for courts to use prospectively to determine whether a sporting rule infringes upon Article 81, Article 82, or both.129

The first part of the test determines whether the sports association that adopted the rule at issue is an undertaking or an association of undertakings.130 If the sports association is an undertaking or an association of undertakings, then Articles 81 and 82 apply,131 otherwise, the inquiry ends because Articles 81 and 82 only apply to an undertaking and an association of undertakings.132

The second part of the test determines whether the rule, at issue either restricts competition under Article 81 or constitutes an abuse of a dominant position under Article 82.133 An analysis under this second step requires the court to use the principles articulated in Wouters.134 However, in Meca-Medina, the court expanded on the Wouters principle of ensuring that the rule in question focuses on legitimate objectives with inherent restrictions that only aid its objective and that are also proportionate to its objective.135

Legitimate objectives include those that relate to the “‘organisation and proper conduct of competitive sport,’”136 and may include rules that protect the safety of athletes, ensure fair competition, protect the financial stability of sports organizations, and relate to the rules of the game.137 The Commission provided that the specificity of sport (meaning the features of sports that distinguish them from other economic activities because of the interdependence of adversaries necessary to any sporting event) should be considered when determining whether the objectives are legitimate.138

The restrictions invoked by a rule must be “inherent in the pursuit of its objective.”139 Inherent rules include those that establish the “‘rules of the game’” such as the length of the game, the number of players, as well as

130 Id. at 2.1.2.
131 Id. at 2.1.3.
132 Id. at 2.1.2.
133 Id.
134 Id.
136 Id.
137 Id.
138 Commission White Paper on Sport, supra note 101, at 2.1.5.
139 Id.
rules to ensure fair competition and uncertainty of results. A rule must be proportional to its objective. The Commission stated that a rule "must be applied in a transparent, objective and non-discriminatory manner," and that "each sporting rule will have to be assessed on a case-by-case basis while taking into account the relevant facts and circumstances." The court in Meca-Medina "concluded that the rules did not go beyond what was necessary to ensure the proper conduct of [the] competitive sport."

The third step of the test asks whether trade between Member States is affected by the application of the rule. Finally, the test inquires as to whether a rule violates Article 81(1). This inquiry may preserve a rule in violation of Article 81(1) if it fulfills the provisions of Article 81(3). Article 81(3) states that the provisions of Article 81(1) do not apply if the agreement or practice in question contribute[s] to improving the production or distribution of goods or [promotes] technical or economic progress, [allows] consumers a fair share of the resulting benefits and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

The Commission indicates that the application of Article 81(3) justifies a rule when the rule is not inherent in the organization or proper conduct of the sport, as stated in the Wouters analysis, but rather has beneficial justifications that outweigh its restrictive effects.

With these guidelines, the Commission indicated how courts should approach cases involving sporting rules, as well as Articles 81 and 82 regarding anticompetitive behavior. The Commission chose not to enumerate a list of sporting rules that would violate the Articles, and instead,

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140 Id.
141 Id.
142 Id.
143 Id.
144 Id. at 2.1.2.
145 Id. at 2.1.6.
146 Id.
147 Id.
148 Id.
149 Id. at 2.1.7.
it reiterated the three-part test analyze a sporting rule in the context of competition law on a case-by-case basis.\textsuperscript{150}

C. Application of the Commission Three-Part Test to Sporting Rule Cases

The ruling in \textit{Meca-Medina} confirmed the Commission’s earlier approach of applying Articles 81 and 82 to sporting rule cases.\textsuperscript{151} Specifically, in \textit{Meca-Medina}, two swimmers tested positive for banned substances after placing first and second in a 1999 swimming competition.\textsuperscript{152} The swimmers challenged the sanctions they received, pursuant to the doping regulations imposed on them by the International Olympic Committee (IOC) and the International Swimming Federation.\textsuperscript{153} The Court of First Instance held that because the anti-doping rules imposed by the IOC were of purely sporting interest; they fell outside the scope of Articles 81 and 82 and had nothing to do with economic activity.\textsuperscript{154}

On appeal, the European Court of Justice decided that, if a sporting activity falls within the scope of Articles 81 or 82, “the conditions for engaging in it are then subject to all the obligations” and rules imposed by Articles 81 and 82.\textsuperscript{155} Thus, even though a rule is purely sporting in nature, because it is inherent in the organization and proper conduct of the sport, it will not necessarily be immune from anticompetitive allegations under Articles 81 and 82.\textsuperscript{156} The court then engaged in a \textit{Wouters} analysis of the anti-doping rule. The court held that the rule’s objective of ensuring fair competition was a legitimate objective, that the restrictive effects of the antidoping policy were inherent to the pursuit of fair competition, that the testing procedures and penalties involved in testing for banned substances were not proven to be disproportionate to the objectives of the rule and, thus, the restrictions imposed by the antidoping rule were not anticompetitive under Articles 81 and 82.\textsuperscript{157}

However, other courts have reached the contrary conclusions in similar cases involving purely sporting rules that restrict competition and are not

\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 2.1.1.
\textsuperscript{152} Case C-519/04, Meca Medina v. Comm’n, 2006 E.C.R. I-6991, para. 1.
\textsuperscript{153} \textit{Id.} para. 3.16.
\textsuperscript{154} \textit{Id.} para. 11.
\textsuperscript{155} \textit{Id.} para. 28.
\textsuperscript{156} \textit{Id.} paras. 29–33.
\textsuperscript{157} \textit{Id.} paras. 43–47, 55.
necessary to the organization or proper conduct of sporting competitions.\textsuperscript{158} In the FIA case, a sports association was both the regulator and commercial exploiter for the sport.\textsuperscript{159} The Commission stated objections to the rules promulgated by the Fédération Internationale d’Automobile (FIA).\textsuperscript{160} FIA is the international body whose members regulate motor sports in their respective countries,\textsuperscript{161} but also promotes and organizes motor sport championships, like the Formula One race.\textsuperscript{162} The Commission took exception with the FIA’s prohibition against FIA-licensed drivers from participating in events not authorized by FIA, and that “[c]ircuit owners were prohibited from using the circuits for races which could compete with [the FIA-sponsored] Formula One.”\textsuperscript{163}

The Commission found that FIA, in its capacity as a regulator, organizer, and promoter of motor sports and motor sport championships, violated Articles 81 and 82 because it prevented other entities from organizing races that competed with FIA-sponsored events.\textsuperscript{164} Following the court’s decision, FIA agreed to modify its arrangements to limit the scope of its authority in the regulation of motor sports and cede its influence over commercial exploitation of championship races to another party.\textsuperscript{165} FIA stated that the purpose of the modification was “to establish a complete separation of the commercial and regulatory functions in relation to the [motor sports championships].”\textsuperscript{166} It also aimed to provide “access to motor sport[s] to any person meeting the relevant safety and fairness criteria.”\textsuperscript{167}

The Commission discusses the Meca-Medina case and the FIA case in its White Paper on Sport, and also describes other cases to illustrate when a sporting rule violates Articles 81 and 82.\textsuperscript{168} Sporting rules that have legitimate objectives, and thus do not violate Articles 81 and 82, include (1) rules fixing the length of the game or number of players (rules of the game),
(2) rules preventing multiple ownership of sports associations, (3) rules concerning selection criteria for sports events, and, as the court in Mecamedina ruled, (4) anti-doping laws. Conversely, sporting rules that violate Articles 81 and 82 if they are not justified under the criteria of Article 81(3), include: (1) rules regulating athlete transfers from one club to another (except transfer windows, which are generally said to not violate Articles 81 and 82), (2) rules preventing decisions made by sports organizations from being challenged before courts if the denial of this access facilitates anticompetitive conduct, and, like the Commission found in the FIA case, (3) rules protecting sports associations from competition.

D. Application of Articles 81 and 82 to BCS Media Contracts

One of the main anticompetitive effects of the BCS system is that it promotes lucrative media contracts with the Major conferences while inhibiting those same opportunities for the Mid-Major conferences. Thus, the Commission’s treatment of sports media contracts under Articles 81 and 82 is applied to the BCS system for purposes of this analysis.

The Commission stated, “[a]ll broadcasting organizations... are undertakings,” thus subjecting them to the standards of Articles 81 and 82. A sports organization performs economic activities, through a broadcasting organization if it acquires and licenses its television rights. The main issue with media contracts, where Articles 81 and 82 apply, is any joint selling agreement of broadcast rights by sports associations that would not have occurred in the absence of agreement between the sports teams. Joint selling agreements occur when teams sell their media rights to a sports association, which then sells those rights to the media on behalf of the teams. The Commission recognizes that many joint selling agreements create important efficiencies, such as reducing transaction costs and creating a league product that is desirable for viewers. However, the positive
effects of the arrangement must outweigh the negative effects on competition for the joint selling agreements to pass Articles 81 and 82.\textsuperscript{177}

The Commission identified several mechanisms to ensure that joint selling agreements of media rights do not constitute anticompetitive activity.\textsuperscript{178} A joint selling agreement violates Article 81 if it is likely to eliminate competition in the rights to a particular sports market because no substitute rights to other sporting events of that particular sport are available.\textsuperscript{179} The Commission may enforce certain remedial measures to address concerns regarding joint selling agreements and Article 81.\textsuperscript{180} One method requires the sports association selling the rights to organize a competitive bidding process, enabling all broadcast company buyers to have an opportunity to compete for the rights to broadcast the sports association's games.\textsuperscript{181} Another method requires the sports association selling the rights to limit the duration of the media contract so that viewers have access to the most desirable competitions and greater access to television for other sports associations in the future.\textsuperscript{182}

The FIA case illustrates how the Commission can enforce changes in media rights to produce less restrictive activity. In addition to FIA's violation of Articles 81 and 82, the Commission believed that FIA engaged in anticompetitive activity with regard to the broadcasting rights it sold.\textsuperscript{183} In response to the Commission's determination that FIA violated Article 81, FIA made changes to the way it sold broadcasting rights.\textsuperscript{184} First, FIA allowed broadcasters to competitively bid for the right to televise FIA races (upon expiration of current contract obligations).\textsuperscript{185} FIA also agreed to

\textsuperscript{177} Id.
\textsuperscript{178} See id. at 3.1.3.2.1–3.1.3.2.6 (providing a non-exhaustive or binding list of remedies, including: tendering, limiting the duration of exclusive vertical contracts, limiting the scope of exclusive vertical contracts, ensuring there are no unused rights, ensuring there are no single buyer obligations, and requiring the tender procedure to be overseen by a trustee).
\textsuperscript{179} Cf. id. at 3.1.3.1.3 ("The joint selling agreements [in the UEFA CL decision] were not likely to eliminate competition... because substitutable rights to other football events... were available (e.g., national football league rights).").
\textsuperscript{180} Id. at 3.1.3.2.
\textsuperscript{181} Id. at 3.1.3.2.1.
\textsuperscript{182} Id. at 3.1.3.2.2.
\textsuperscript{183} Id. at 2.2.2.1.
\textsuperscript{184} See id. ("The Commission closed the case after having reached a settlement in 2001. The settlement provided in particular that FIA would: limit its role to that of a sport regulator...; guarantee access to motor sport...; waive its TV rights or transfer them...; and remove the anticompetitive clauses from the agreements between [Formula One] and broadcasters.").
\textsuperscript{185} Ivo Van Bael & Jean-Francois Bellis, Commission Closes Its Investigation into Formula One and Other Four Wheel Motor Sports, 2 E.C. COMPEITION L. REP. 96–226 (2001)
reduce the length of each broadcasting contract, to a maximum of three years (except for certain contracts requiring a five-year maximum term based on the nature of the investment) which allowed more fluidity in providers and more opportunities for bids. The Commission's determination that FIA violated Article 81 with its media contracts caused FIA to promptly change its media methods; it changed its media contract terms in response to the Commission's suggestions and avoided potential litigation.

Having discussed the ways in which the Commission has set forth specific rules, tests, and directives to apply Articles 81 and 82 to sports through application to sporting rules and media contracts, this Note now examines whether the BCS system constitutes a violation of the principles of Articles 81 and 82.

V. ANALYSIS OF THE BCS UNDER THE EUROPEAN COMMISSION WHITE PAPER ON SPORT

If the sporting rules test set forth by the Commission applied to the BCS system, the BCS would be considered anticompetitive under Articles 81 and 82, but may be saved by the provisions of Article 81(3). Preliminarily, a determination as to whether the BCS formula for selecting postseason game participants qualifies as a sporting rule as defined by the Commission. The Commission provides an assessment for any "rule adopted by a sports association relating to the organisation of a sport..." If the BCS qualifies as a sports association, its selection system for the BCS bowl games, including the National Championship Game, should be considered a sporting rule, and thus, subject to analysis under the Commission's anticompetitive test.

The BCS describes its selection system as a "five-game arrangement for postseason college football that is designed to match the two top-rated teams in a national championship games and to create exciting and competitive matchups among eight other highly regarded teams in four other games." The BCS selection system controls how the national champion is determined

("[B]roadcasters... will be invited to tender for the TV rights on the expiry of the current (and any future) contracts.").

186 Id.

187 See id. ("FIA agreed to modify its rules to bring them into line with EC law.").

188 Commission White Paper on Sport, supra note 101, at 2.1.2.

in the sport of college football, and thus, should be considered a sporting rule.

Assuming the BCS selection process qualifies as a sporting rule, it is then appropriate to analyze the BCS under the Commission’s sporting rule test. As discussed previously, the first step of the sporting rule test is to determine whether the BCS is a sports association that is an undertaking, or an association of undertakings, within the meaning of Articles 81 and 82.\textsuperscript{190}

In the White Paper on Sport, the Commission states that an undertaking is an entity engaged in economic activity, such as the commercial exploitation of a sporting event.\textsuperscript{191} The BCS satisfies the definition of an undertaking because it engages in a variety of economic activities, including commercially exploiting bowl games for public consumption, engaging in contracts with television networks, and paying schools and conferences to compete in the BCS bowl games.\textsuperscript{192} Sports teams, as well as and groups of sports teams, may be undertakings in the areas where they carry out economic activities, even if the teams’ participating athletes are not compensated.\textsuperscript{193} Thus, even though the conferences that participate in the BCS system use amateur athletes, lack of compensated players does not disqualify the BCS from consideration as an undertaking.

In the White Paper on Sport, the Commission also states that a sports association can be an association of undertakings, within the meaning of Article 81, if it consists of a group of sports teams that engage in economic activity.\textsuperscript{194} Regardless of whether the sports teams comprising the sports association consist of amateur athletes, the sports association can be an association of undertakings to the extent the individual member groups engage in economic activity.\textsuperscript{195} Because the conferences that comprise the BCS engage in economic activities by selling tickets and merchandise, the BCS satisfies the definition of an association of undertakings, under the provisions of Article 81.\textsuperscript{196} Since both the BCS and its conference members

\textsuperscript{190} Commission White Paper on Sport, supra note 101, at 2.1.2.
\textsuperscript{191} Id.
\textsuperscript{192} See Rogers, supra note 29, at 288–91 (stating that the BCS enters into television contracts to broadcast bowl games and that each school whose football team plays in a BCS bowl game can be expected to earn 14 to 17 million dollars, half of which is divided among the conference members that the school belongs to).
\textsuperscript{193} Commission White Paper on Sport, supra note 101, at 2.1.3.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} See Rogers, supra note 29, at 294 (“[The BCS] is clearly a commercial enterprise designed to make profits for its member schools and conferences.”).
perform economic activities, Articles 81 and 82 apply to the BCS system. Therefore, the first step of the sporting rule test is satisfied in this analysis of the BCS system.197

The next step in the analysis is to determine whether the BCS system restricts competition under Article 81 or constitutes abuse of a dominant position under Article 82.198 If the object or effect of a sporting rule is to restrict competition within the market, and if the rule affects trade between the states of the European Union, Article 81 prohibits such a rule.199 Article 82 prohibits a sporting rule if it constitutes an abuse of a dominant position within the relevant market.200 "[S]ports associations usually have practical monopolies in a given sport and may thus normally be considered dominant in the market . . . under Article 82 EC."201 According to the Commission's sporting rule test, three factors determine, whether a sporting rule restricts competition, under Article 81 or results in the abuse of a dominant position under Article 82.202 If the Commission evaluated the BCS selection procedures and applied the three factors from Wouters, it would look at "[(1)] the overall context in which the rule was adopted or produces its effects and its objectives; [(2)] whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and [(3)] whether the rule is proportionate in light of the objective pursued."203

The BCS objectives are to determine college football national champion by matching the two top teams together in a game, and to create opportunities for other highly ranked teams to compete against each other.204 The BCS sporting rules provide that only the Major conferences receive an automatic BCS bowl bid every year, and that a system of polls and computer programs determine which two teams play in the National Championship Game and the other BCS bowls games.205 These selection rules effectively bar teams of the Mid-Major conferences from the National Championship

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197 Commission White Paper on Sport, supra note 101, at 2.1.2.
198 Id.
199 Id. at 2.1.4.
200 Id.
201 Id.
202 Id. at 2.1.2.
203 Id.
204 The BCS Is . . . , supra note 8.
205 BCS Selection Procedures, supra note 11 (stating that, while there is a selection process for the bowl participants, the polls and programs determine initial eligibility).
Game and other BCS bowl games, as well as from the revenue and other benefits associated with a Major conference.\footnote{206}

Whether the BCS system violates Article 81 or 82 turns on whether the restrictions imposed by the BCS are inherent in pursuit of its objectives.\footnote{207} The restrictions imposed by the BCS procedures are not inherent to the objective of selecting a college football national champion. The Commission gives rules that set forth the number of players or the field dimensions in a given sport as examples of rules that are inherent to the competitiveness of sport.\footnote{208} While the selection of a champion is a legitimate objective, the rules governing the manner in which the BCS selects a national champion are not inherent to this objective, distinguishable from the type of rule that sets a number of players for a sport, which is inherent to proper competition. A college football national championship selection process has countless alternatives, such as polls and computer ranking systems. The BCS process is not inherent to the selection of a national champion; only the Major conferences, to the general exclusion of the mid-Major conferences to have automatic yearly bids to the BCS bowl games. For these reasons, the BCS selection process is not inherent to the objective of selecting competitors for a national championship game.

Whether the BCS selection rules are “proportionate in light of the objective pursued” is the next factor in the analysis.\footnote{209} Here, the BCS pursues an objective of staging a national championship game. The Commission also states in its White Paper on Sport that the rules must be applied in a “transparent, objective, and non-discriminatory manner.”\footnote{210} Even if the BCS selection rules inherent to the existence of the National Championship Game, the selection procedures are not proportionate with the BCS objective. A merit-based system naturally excludes some teams from BCS bowl consideration, but the distinction between selection of the Major conferences and the Mid-Major conferences is disproportionate, based on the proven success of Mid-Major teams and the corresponding lack of BCS bowl opportunities for them.\footnote{211}

\footnote{206 See Rogers, supra note 29, at 288–91 (stating that the BCS system denies teams from Mid-Major conferences the same opportunities to derive revenue from BCS bowl payouts and the television revenue associated with the broadcast of those games).}
\footnote{207 Commission White Paper on Sport, supra note 101, at 2.1.2.}
\footnote{208 Id. at 2.1.5.}
\footnote{209 Id. at 2.1.2.}
\footnote{210 Id. at 2.1.5.}
\footnote{211 See Mandel, supra note 64 (showing that in recent years, many teams from the Mid-Majors have finished the season undefeated without an opportunity to play in the National
The final element of the Commission’s sporting rules test is whether the rule affects trade between Member States. While the BCS does not have Member States like the European Union, the member conferences and the states in the U.S. are analogous to Member States, and have their trade affected by the BCS selection rules. In the majority of cases cited in the White Paper on Sport, the disputes involve a sports association that governs within more than one Member State (European country), which is sufficient to affect trade between the Member States. In comparison, the BCS also is an organization that creates rules affecting trade between member entities, whether the states or its member conferences would be construed as the member entities.

At this point in the analysis, the BCS system appears to fail the sporting rule test. Such that it violates Articles 81 and 82, and is anticompetitive. The BCS failed to satisfy the three elements of the Commission’s sporting rule test, and also, fails under the precedent established by the FIA case. In the FIA case, as discussed, the Commission found an anticompetitive conflict of interest when a sports association was the regulator and commercial exploiter of a sporting event. The BCS also is the regulator of the college football postseason, and it commercially exploits postseason play by entering into contracts with television networks and bowl games. Based on precedent cited by the Commission in its White Paper on Sport, sports associations with both of these functions are violators of Articles 81 and 82.

In the final step of the test, the Commission provides a type of safe harbor provision in Article 81(3), which may apply despite violations of Articles 81 and 82. Article 81(3) may relieve a sporting rule that is not inherent in the organization of a sports association when the rule’s beneficial effects outweigh its restrictive effects. This analysis is substantively similar to the

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212 Commission White Paper on Sport, supra note 101, at 2.1.2.
213 See generally id. at 2.2.2.1–2.2.2.5 (providing examples of sporting rules that may infringe on Articles 81 and 82).
214 Id. at 2.2.2.1.
215 See Rogers, supra note 29, at 288–90 (stating that teams who are selected to participate in BCS bowls are paid approximately 14 to 17 million dollars and that the BCS has contracts with a variety of television networks to exclusively broadcast BCS games).
216 Commission White Paper on Sport, supra note 101, at 2.2.2.1.
217 Id. at 2.1.2.
218 Id. at 2.1.6.
rule of reason test under the Sherman Act. If the BCS selection rules were challenged under the Commission's scheme, and were found to be anticompetitive, the BCS rules are still redeemable through their procompetitive effects upon comparison with their restrictive effects. The results of this particular challenge remain unclear because experts remain divided as to whether the benefits of the BCS system outweigh its negative restrictive effects.

The case law and the sporting rule test set forth in the Commission's White Paper on Sport offer valuable insight on an evaluation of sporting rules in the context of antitrust law, and an analysis of their application to the BCS indicate that if the BCS selection scheme was challenged under Articles 81(1) and 82, the BCS would be found to be anticompetitive. However, under the Article 81(3) analysis, which is no clearer than the muddled rule of reason test set forth in the Sherman Act, the Commission fails to provide any guidelines or case law to aid in its specific application of Article 81(3) to a sporting rule. While superficially the BCS appears to violate Articles 81(1) and 82, as shown by analogy to the FIA case, the final determination of whether the BCS system is anticompetitive and would be forced to make changes to increase competition under European law, involves a balancing test similar to that in the Sherman Act.

VI. RELEGATION: A LESS RESTRICTIVE ALTERNATIVE TO THE BCS

A major factor in both the Sherman Act's rule of reason balancing test and under Article 81(3) is whether there is a less restrictive alternative to the BCS that will achieve the same objective. This Note examines the BCS system under relevant laws of the European Union. This Note continues with the application of European precedent as it proposes a less restrictive alternative by mirroring the merit-based selection system used in European professional football.

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219 See supra notes 83–96 and accompanying text (discussing the rule of reason test under the Sherman Act).
221 See Schmit, supra note 28, at 243–46 (outlining the anticompetitive and precompetitive effects of the BCS system).
222 Commission White Paper on Sport, supra note 101.
223 See id. at 2.1.6 (reasoning that a less restrictive alternative is more easily outweighed by its beneficial effects and thus, more likely to be valid); see also Schmit, supra note 28, at 250–51 (discussing less restrictive alternatives for the BCS selection process).
A. What Is Relegation?

Among the various European football leagues, there are a number of relegation systems, but each system follows the same general structure. This Note focuses on the relegation system of the English Premier League, which “is widely regarded as the elite club competition in world football.” The English system of relegation applies to six different leagues in English football, with the Premier League as the top league and the Football League as the second highest league. At the end of each regular football season, the three teams with the fewest awarded points, based on the record from the Premier League, are demoted, or relegated, to the Football League, and the teams with the best records from the Football League are promoted to the Premier League. Consequently, the most talented teams have an opportunity to compete against each other in the Premier League and enter the Union of European Football Associations (UEFA) Champions League to compete against the best teams from other countries. Also, the lower ranked teams have an opportunity to play opponents of a similar skill level during the season, while retaining the opportunity to be promoted to a higher league at the end of the season if performance merits such an advance.

B. How Can Relegation Be Applied to College Football?

Even though relegation is a European device used for professional leagues, this system could remedy the BCS. Due to the similarities between the Sherman Act and Articles 81(1) and 82, a system of relegation that complies with competition laws in the European Union should comply with the antitrust laws of the United States.

ESPN analyst, Pat Forde, proposed a selection method to provide the best teams in college football with an opportunity to play for the national championship title, while allowing for mobility among the Major

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227 Id.
228 Id.
conferences through a relegation system.\(^{229}\) Under Forde’s method, conference alignments would be reworked and split into leagues according to overall recent success.\(^{230}\) Similar to the English Premier League, there would be a league consisting of forty top-ranked teams, and a league for the eighty remaining teams.\(^{231}\) There would be multiple conferences within each league; each team would play all the other teams within its conference during the regular season, and then compete in a playoff series to determine the league champion.\(^{232}\) The national champion would be the winner of the top league’s playoff match.\(^{233}\) At the end of each season, the lowest ranked teams in the top league would be relegated to the lower league, and the top ranked teams from the lower league would be promoted to the top league.\(^{234}\)

C. What Are the Pros and Cons of Using Relegation in NCAA Football?

The benefits of the Forde-proposed relegation system in lieu of the BCS system address many of its anticompetitive effects; specifically, the arbitrary restriction imposed by the BCS on access to the National Championship Game.\(^{235}\) Although the Forde system also restricts access to the national championship (to teams in the top-tier league), the restriction would be merit-based and attributable to performance during the current and preceding years.\(^{236}\) While proponents of the BCS system argue that the future selection process whereby a Mid-Major conference can become an automatic qualifying conference for two years based on prior performance makes access less arbitrary, the system does nothing to remove lesser performing conferences from automatic qualifying status.\(^{237}\) Under the Forde relegation system, there would also be more mobility of teams between leagues by promotion and relegation based on performance.\(^{238}\) This mobility would


\(^{230}\) Id.

\(^{231}\) Id.

\(^{232}\) Id.

\(^{233}\) Id.

\(^{234}\) Id.

\(^{235}\) See Schmit, supra note 28, at 243–44 (detailing the anticompetitive effects of the BCS system).

\(^{236}\) Forde, supra note 229.


\(^{238}\) Forde, supra note 229.
give the most deserving teams access to the national championship and prevent undeserving teams from having an unfair advantage simply because of a historical conference affiliation.\textsuperscript{239}

BCS advocates claim that the benefit of the BCS system is that it makes the regular season more valuable than if there was a playoff among all teams to determine the national champion at the end of the year.\textsuperscript{240} The Forde system also addresses this problem in a less restrictive manner than the BCS. Under the Forde system, the regular season matters for two main reasons: first, only the top teams in each league would be able to play in the playoff at the end of the season, and second, in order to move up or maintain a place within each league, a team would have to win enough games during the regular season to not be relegated.\textsuperscript{241}

However, the Forde system is not without its faults. First, the system would remove many of the traditional conference rivalries in college football by totally reconfiguring the teams into separate leagues based on merit. Also, as Forde admits, while the Forde system’s best achievement is that it allows the best teams in the country to play each other and compete for a national championship title, the system would do little for lower ranked teams.\textsuperscript{242} While lower ranked teams would be more competitive within their leagues than they are under the BCS, where they often win only one or two conference games, they would have the same problems with revenue from media contracts that the Mid-Majors currently have under the BCS system.\textsuperscript{243} However, Forde acknowledges that his is a system where the rich get richer and the poor get poorer, so to speak, but justifies it as a better system than the BCS because the division would be rationally based on merit and not simply due to old conference affiliations.\textsuperscript{244}

Overall, though the Forde system of relegation would involve some restrictions, the system is a plausible, less restrictive alternative to the BCS simply because the restrictions are based on the quality of the teams rather than on contracts and alliances with television networks and bowl games. However, the Forde system would be a massive overhaul of the highest level of college football. It may be unrealistic to expect such a drastic change all

\begin{footnotesize}
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\item \textsuperscript{239} \textit{Id.}
\item \textsuperscript{240} Perlman Testimonial Statement, \textit{supra} note 90.
\item \textsuperscript{241} Forde, \textit{supra} note 229.
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} \textit{Id.}
\end{itemize}
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at once because of the slow pace at which Congress has dealt with BCS issues and because of the reluctance of many member schools to change.\textsuperscript{245}

VII. CONCLUSION

While there appear to be numerous anticompetitive components of the BCS, its status under the Sherman Act remains uncertain, in part, due to a lack of applicable guidelines to gauge such a system. This analysis of applying the guideline provided in the Commission White Paper on Sport to the BCS system shows that the BCS system is analogous to European sports associations that violated Articles 81 and 82 of the European Commission. However, this analysis is still inconclusive because the Commission has also set forth a balancing test under Article 81(3) that potentially saves the BCS system from a violation. The BCS system is flawed because its exclusionary effects; and a system of relegation, similar to that used in European sports associations, is a viable, though radical, alternative that Congress should explore.

\textsuperscript{245} Staples, supra note 5.