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United We Stand: The Anti-Competitive Implications of Media Ownership of Athletic Teams in Great Britain

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United We Stand: The Anti-Competitive Implications of Media Ownership of Athletic Teams in Great Britain

ABSTRACT

This Note analyzes the increasing integration of the sports and broadcasting industries and the British framework for evaluating the permissibility of transactions furthering such integration. In the context of the recent attempted takeover of British football club Manchester United by Rupert Murdoch's British Sky Broadcasting, the Note examines how the Monopolies and Mergers Commission (MMC) was uniquely poised to fully consider the ramifications of this developing nexus of sports and media and evaluates the significance of the MMC's decision on the future of both industries.

A diverse array of domestic, international, political, and economic issues and implications face any court or administrative agency confronted with a media/sports merger. Although the MMC ultimately recommended that the British Sky Broadcasting-Manchester United merger be prohibited, it will only be determined through the united consideration of such an array of issues whether the vertical integration of broadcasting and professional athletics is merely the inevitable result of a growing trend or a legitimate cause of concern for free competition in sports and media worldwide.

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I. INTRODUCTION

In the sport of football, or soccer in the United States, the last line of defense is the sweeper, a free, roaming player who plays behind all the defenders except the goalkeeper.¹ The sweeper has a unique perspective; he can observe developing attacks from a withdrawn position, guide and caution his fellow defenders accordingly, and when necessary, step in to halt any scoring threat that breaks through the back line.² The Monopolies and Mergers Commission (MMC or Commission), one of three divisions of the British government's antitrust authority, may have functioned as the most important sweeper in English football history when it stymied an offensive assault that threatened the future of the sport in Great Britain.³

Administrative agencies such as the MMC are frequently confronted with escalating economic trends that, if left unchecked, could change the face of an industry forever. Rarely, however, does such an agency have the ability to alter such a trend through one decision. The MMC recently possessed both the opportunity and the ability to mold the current interrelation of two separate industries—broadcasting and professional athletics—and guide their development for years to come. However, it remains to be seen whether the MMC's action successfully leveled the competitive playing field in British sports and broadcasting or accidentally put the ball in the back of its own net.

1. The author holds a national coaching license in the sport of soccer and specialized as both a player and coach in the sweeper position.

2. See *supra* note 1.

3. This Note will focus primarily on the MMC's investigation of the attempted takeover of British football club Manchester United by satellite broadcaster British Sky Broadcasting. See discussion *infra* Part I.C.

A. *The Convergence of the Sports and Broadcasting Industries*

Although some believe the impending convergence of broadcasting and professional athletics has potentially serious anti-competitive implications, others view the two industries as natural partners, dependent on each other for continued profitability.⁴ The business of professional sports is one of the most visible and lucrative industries on the planet, due in large part to the ever-increasing media coverage it receives.⁵ Athletes currently receive greater exposure, demand greater attention, and incite greater adulation than ever before.⁶ New stadiums single-handedly revitalize crumbling urban areas.⁷ Sports stars, voluntarily or involuntarily, become role models for children from a diversity of backgrounds. Athletes earn hundreds of millions of dollars in salaries⁸ and even more for their teams and the companies whose products they endorse.

Media broadcasting conglomerates are fast becoming similarly omnipotent and ubiquitous.⁹ Broadcasters utilize the latest technology to bring the public hundreds of specialized

4. "Sports 'absolutely overpowers' film and all other forms of entertainment in attracting television viewers," according to Rupert Murdoch, whose failed takeover attempt of the English football club Manchester United is the subject of this Note. See Barry Came et al., *Murdoch's Big Play*, MACLEAN'S, Oct. 19, 1998, at 56. "The world has become a playground for the media conglomerates as they pursue live, unscripted programming that is more valuable than ever on an increasingly crowded dial." Harvey Araton, *Bizball*, N.Y. TIMES MAG., Oct. 18, 1998, 59, at 61.

5. See *id.* at 60.

6. See *id.* at 60-61.

7. See Alan Katz, *Latest May be Greatest Jewels Starting Second Golden Age*, DENVER POST, March 31, 1995, at 3. New sports arenas in the United States such as Baltimore's Camden Yards, Cleveland's Jacob's Field, and Denver's Coors' Field have revitalized urban areas and inspired an influx of new businesses and renovation work on existing downtown architecture and industry. See *id.* Even those arenas built in the mid to late 1980s are now considered obsolete in light of the unqualified success of the more recent structures. See Heather Bird, *Skydome Sags in Middle Age*, TORONTO SUN, March 2, 1999, at 5; see also Jay Mariotti, *Empty Seats Tell Story of Team in Crisis*, CHIC. SUN TIMES, Apr. 7, 1998, at 98.

8. See Araton, *supra* note 4, at 60. "Who could have imagined a decade ago that a single player, even one as breathtaking as Michael Jordan, could reel in a reported \$80 million in salary and endorsements in a single year?" *Id.*

9. Mass media mergers appear to have become the wave of the future, or at least an extremely attractive current option. See generally Keith Conrad, Note, *Media Mergers: First Step in a New Shift of Antitrust Analysis?*, 49 FED. COM. L.J. 675 (1997) (providing an overview of the history of media mergers). Recent mergers have spawned a growing relationship between the production source and a distribution outlet. See *id.* at 680. "[T]he executives of the large media conglomerates pleasantly refer to this as 'synergy' while critics warn that it eliminates competition." See *id.*

digital and satellite channels and instantaneous information services¹⁰ while maintaining a stranglehold on society's traditional and preeminent source of news and entertainment—terrestrial television.¹¹ A large portion of the recent surge in the profitability of media ventures can be directly traced to the almost guaranteed audience for professional sports.¹²

As a result, sports and media industries have grown to be inextricably linked and remain heavily dependent on one another for their respective livelihoods.¹³ The structure and rules of sporting events are already dictated to a large degree by television coverage: (1) live events are periodically interrupted to provide television commercial time, (2) the prevalence of night games has increased to maximize viewing audiences, and (3) the market price for star athletes is a clear function of ever-escalating broadcast rights revenues.¹⁴ Media groups are at least as financially dependent on sports, as evidenced by the exorbitant sums of money paid for the broadcasting rights to professional

10. "Satellite dishes provide more games in a year than most could watch in a lifetime The sports cable networks never sleep, and when they run short of viable programming, they can always make something up, as ESPN has done with its Extreme, or X, Games." Araton, *supra* note 4, at 63.

11. The term "terrestrial television" is used to describe one of the various modern television broadcasting markets, the other two being cable television and satellite television. See Phillip L. Spector et al., *Appendix L: Survey of National Broadcasting, Cable and DTH Satellite Laws*, 5 CARDOZO J. INT'L & COMP. L. 715, 741-44 (Fall 1997); see also Steven Ruth, Comment, *The Regulation of Spillover Transmission from Direct Broadcast Satellites in Europe*, 42 FED. COMM. L.J. 107, 108 (Dec. 1989).

12. These developing circumstances are by no means a uniquely American phenomenon. See *infra* Part V.B.1. At the 1996 annual meeting of his worldwide media conglomerate News Corporation International, Murdoch made clear his plans for the future of sports broadcasting. See Came et al., *supra* note 4, at 56. "We have the long-term rights in most countries to major sporting events and we will be doing in Asia what we intend to do elsewhere in the world—that is, use sports as a battering ram and a lead offering in all our pay-television operations." *Id.*

As the world has grown smaller, the international interest in sports and entertainment has expanded dramatically, and, along with it, the disparity of resources between large and small competitors in both industries. See Araton, *supra* note 4, at 64. "The players are richer, the arenas are nicer, and the telecasts are better, but the financial and ideological divide has grown Sports has a class crisis in ownership that mirrors the one in the stands." *Id.* at 61, 64; see also *infra* Part II.A and note 36.

13. See generally *infra* Part II.

14. The concern is that, as sports clubs are gradually integrated into broadcasting companies, the broadcasters will begin to exercise significant control over how the game is played. See Ian Bell, *Rupert's Puzzle Falls Into Place*, SCOTLAND ON SUNDAY, Dec. 12, 1998, at 24. The broadcasters do this as a means of ensuring a return on their investment both by acquiring the most talented players and by presenting the game in an exciting and innovative but made-for-TV way. See *infra* note 70 and accompanying text. Many fans who enjoy attending live matches in person question these improvements to the game. See Bell, *supra*, at 24.

athletic competitions, the emergence of total sports channels, and the price paid by advertisers for a thirty-second time slot during worldwide televised championship events.¹⁵ As a result of this apparent codependency, the vertical integration of sports teams and broadcasting providers seems to be a rational solution to preserving the vitality of both industries.¹⁶

B. *The Anti-Competitive Effect of Vertical Integration*

From an alternative perspective, the extensive intermingling of broadcasting and athletics is thought to pose ominous prospects for the long-term future of both industries. Perhaps the most recognizable and troubling effect of permitting media ownership of athletic teams is the anti-competitive impact such a vertical integration may have on participants in each industry.¹⁷ This concern is especially exacerbated in the professional athletics industry, in which competition is not merely an idealistic goal but its very essence.

A sport such as football is not comprised of programs offered by individual entities that consumers may freely choose between in the marketplace.¹⁸ Nor are the individual teams themselves truly competing entities operating in a free market.¹⁹ The

15. See Araton, *supra* note 4. In America, the NFL deal at present is spread out among various networks over eight years and is worth \$17.6 billion. See *id.* at 61. The current NBA contract is for \$2.4 billion over four years. See *id.*

16. See *id.* at 60. In the market for sports broadcasting, the financial backing of mega-media corporations helps athletic clubs acquire the most sought-after players, both as a result of the amount they are capable of spending on salaries as well as the high visibility that consistent television coverage can offer. See *id.* at 61. From a broadcasting perspective, the opportunity to assure oneself of long-term valuable programming content is unique, especially when a media company needs only purchase one team to acquire those rights, as opposed to sharing in a league-wide arrangement. See generally Came et al., *supra* note 4, at 57.

17. See *infra* Part I.C. These concerns were borne out in the British government's investigation of British Sky Broadcasting's attempted takeover of Manchester United. See Ben Potter, *MMC to Probe B SkyB's Offer for Manchester United*, DAILY TELEGRAPH (London), Oct. 30, 1998, at 33. The Trade and Industry Secretary at the beginning of the investigation, Peter Mandelson, "agreed with the Office of Fair Trading that the transaction raised competition issues in respect of the broadcasting of 'premium' football and the broadcasting market and wider public interest concerns over the implications for football." *Id.*

Vertical integration is the process by which an entity acquires rather than builds its own claim of distribution. Although such behavior can enhance efficiency, the major concern is that such integration will allow a firm with market power in one market to use that power as leverage to control a second market. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 785 (4th ed., 1999).

18. See *The Soccer Business has Returned to a Level Playing Field*, INDEPENDENT (London), Apr. 10, 1999, at 3.

19. See *id.*

products being sold—the games—are the result of two teams' collaborative, yet adversarial efforts.²⁰ Success on the field is each team's ultimate goal in order to maintain profits through spectators' repeat purchases of such products.²¹ However, a league of such teams must establish an organized series of games with a winner declared according to the rules of the sport and not the rules of the market.²²

Thus, the business of professional sports is unlike all other industries, in that competition is not the means to the end, but the end itself. Each team seeks to become as strong, skilled, and successful as possible in order to prevail over all others. Yet, the aggregate effect of such behavior is to increase the overall level of competition and, with it, the number of spectators paying admission.

With the onset of recent technological advances, the primary profit source in sports has shifted from the limited audiences attending the matches to the unlimited number of viewers at home, watching on television.²³ To maximize these profits, most sports leagues have chosen to negotiate broadcasting rights arrangements collectively and sell such rights to the highest bidder.²⁴

As the live transmission of sporting events to large audiences produces so much of the business value of sports (tickets, salaries, advertising, merchandizing, etc.), the professional sports industry has become especially susceptible to the external influence of those who provide its greatest revenue—the broadcasters. While advances in technology have made such

20. *See id.* Each team desires to prevail in the match, but the more competitive the games, the more exciting and unpredictable the result, generating more viewer interest and resulting in more profits. *See id.*

21. *See id.*

22. *See id.* "At one level, sport is simply a branch of the entertainment industry, and should be treated in the same way as the movies, television and ten-pin bowling But soccer is not—yet—a show It is a sport which grew organically from thousands of local teams, sustained by the loyalties of millions of supporters. Even Manchester United began as Newton Heath, a local railway works' team." *Id.*

23. *See also* Araton, *supra* note 4.

24. The benefits of the collective negotiation of broadcasting rights are numerous. Such practice (1) creates a more uniform telecast, (2) increases the amount bid for the rights as the winning bidder knows he will receive all revenues generated by that league's telecast, and (3) benefits the smaller market teams by equally distributing the consideration paid by the broadcaster to each club. *See infra* Part VI.D. (discussing the beneficial effects of such collective negotiation in America). While collective arrangements boast such advantages, exclusive deals such as British Sky Broadcasting's agreement to broadcast the Premier League came under considerable scrutiny in a suit brought by the Office of Fair Trading (OFT) in the Restrictive Practices Court (RPC). *See infra* Part II.D. (analyzing arguments presented before the RPC).

interaction inevitable, an increased cause for concern arises in both the sports and broadcasting industries when these previously external influences "internalize" themselves by purchasing the individual teams and use them as leverage in a separate market—sports broadcasting.

Not only may the substantial concentration of market power in a single broadcasting entity lead to dominance in the sports broadcasting market,²⁵ but it may also create a general coercive power over an entire sport in terms of organization, competition and public accessibility, especially when a dominant broadcaster acquires a similarly successful professional sports franchise.²⁶ As the incentive for such acquisitions has increased,²⁷ the fear of such dominance has inspired a tremendous controversy concerning the future interrelation of broadcasters and professional sports teams.

C. *British Sky Broadcasting's Attempted Takeover of Manchester United*

The opportunity to examine and challenge the trend towards total integration of sports and media arose recently in Great Britain when on October 29, 1998, the most expensive takeover deal in the history of sports was put on hold pending review by the MMC.²⁸ Media mogul Rupert Murdoch sought to purchase the British football club Manchester United (United) through his satellite television company, British Sky Broadcasting (Sky or BSKyB).²⁹ Sky currently owns the broadcast rights to the English Premier League,³⁰ the top professional level of English football

25. See *infra* notes 70-73 and accompanying text.

26. See *infra* Part VI.C. One major concern of Secretary of State for Trade and Industry Stephen Byers, who ruled that the Manchester United takeover should be prohibited, was that the deal would give British Sky Broadcasting "additional influence over Premier League decisions about the organisation of football, leading to some decisions which would not reflect the game's long term interests." *Roundup: UK Govt Blocks BSKyB Takeover of Manchester Utd*, AFX NEWS (London), Apr. 9, 1999, Company News.

27. With the incredible profits the sports industry has recently generated, bids for broadcasting rights have increased almost exponentially. As will be discussed in this Note, many large media conglomerates have determined that it is cheaper and more efficient in the long run to own the right to broadcast an individual club's matches rather than merely rent it.

28. See *infra* Part IV.

29. See Patrick Harverson, *Murdoch United PLC—Empire of the Sun*, TOTAL SPORT, Dec. 1998, at 95.

30. Sky has exclusive rights—acquired for more than \$1 billion two years ago—to broadcast the Premier League until the 2001-2002 season. See Eric Boehm, *A Whole New Ballgame—Media Mogul Rupert Murdoch Purchases the Manchester United Professional Soccer Team*, VARIETY, Sept. 14, 1998, at 28.

and the league of which United is the perennial champion.³¹ Although United is the top British team and one of the most popular and highly successful football clubs worldwide,³² Murdoch's £625 million bid was extraordinary, setting the record for a sports franchise.³³ While United would clearly have benefited from such a deal, the takeover created intense public outrage throughout the nation (most remarkably among United's own fans).³⁴

Upon recommendation from the Office of Fair Trading (OFT) and the subsequent approval of the Secretary of State for Trade and Industry, the United matter was referred to the MMC for an investigation of its anti-competitive effects. The MMC ultimately concluded that Sky's purchase of United should be prohibited, based on the resulting market power increase to Sky from acquiring United's football broadcast rights for pay television.³⁵ The Secretary of State for Trade and Industry accepted the MMC's

31. See *id.* United has been the dominant team this decade in English football, winning four Premier League titles and finishing runner up three other times. See *id.* The Red Devils (United's nickname) have a worldwide following and numerous fan-maintained websites, many of which were consulted in the preparation of this Note.

Several quotes by Secretary Byers provide further evidence of the interest generated by Sky's attempted takeover, and by United in general. "I now know that Manchester United even has 8,000 supporters in Kuala Lumpur," he said with the weary air of someone who had received a letter from many, if not most, of them in recent weeks." Andrew Alderson et al., *Murdoch's Red Card*, SUNDAY TELEGRAPH (London), Apr. 11, 1999, at 21. Secretary Byers also referred to another encounter in Egypt in which he "was being driven by a taxi driver in Cairo at the beginning of this year and the four words of English he knew were 'Thatcher', 'Blair', and 'Manchester United.'" *Id.*

32. Even prior to hearing of the negative findings of the MMC, Murdoch had already moved in on broadcasting rights to Italian soccer, with a proposed £1.5 billion bid. See *infra* notes 281-84 and accompanying text. Italian clubs with no individual TV deals initially backed Murdoch, while many of the larger clubs had already signed with French competitor Canal Plus for £50 million. See *id.*

33. £625 million equaled \$1.07 billion at the time of the bid. See Araton, *supra* note 4, at 60; see also Came et al., *supra* note 4. The deal dwarfed the recent purchases of the Cleveland Browns expansion National Football League franchise for \$530 million and the Washington Redskins at over \$700 million. See *id.*

34. See *Manchester United Shareholders Vent Anger Over BSKyB Bid*, EXTEL EXAMINER (London), Nov. 19, 1998, Company News, Takeovers and Acquisitions Section; see also Steve Millar, *Football: Fans Slow Red Devil Takeover*, MIRROR (London), Nov. 12, 1998, at 62. Andy Walsh, chairman of the Independent Manchester United Supporters Association (IMUSA), said the referral of the matter to the MMC was "a moral victory for the ordinary guy on the street. No one else in the world has managed to stand up to Murdoch, but a group of raggy-trousered fans from Manchester have [sic] done it." *Id.*

35. See *Britain Blocks BSKyB Effort to Take Over a Soccer Team*, N.Y. TIMES, Apr. 10, 1999, at B2.

findings and declared that the transaction would be blocked by the government.³⁶

D. *The Office of Fair Trading's Case Against the Premier League*

Sky's United bid, however, was not the only debate regarding the interrelation of sports and media recently undertaken by the British government. A case pending in the Restrictive Practices Court (RPC) further complicated the situation.³⁷ The outcome of this case, brought by the OFT against the English Premier League itself,³⁸ had the potential to significantly affect the ability of Premiership clubs to negotiate future collective broadcasting deals.³⁹

Despite the OFT's allegations that Sky's league-wide agreement with the Premier League created a monopoly that infringed upon consumers' choice and increased the cost of viewing, the RPC found that the exclusive selling of broadcast rights to the English Premiership was not against the public interest.⁴⁰

Although resolved several months after the MMC recommendation, the RPC case to a certain extent dictates the importance of the MMC's response to the United deal. The collective result of the two investigations will likely set the tone for

36. See Alderson et al., *supra* note 31. Secretary Byers said that "the merger would adversely affect competition between broadcasters" and that "the merger would damage the quality of British football by reinforcing the trend towards growing inequalities between the larger, richer clubs and the smaller, poorer ones." Philip Pank, *London Blocks Murdoch/BSkyB Takeover of Manchester United*, AGENCE FRANCE PRESSE, Apr. 9, 1999 (Financial Pages). Essentially, the government feared that Sky would "gain influence over and information about the Premier League's selling of coverage rights for top-flight English soccer that would not be available to its competitors." *Id.*

37. See Dan Gledhill, *Football Faces a Trial by TV Rights*, INDEPENDENT (London), June 27, 1999, at 3.

38. See Stuart Millar & Janine Gibson for *football.guardian*, *Murdoch and Man Utd—Murdoch Goes for Double with Club and TV Football Deal* (Sept. 8, 1998), <http://www.reports.guardian.co.uk/sp_reports/manutd/563.html> (web-page no longer accessible, copy of document on file with author). The Office of Fair Trading pursued a case at the Restrictive Practices Court seeking to have the Premiership judged a cartel and the current collective contract with Sky voided. *See id.* It was this inquiry that clearly inspired Murdoch to attempt to purchase United in an effort to hedge against his own Premiership deal in the event of an unfavorable RPC decision. *See id.*

39. See Boehm, *supra* note 30. "The TV rights to the Premier League are under review to determine whether the current collective deal for all 20 Premier League teams is anti-competitive. Should the U.K.'s Office of Fair Trading decide against collective bargaining, clubs would be free to negotiate individually." *Id.*; see also Peter Thal Larsen, *Football OFT Investigation: TV Free-for-all Could Lead to a Breakaway; The Future*, INDEPENDENT (London), Jan. 12, 1999, at 19.

40. See *Court Rules in Favor of BSkyB-Premiership Football Broadcasting Deal*, AGENCE FRANCE PRESSE, July 28, 1999, (Sports Section).

the integration of professional sports and television media in Great Britain into the next century.⁴¹

This Note analyzes the increasing integration of the sports and broadcasting industries and the British framework for evaluating the permissibility of transactions furthering such integration, specifically the United takeover. The Note will also examine how the MMC was uniquely poised to fully consider the ramifications of this developing nexus of sports and media and will evaluate the significant impact that the MMC's decision may have on the future of both industries.

Part II of this Note contains a brief overview of the background and the motivating factors behind Sky's attempted takeover of United. Part III then considers the nature of the governmental inquiry undertaken in relation to the United transaction, detailing the overall structure of the British antitrust system and the particularized responsibilities of the MMC and evaluating the recent changes made to this system. Part IV discusses the MMC's recommendation to prohibit the merger and the factors considered by the MMC in reaching that conclusion. A diverse analysis of domestic and international precedent and policy follows in Part V, outlining the divergent international backdrop against which the MMC's decision was reached.

The Note culminates in Part VI, which contains a critical analysis of the British government's decision and an evaluation of whether the full vertical integration of broadcasting and professional athletics is merely the inevitable result of a growing trend or a legitimate cause of concern for free competition in sports and media worldwide.

II. HISTORICAL BACKGROUND AND MOTIVATING FACTORS

To best understand the interests advanced and the dangers posed by media ownership of athletic teams and to specifically consider the interests and dangers presented by Sky's purchase of United, it is first necessary to explore the nature and extent of Rupert Murdoch's media empire. Additionally, in order to fully appreciate the opportunity for dominance of the football and broadcasting markets created by the United takeover, the takeover bid must be analyzed in the context in which it developed and in light of its underlying motivations.

41. See Boehm, *supra* note 30. "The bid marks the start of a global race for the \$200 billion a year soccer business where the price of broadcasting rights is rising 40% annually and player salaries and ticket prices are soaring." *Id.*

A. Murdoch's Media Empire

Rupert Murdoch's News Corporation (News Corp.) is truly a worldwide media conglomerate. Among its many divisions are (1) Sky,⁴² the British satellite entity seeking to purchase United⁴³ and (2) Fox Entertainment Group,⁴⁴ a U.S.-based company that purchased the Los Angeles Dodgers of Major League Baseball (MLB) for \$311 million in March 1997⁴⁵ and also owns Fox SportsNet, a network of twenty-two local cable sports channels.⁴⁶ Fox additionally holds non-exclusive rights to broadcast National Football League (NFL) and MLB games.⁴⁷

The scope of Murdoch's broadcasting empire extends to the Far East as well, where his Hong Kong-based Star TV channel provides coverage throughout the region of international cricket, football, rugby, and American sports.⁴⁸ Further, in his native Australia, Murdoch owns fifty percent of the continent's main rugby league competition, along with broadcast rights to club and international rugby union, rugby league, and cricket.⁴⁹

Murdoch additionally possesses a substantial print media enterprise, featuring the British newspapers *The Times of London*, *The Sun*, and *News of the World* as well as the U.S. paper, *The*

42. See generally Joanna Cagan & Neil deMause, *Bizbrawl: How the Heavy Hitters are Fighting to Control the Planet*, N.Y. TIMES MAG., Oct. 18, 1998, at 66; see also Harverson, *supra* note 29.

43. Murdoch's News Corp. owns a 40% share of Sky. See Cagan & deMause, *supra* note 42, at 66. In Britain, the rights to Premier League football turned Sky from a liability "into the world's most profitable satellite-television operator, and the dominant power in pay-television business in Britain." *Murdoch United: Even if the Whole of Britain Hates the Idea, Rupert Murdoch Should be Allowed to Buy Manchester United*, ECONOMIST, Sept. 12, 1998, at 20.

44. See Alan Deutschman, *Sly as Fox: Sports is the Surreptitious 'Battering Ram' of Rupert Murdoch's Campaign for Global Media Dominance*, N.Y. TIMES MAG., Oct. 18, 1998, at 68. Owned equally by News Corp. and Liberty Media Corporation, Fox has 58 million subscribers and owns a 40% share of the National Basketball Association's (NBA) New York Knicks and the National Hockey League's (NHL) New York Rangers and owns a 40% interest in the Los Angeles Staples Center, including an option to purchase 40% of the Los Angeles Kings NHL franchise and slightly under 10% of the L.A. Lakers NBA team. See Came et al., *supra* note 4.

45. See *id.* Murdoch paid \$479 million for the Dodgers team, stadium, real estate, and licensing rights, which had previously been valued at \$277 million. See *id.*

46. See Cagan & deMause, *supra* note 42.

47. See *id.* Since Murdoch's then-struggling Fox Network secured a four year deal to broadcast NFL games for \$2.43 billion, the network has established itself as the fourth national network in America and is now worth an estimated \$10.8 billion. See Came et al., *supra* note 4.

48. See Harverson, *supra* note 29.

49. See *id.*

New York Post.⁵⁰ Finally, Murdoch owns book publisher HarperCollins and 20th Century Fox Film Studios.⁵¹

The sheer size and scope of Murdoch's holdings clearly signal the possibility of the devastating competitive impact such a conglomerate could have in either the broadcasting industry or on the athletic fields. Yet, Murdoch's empire itself must be considered in the context of a larger, developing trend. While at first glance Murdoch's global media holdings and recent forays into sports franchise ownership may seem unique, in light of the increasing commercialization of sports, these unique facts have already become a familiar scenario.

Although Murdoch clearly exerts massive media influence on athletics worldwide, he is not without rivals. In the United States, both Disney and Time Warner have comparable holdings and clout in sports and broadcasting.⁵² Further, smaller media ventures based or operating in the United Kingdom were eagerly anticipating the outcome of the MMC investigation, each hoping to capitalize on an opportunity to emulate Murdoch's strategy on a more localized scale.⁵³ Although most of these British competitors cannot challenge Murdoch's News Corp. in market share, many of these rivals were ready to pounce on other high profile football clubs, waiting for the perceived go ahead from the

50. See Cagan & deMause, *supra* note 42.

51. See *id.*

52. See *id.* at 66-67. Disney not only owns the Mighty Ducks of Anaheim franchise of the NHL and a controlling interest in Major League Baseball's Anaheim Angels but also the American Broadcasting Company (ABC), the Entertainment and Sports Programming Network (ESPN), and partial rights to broadcast NFL and MLB games. See *id.* To round out its own empire, Disney of course owns Disneyland and Disneyworld, along with Touchstone and Miramax film studios, and *ESPN the Magazine*. See *id.*

Time Warner, as a result of its own recent merger with Turner Broadcasting, now owns MLB's Atlanta Braves, the NBA's Atlanta Hawks, the NHL's expansion Atlanta Thrashers, the Goodwill Games, and World Championship Wrestling (WCW). See *id.* Now the world's largest media corporation, Time Warner also owns Cable News Network (CNN), Home Box Office (HBO), Turner Network Television (TNT), and Turner Broadcasting Systems (TBS). See *id.* In addition to cable broadcasting, Time Warner is the owner of Warner Brothers film and network television, New Line Cinemas, print media such as *Time Magazine* and *Sports Illustrated*, and five major record labels. See *id.* Turner Sports in 1997 signed a four-year \$890 million deal to continue as the NBA's cable partner. See *id.*

53. See Boehm, *supra* note 30. Immediately after the announcement, it was learned that ITV station owner Carlton Communications was negotiating to buy a club of its own, London's Arsenal, for \$459 million. See Mihir Bose, *Soccer: Newcastle Directors on a Premium—Media and Telecommunications Group Pays 10 Million Pounds for a 6.3 per cent share in Troubled Team*, DAILY TELEGRAPH (London), Dec. 18, 1998, at 42. Both Arsenal and Newcastle have enjoyed lasting success at the top of the English Premier League and remain attractive targets for media takeovers. See *id.*

MMC.⁵⁴ Even though the green light never came, the question still remains following the MMC's recommendation whether *any* corporate nexus between media and sports will conflict with competition and public interest policy goals, or whether such goals are specifically compromised only by a *Sky* takeover of *United*.

Although many rival broadcasters were ready to follow Murdoch's lead in attempting to purchase their own sports programming content, Murdoch's position remained somewhat unique, not so much in his international holdings or immense financial strength but in the advantageous situation he created for himself in Great Britain.⁵⁵ None of Murdoch's British or U.S. competitors has the potential to completely dominate the market for the broadcast rights to a single sport throughout an entire country. Rupert Murdoch may have that ability, and had the outcome of this MMC investigation been more favorable, media ownership of professional sports franchises may have been transformed from merely an unusual circumstance into the prototypical arrangement and worldwide norm.⁵⁶

B. *Background of the Attempted Takeover of United*

Murdoch's bid was the largest takeover deal in the history of sports and the first attempt by a broadcaster to purchase an English football club.⁵⁷ The opportunity for the deal can be traced back to June of 1991, when *United* was floated on the London Stock Exchange.⁵⁸ Once *United* shares were made public, Martin Edwards commenced a systematic withdrawal from his position as the majority owner of the club, decreasing his ownership to just fourteen percent and simultaneously increasing *United*'s susceptibility to takeover.⁵⁹

Murdoch's broadcasting company, *Sky*, approached Edwards last fall with an offer to purchase his fourteen percent, hoping to

54. See Boehm, *supra* note 30; see also David Hardie, *Shock GBP 160M Swoop for Newcastle*, EVENING NEWS (Edinburgh), Dec. 15, 1998, at 40.

55. See *infra* Part II.C.

56. See *supra* note 44; see generally *infra* Part IV.

57. See Harverson, *supra* note 29, at 95.

58. See *id.* The flotation of professional football teams on the British market has been heavily criticized in the press and academic circles. See generally Brian R. Cheffins, *Playing the Stock Market: "Going Public" and Professional Team Sports*, 24 IOWA J. CORP. L. 641 (1999). The majority of sports franchises worldwide which have offered shares to the public have been met with mixed results. See generally *id.*; see also Market Savvy, *Next Play Could be the Fans if Yankees Net Offers Shares to Public*, L.A. TIMES, Sept. 23, 1999, at 4.

59. See Harverson, *supra* note 29. By 1998, 62% of *United*'s shares were owned by institutional investors, slightly over 20% by the fans, and the remainder by executives at the club. See *id.* at 95.

use Edwards's shares as a springboard to buy out the remaining directors, who between them owned close to six percent.⁶⁰ However, the resultant combined twenty percent would still not have given Sky control of the club, so Edwards had to persuade United's Board of Directors to recommend the offer to the remaining shareholders.⁶¹ The decision to recommend, however, was not a difficult one, as Murdoch's 240p a share final offer far exceeded the 159p trading price at the time.⁶² Not only was the takeover offer far too substantial to turn down, but the thought of Murdoch turning to one of United's rivals with a similar offer was a less than acceptable alternative.⁶³

C. Underlying Motivations for the Deal

The question arises why Murdoch would invest such an extravagant sum and what return he could possibly expect from such an investment. Although Murdoch's motives were clearly profit-based, what was the underlying goal of purchasing United and what would the impact be on the competitive framework in which both Sky and United participate?

The answer lies in the fact that United's value to Murdoch was not as a football club but as valuable programming content⁶⁴—United produces something that people both in Great Britain and abroad are willing to pay money to watch on television.⁶⁵ Currently, United has to share its broadcast revenue with nineteen other Premier League clubs.⁶⁶ The future, even in

60. See *id.*

61. See *id.*

62. See *id.* As controlling shareholder, the only way Edwards could have rejected the bid was to convince United's board (whose job it is to represent the interests of all the shareholders) that the Sky offer was not in the best interests of the club. See *id.* at 95-97.

63. See *id.* at 97.

64. See *id.*; see also Millar & Gibson, *supra* note 38. The modern media market has been traditionally divided into three elements: content, carriage and software. See *infra* notes 242-44. "Sky needs must-buy content, i.e. Premiership football to convince viewers to subscribe, especially to its new 200-channel digital service . . . the broadcaster is betting substantial sums that digital satellite broadcasting will take off, and the only way it knows to ensure that is by offering some kind of unique football coverage." Millar & Gibson, *supra* note 38.

However, prior to the MMC ruling, the question still remained whether the purchase of United's dominance on the field to ensure the success of Sky's digitized service would result in an anti-competitive misuse of market power. See Harverson, *supra* note 29, at 97.

65. See Millar & Gibson, *supra* note 38.

66. See Harverson, *supra* note 29, at 97. In fact, "United receives about seven percent of the BSkyB pot, when its share of aggregate attendance would justify three times as much." Gledhill, *supra* note 37. Spanish powerhouse Barcelona recently negotiated a five-year deal authorizing Spanish cable company Via Digital the rights to show its games for a staggering £ 254 million. See *id.* The

light of the RPC ruling, has the potential to be quite different with clubs able to sell the television rights to their home games to anyone they wish.⁶⁷

By purchasing United, Murdoch could not only have guaranteed his broadcasting system the nation's most valuable sports programming content but also could have acquired a seat on both sides of the bargaining table for future broadcasting rights. Thus, following a change in circumstances, in which Sky either (1) might not remain the exclusive broadcaster of the entire Premiership⁶⁸ or (2) was not allowed to retain those exclusive rights,⁶⁹ Murdoch would have assured himself that Sky, as owner of United, either would have a substantial bargaining edge in bidding for the new contract, or the pay-per-view future of the Premier League (or at least that of United) would become an

consensus is that United could receive at least a comparable sum if it were allowed to negotiate its own individual deal rather than share in the Premier League contract. *See id.*

67. The RPC did not prohibit the selling of broadcasting rights, individually or non-exclusively, but merely found that exclusive, collective arrangements were neither anti-competitive nor violative of the public interest. For a discussion of the issues and considerations facing the RPC, see generally Gledhill, *supra* note 37; Boehm, *supra* note 30. "[T]here is also talk of setting up a European soccer superleague, in which Man U would join a handful of lucrative continental peers. In such a scenario, BSKyB would also have the upper hand, in that—as a major Eurocaster as well as a club owner—it would sit on both sides of any TV rights negotiations." Boehm, *supra* note 30.

68. In the first instance, motivation for Murdoch lay in the fact that Sky's contract to broadcast the Premiership matches expires at the end of next season, creating an obvious incentive to try to lock in Sky, either as the broadcaster of the entire Premiership again or of only the most watched matches—those involving United. *See id.*; see also Millar & Gibson, *supra* note 38. "Since 1992, Sky has parted with enormous amounts of cash to secure exclusive live television rights for Premiership matches, but a new revolution is about to unfold. The Premier League contract has only one full season left to run after the present one, and the consensus in the industry is that after 2001, the biggest clubs will go it alone." Millar & Gibson, *supra* note 38; see also Boehm, *supra* note 30. "Acquiring United is an ace up the sleeve for future rights negotiations, in that it will be difficult for other teams not to follow in the commercial footsteps taken by the leading club. Manchester United is already partnered with BSKyB in MUTV, the team's digital TV channel that will launch as part of BSKyB's Sky Digital platform on October 1." Boehm, *supra* note 30.

69. Under the second scenario, impetus lay in the inquiry then underway in the Restrictive Practices Court concerning the Premier League itself. *See Larsen, supra* note 39. If the OFT had prevailed in having the Premiership judged a cartel, which would have barred the League from further collective bargaining, all the clubs would have been free to negotiate their broadcasting deals individually. *See id.* In such an event, Sky's current broadcasting deal with the League would be voided, but Sky (acting as both club owner and broadcaster) could immediately have begun offering a pay-per-view coverage system solely for United. *See Millar & Gibson, supra* note 38.

immediate reality with Sky as a major participant in that reality.⁷⁰

Thus, in a sense, Murdoch's takeover bid was an attempt to strike preemptively and provide Sky with an insurance policy. By acquiring United, Sky would have been protected either at the true expiration of its contract with the Premiership or in the event that the current deal was voided by the RPC. Under either scenario, Sky would have been positioned to retain a substantial edge in bargaining power to negotiate new arrangements.⁷¹ The implications of this power to control and shape the entire British football and football broadcasting industries in large part created the threat to competition and to the public interest that was perceived by the MMC as too dangerous to permit such a merger to go forward.⁷²

D. *The MMC and RPC Decisions—Coextensive Implications*

The resulting effects of the United takeover, had it been permitted, could not have been limited to United and the large clubs alone. Further implications would resound throughout the sports and broadcasting markets. If United were able to negotiate its own deal, either at the expiration of the current contract or

70. According to a report published last year by the sports consultants Oliver & Ohlbaum, there are eighteen million football fans in England and Wales, all of whom, Sky thinks, could be persuaded to watch more matches featuring their favorite team. See Hilary Curtis, *The Price of Always Playing at Home*, GUARDIAN, Feb. 22, 1999, at 6. Pay-per-view is predicted by the report to bring in £ 280 million annually for Premiership clubs by the 2003-2004 season. See *id.* Clubs could earn a further £ 240 million from selling a television 'season ticket'—offering a package of 60 live games a season to their fans. See *id.* That compares with the £135 million the entire Premiership receives from Sky for live rights this year. See *infra* notes 211-18 (discussing problems arising from the similar 'season ticket' approach in America).

71. See Millar & Gibson, *supra* note 38.

72. See *id.*

Sky is, and is likely to remain, the only broadcaster with the capacity to offer true pay-per-view football. In May, the 20 top-flight clubs rejected Sky's pay-per-view proposition for the current season, but it is widely accepted that this was only a temporary setback.

Given that the Premier League chairmen have already acknowledged, at least in private, that pay-per-view is the only way forward, it must be of concern to know that their lead force will be on both sides of the negotiating table—a factor which will become even more important after the likely demise of the current collective deal between the league and Sky.

Id.

But see *infra* notes 287-94 and accompanying text (detailing arguments before the RPC). Sky's consistent argument has been that United is but one of twenty Premier League teams and that a two-thirds majority of those clubs is required to approve any new broadcasting arrangement. See *id.*; see also Came et al., *supra* note 4.

upon that contract's nullification by the RPC, the other clubs—with the exception of those few which might also have been purchased by media groups—would likely have been forced to acquiesce to United's position and sign into a pay-per-view deal with Sky.⁷³

While the RPC case might potentially have had more immediate implications for British football and broadcasting than the United transaction,⁷⁴ the two decisions were ultimately coextensive—the eventual ramifications of each hinged on the other's outcome.⁷⁵ An RPC decision voiding collective deals would have opened the door for extensive vertical integration of teams by media companies seeking to purchase rather than rent their own programming content. An MMC decision denying the rights of media entities to purchase football clubs, however, would have had just the opposite effect.

Although the two investigations seem somewhat at odds with each other, together the RPC and the MMC were in a unique position: they had the opportunity to either (1) open the door wide, allowing media groups to purchase their own sports programming content, (2) slam it shut in the name of free competition, or (3) perhaps find some compromise position between the full acceptance and complete prohibition of the integration of sports and media.⁷⁶ The MMC started the ball rolling by recommending the prohibition of Sky's purchase of United. However, it is yet to be seen how other attempted alliances between clubs and broadcasters will be treated by the new British antitrust authorities.⁷⁷

73. See Millar & Gibson, *supra* note 38.

74. See Gledhill, *supra* note 37.

75. See *id.* In fact, Murdoch probably never would have bid such a price for United if he had not been concerned that his current stranglehold over the rights to broadcast Premier League matches was nearing its end. See *id.*

76. See *infra* Part IV.

77. There remains confusion among analysts as to whether the blocking of the Sky-United merger precludes all takeovers of football clubs by broadcasters. Michael Crick, spokesman for Shareholders United Against Murdoch (SUAM) and ardent opponent of the Sky bid, claimed that "[t]he MMC and the Government have established the principle not that just Rupert Murdoch should not own United but that no other TV company should own a football club either." Brian Roberts, et al., *Sky Falls on Murdoch Utd*, MIRROR, Apr. 10, 1999, at 1. The fact that the NTL-Newcastle bid was also referred to the Competition Commission lends further validity to this position. See *infra* note 162. However, this issue—essentially the ultimate precedential weight to be accorded the MMC's conclusion—is the most compelling question arising out of the whole transaction, especially in light of substantial contrary Continental practice.

III. THE GOVERNMENTAL INQUIRY

The opportunity possessed collectively by the RPC and MMC to determine the future of sports and sports broadcasting in England originated in the structure and policies underlying the British antitrust authority. The general nature of the British antitrust system, and the MMC's structure and responsibilities in particular, served to create a competition authority that was especially suited to handling politically controversial business transactions with potential anti-competitive effects.⁷⁸ However, recently enacted legislation rendered the referral of the United matter to the MMC one of the Commission's last and most important investigations.⁷⁹

A. *The British Antitrust System Generally*

Antitrust law generally considers whether government intervention to control business concentration and economic power is necessary to preserve free competition.⁸⁰ The British government, however, has traditionally utilized a rather unusual system for determining when, whether, and how to intervene in everyday business transactions. Despite, or perhaps because of, this unusual structure, the British system was very successful and prescient, and great value was placed on the recommendations of the three individual branches: (1) the Secretary of State for Trade and Industry, (2) the Office of Fair Trading, and (3) the Monopolies and Mergers Commission.⁸¹ One of the most unusual attributes of the British system was that while such a tripartite division of responsibility was maintained (along with a large, high-quality investigative staff), a tremendous

78. See *infra* Parts III.A. and III.B.

79. See *infra* Part III.C.

80. The British antitrust system, with a few notable exceptions, is based on American antitrust tradition. Under U.S. law, the traditional antitrust goal is to protect competition in order to permit the free market system to function properly. See SULLIVAN & HERBERT HOVENKAMP, *supra* note 17, at 1-2. Monopolistic abuse of market power by one entity, or concerted action by competitors, often can skew market outcomes and distort the market's otherwise theoretically efficient allocation. See *id.* As a general matter, antitrust law seeks to prevent such anti-competitive practices, either through private cause of action or governmental intervention, in order to allow a competitive market to guide the development of business and industry. See *id.*

81. These divisions making up the tripartite structure of the British antitrust authority are each individually analyzed in the sections following. See Parts III.A. and III.B.

amount of power was, in the end, allocated to one presiding figure, the Secretary of State.⁸²

Due to the introduction of a new Competition Commission, however, in the Spring of 1999, some of the procedural and substantive characteristics of the British system have been significantly altered.⁸³ Prior to the introduction of the new Competition Commission, the traditional investigative process followed the procedure outlined below.

1. An Overview of the Traditional Investigative Process

The initial phase of all anti-competitive review began with the Office of Fair Trading (OFT).⁸⁴ Under the traditional framework, the OFT made the preliminary determination as to whether a certain deal was potentially violative of the public interest or breached any competition laws.⁸⁵ The Secretary of State for Trade and Industry made the next decision based on the OFT's analysis.⁸⁶ The Secretary determined whether the transaction

82. See A. Nigel Parr, *Avoiding a Second Stage Inquiry by Giving Conduct Undertakings: Recent Changes to United Kingdom Merger Control*, ANTITRUST Spring 1996, at 31. The structure of the three administrative bodies primarily reflects a desire to achieve a separation of powers between the detection and investigation of, the power of decision over, and the regulation of mergers and other business conduct. See *id.*; see also Alissa A. Meade, Note, *Modeling a European Competition Authority*, 46 DUKE L.J. 153, 178 (Oct. 1996) (explaining that political review ultimately rests with the Secretary of State, while most judicial appeals in competition are sent to the RPC); Alan Watkins, *The Inns of Court Are Set to Flow with Fine Wines*, INDEPENDENT (London), Dec. 13, 1998, at 25 ("[w]hether you call them quasi-judicial exercises or exercises in ministerial discretion is largely a matter of taste. The most important are taken by Mr. Peter Mandelson, [the Secretary of State who referred the United takeover to the MMC and since resigned] who possesses powers of terrifying extent over references to the Monopolies and Mergers Commission, the functions of the Office of Fair Trading and much else. He can propose or dispose, accept or reject, . . . a consequence of what Parliament has passed, principally an Act of 1973.")

The procedures applicable only to the traditional system involving the MMC (and not the new system involving the Competition Commission) will, when possible, be referred to in the past tense. The emphasis of this Note will be on this traditional form of investigation and evaluation as conducted by the MMC.

83. See *infra* Part III.C.

84. See Parr, *supra* note 82, at 31. The OFT gathers information about monopolies and mergers, acts as the British competition authority internationally, works with the Commission on EU matters, advises the Secretary of State in merger regulation, and reports to the Secretary of State on the status of competition in Great Britain. See *id.* Even though the OFT is ostensibly an apolitical institution, due to the wide range of areas in which it has competence, the OFT quite often plays a greater role in competition matters than its advisory role might suggest. See *id.*

85. See *Monopolies and Mergers Commission, Statutory Responsibilities* (visited Nov. 15, 1999), <<http://www.mmc.gov.U.K./role1.htm>> [hereinafter *Monopolies and Mergers Commission*]; see also Parr, *supra* note 82, at 31.

86. See Parr, *supra* note 82, at 31.

should be allowed to proceed without further delay or if it instead should be referred to the MMC.⁸⁷

Following a referral to the MMC and its investigation and evaluation, the matter was returned once again to the Secretary for a final decision.⁸⁸ Only in certain circumstances was the Secretary obliged to accept or enforce the MMC's recommendations.⁸⁹ Although possessing the ultimate decision-making authority, the Secretary's discretion was initially tied to the OFT's preliminary investigation and heavily guided by the MMC's subsequent recommendation.⁹⁰

2. The Office of Fair Trading and the Director General of Fair Trading

The OFT is a non-ministerial, independent government department that is separated into competition policy and consumer affairs divisions.⁹¹ Established twenty-five years ago, the OFT is heavily involved in both ensuring consumers' welfare and enforcing competition policy.⁹² In addition to its role in conditioning or halting trade practices that are contrary to consumers' interests, the OFT has the somewhat dichotomous (but traditional antitrust) goals of encouraging free competition and intervening in industry practices found to be anti-competitive.⁹³

On top of its domestic duties, the OFT has international responsibilities, including maintaining relations with the European Commission on Continental competition dilemmas.⁹⁴ In order for European law to figure prominently in OFT investigations in the United Kingdom, however, certain threshold requirements must be satisfied.⁹⁵ Such thresholds were not met by the Sky-United transaction and as a result, European law was essentially inapplicable.⁹⁶

The Director General of Fair Trading (DGFT), the head of the OFT, has generalized responsibilities in reviewing competition

87. See *Monopolies and Mergers Commission*, *supra* note 85; see also Parr, *supra* note 82, at 31.

88. See *infra* Part III.A.3.

89. See Parr, *supra* note 82, at 32.

90. See *id.* at 31-32.

91. See *id.* at 31.

92. See *id.*

93. See *id.*

94. See Meade, *supra* note 82.

95. See *infra* notes 131-34 and accompanying text.

96. See *id.*

matters.⁹⁷ In addition to the duties preceding referral to the MMC, the DGFT and OFT staff also handle the negotiation of undertakings and the monitoring of the operation of any undertakings given or orders made following an adverse MMC report on a monopoly, merger, or anti-competitive practice.⁹⁸

The OFT's initial decision to investigate the United deal was virtually obligatory, as any acquisitions that exceeded the £70 million threshold received automatic review by the OFT.⁹⁹ The investigation by this competition division lasted a month.¹⁰⁰ Upon the completion of the OFT's investigation, the DGFT made a final assessment that was then sent on to the Secretary of State for Trade and Industry.¹⁰¹

3. The Secretary of State for Trade and Industry

If, after examining the OFT's report, the Secretary of State for Trade and Industry determined that the proposed merger or acquisition worked against the public interest,¹⁰² the Secretary would automatically pass the report to on to the MMC.¹⁰³ The MMC then would conduct a more broad and thorough investigation.¹⁰⁴

Under the Fair Trade Act,¹⁰⁵ the Secretary was empowered to refer any merger that satisfies the Act's jurisdictional

97. See *Monopolies and Merger Commission*, *supra* note 85. The Director General of Fair Trading occupies the focal point in the British competition law. See Parr, *supra* note 82.

98. See *Monopolies and Merger Commission*, *supra* note 85. An alternative to the reference of a merger to the MMC exists in the acceptance of undertakings, concessions as to the future behavior of the merged entity. See *infra* note 259 (questioning the effectiveness of concessions in the Sky transaction).

99. See Parr, *supra* note 82, at 32. The United transaction involved an exchange of £625 million. See *supra* note 33.

The only other Premiership clubs currently meeting this threshold requirement are Arsenal and Newcastle United. See David Gow, *Net Raised on Merger Inquiries*, *GUARDIAN* (London), Aug. 7, 1999, at 19. Alternatives to this "assets" test are discussed *infra* note 161 and accompanying text.

100. See *Murdoch Meets Man Utd, Is Mandelson a Match for Murdoch*, *BBC NEWS*, Sept. 9, 1998 (visited Nov. 6, 1999) <<http://news.bbc.co.uk>> (search by title in quotations).

101. See Meade, *supra* note 82, at 178 (stating that the OFT "heavily influences" the Secretary of State).

102. See *infra* note 111 and accompanying text (discussing the meaning of public interest).

103. See *infra* Part III.B.

104. See Parr, *supra* note 82, at 31.

105. See *supra* note 82 and accompanying text. In practice, this has meant that a reference will probably be made where a merger is likely to confer an enhanced degree of market power on the merged company enabling it to act to the detriment of its customers or suppliers and ultimately the consumer, in terms of price and choice. See *id.*; see also *infra* note 113.

requirements to the MMC for a detailed investigation.¹⁰⁶ This wide discretion to make merger references was limited during the last fifteen years, however, by a number of ministerial statements to the effect that references would be made primarily, though not exclusively, on competition grounds.¹⁰⁷ Following an adverse MMC report on a monopoly, merger, or anti-competitive practice, the Secretary had the further responsibility of determining what action the government would ultimately take in relation to the MMC's recommendation.¹⁰⁸

The power to evaluate and take action based on the OFT's and MMC's recommendations clearly provided the Secretary with the greatest decisionmaking ability under the traditional British antitrust system. The broad discretion inherent in such a position, however, recently came under scrutiny as a needless and dangerous infiltration of politics into an otherwise objective administrative process.¹⁰⁹ Although some de facto restraints were implemented, the Secretary still retained virtually complete authority to refer all forms of mergers and acquisitions and, in rare instances, monopolies to the MMC.¹¹⁰

As evidenced by the above described responsibilities of the OFT and Secretary, the substantive and procedural hurdles that a transaction had to overcome to avoid referral to the MMC were rigorous. Yet underlying much of this procedure and the MMC's subsequent analysis was the rather subjective—and inevitably political—standard of the public interest.¹¹¹

106. See Parr, *supra* note 82, at 32.

107. See *id.*

If the MMC concludes by at least a two-thirds majority that a merger is likely to operate against the public interest, the Secretary of State has the discretion to prohibit it or permit it to proceed either conditionally or unconditionally. If however, the MMC concludes that the merger is not likely to operate against the public interest, the Secretary of State is unable to prevent it from proceeding.

Id.

108. See *id.*

109. See *infra* note 152 and accompanying text (discussing changes made to remove politics and ministerial discretion from the merger analysis).

110. See Parr, *supra* note 82, at 31.

111. Public interest is an ambiguous legal term with significant political overtones. The political aspects of the construction of public interest in the merger referral process became especially apparent in the controversy surrounding Sky's attempted takeover of United. See *infra*, Part III.D. Commentators have often described the MMC's rationale for its investigation as "couched in vague terms." Meade, *supra* note 82, at 180.

B. *The Structure and Responsibilities of the MMC*

The MMC was first set up as the Monopolies and Restrictive Practices Commission by the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, but it ceased to be responsible for restrictive practices in 1956.¹¹² The Commission's most recent title and duties originated from the Fair Trading Act 1973 (FTA), which set forth the MMC's responsibilities to investigate and report on matters referred to it relating to mergers, monopolies and anti-competitive practices, the regulation of utilities, and the performance of public sector bodies.¹¹³

1. Authority of the MMC

The MMC had no power of its own to initiate inquiries or to choose which inquiries to undertake.¹¹⁴ As discussed above, the Commission was merely one of a number of authorities with responsibilities under British competition law. The MMC was thus dependent on the OFT/DGFT and the Secretary to set forth matters for investigation.¹¹⁵

Upon the referral of such a matter, it was the MMC's responsibility to determine whether the referred matter operated or could be expected to operate against the public interest and to report its conclusions to the Secretary.¹¹⁶ In the case of an

112. See *Monopolies and Mergers Commission*, *supra* note 85. Three principle statutes regulate British competition law: the Fair Trading Act 1973 (FTA), which regulates mergers and monopolies; the Competition Act 1980, which regulates anti-competitive practices; and the Restrictive Trade Practices Act 1976, which regulates restrictive agreements and cartels. See Parr, *supra* note 82, at 32.

113. See Fair Trading Act 1973, § 3, Part II (Performance of the Functions of the Monopolies and Mergers Commission) (U.K.) available in LEXIS UK Library, Stat File; see also *Monopolies and Mergers Commission*, *supra* note 85.

114. The MMC was established by statute to investigate and report on matters referred to it relating to mergers, monopolies, and anti-competitive practices. See *id.*; see also Meade, *supra* note 82, at 178. The MMC had no original jurisdiction, but was given the power to conduct investigations under various British laws (the FTA, the Competition Act 1980, the Telecommunications Act 1984, the Airports Act 1986, the Gas Act 1986, the Electricity Act 1989, the Broadcasting Act 1990, and the Water Industry Act 1991). See Meade, *supra*, at 178.

115. See *id.* at 179. "While the MMC is an independent institution, it is technically subordinate to the DGFT [Director General of Fair Trading], who is officially charged with acquiring and reviewing all information on mergers and monopolies in Great Britain. In practice, however, the MMC's opinions have proven to be accurate and influential despite its lack of enforcement powers." *Id.* Much of the MMC's present success derives from the quality of its work and from the relationship it shares with the OFT. See *id.*

116. See Parr, *supra* note 82, at 32.

adverse report, the MMC recommended how, if at all, the identified detrimental aspects of a matter could be remedied.¹¹⁷

In investigating the effect of a merger on the public interest, the MMC was required by Section 84 of the FTA to take into account "all matters which appear to them in the particular circumstances to be relevant and, in particular; [1] the promotion of effective competition, [2] the interests of consumers, [3] the development of new techniques and products and new market entry, and [4] the promotion of a balanced distribution of industry and employment in the U.K.." ¹¹⁸ In practice, however, the effect of the merger on competition was typically the most important aspect of the MMC's analysis.¹¹⁹

2. Composition of the MMC

Although its tasks were relatively straightforward, the MMC's approach to carrying out those tasks was rather unusual, due in large part to the composition of the MMC itself. The Chairman and members of the MMC were appointed by the Secretary, who was responsible for overall competition policy.¹²⁰ With the exception of the Chairman, all members were part-time.¹²¹ There were as many as fifty members on the MMC at any one time, although the actual number typically fell between thirty and thirty-five.¹²² Members were usually appointed for an initial term of three years and remained eligible for reappointment.¹²³

3. Impact of European Law on the MMC

While the MMC members usually became experts in the various domestic industries and in each industry's unique propensity for anti-competitive activity, they had to develop a working knowledge of Europe-wide competition law, issues, and practices as well.¹²⁴ As noted above in discussing the OFT's duties, European Community (EC) competition law may

117. *See id.*

118. Fair Trading Act 1973, § 84, *supra* note 113; *see also* Parr, *supra* note 82, at 32.

119. *See* Parr, *supra* note 82, at 32.

120. *See Monopolies and Mergers Commission, supra* note 85.

121. *See id.*

122. *See id.* The MMC is comprised of full time civil servants drawn from industry, the professions, academia, trade unions, and retail businesses. *See* Meade, *supra* note 82, at 179. This relatively unique make-up in the world of antitrust authorities may have aided the MMC in accumulating the many diverse opinions it accepted regarding the United transaction.

123. *See Monopolies and Mergers Commission, supra* note 85.

124. *See id.*

sometimes be relevant to the resolution of anti-competitive matters within the United Kingdom.¹²⁵

The main EC competition laws of relevance to the MMC's work were Articles 85 and 86 of the Treaty of Rome and the regulation on the control of mergers.¹²⁶ Article 85(1) prohibits all agreements and concerted practices that may affect trade between member states and that have as their object or effect the prevention, restriction, or distortion of competition within the common market.¹²⁷ Article 86 prohibits the undertaking or abusing of a dominant position which an entity enjoys in so far as it may affect trade between member states.¹²⁸ Although it was not the MMC's function to determine whether an agreement or practice was contrary to Article 85 or 86, the Commission typically took account of EC law, where relevant, in the course of its investigations.¹²⁹

One EC regulation often considered by the MMC in the context of large corporate transactions was Regulation 4064/89, which came into force in late September of 1990.¹³⁰ Under this regulation, mergers with a "Community dimension" are subject to the exclusive jurisdiction of the European Commission.¹³¹ Essentially, this Community dimension concept implicated mergers or acquisitions involving parties with a combined worldwide turnover of more than five billion ecu (approximately £4.2 billion) and subjected them to the control of the European Commission.¹³² Those mergers not caught by the EC merger regulation remain subject to national competition law.¹³³

As a result, the EC competition law was *not* invoked by the MMC in its consideration of the United takeover, which involved only £625 million.¹³⁴ Ironically, although the Sky-United merger

125. *See id.*

126. *See id.*; *see also Merger Control in Europe: The Main Provisions of EC Regulation*, 4064/89, DTI Publications (available from DTI Publications, Admail 528, London, SW1S 8YT) *cited in Monopolies and Mergers Commission*, *supra* note 85.

127. *See Monopolies and Mergers Commission*, *supra* note 85. Exemptions can be granted to certain transactions under Article 85(3). *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *Id.* However, some mergers with a Community dimension may be reviewed by the national authorities. *See id.* Under Article 9 of the regulation, a member state can ask the European Commission to refer a merger back to its national competition authorities for investigation. *See id.* In such cases, the member state must demonstrate to the Commission that the merger threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a distinct market in the member state. *See id.*

132. *See id.*

133. *See id.*

134. *See supra* notes 33 and 131 and accompanying text.

did not meet the monetary threshold for EC jurisdiction, the economic and competitive implications created by the transaction, had it been permitted, could have had a Continental impact quite disparate with the transaction's relatively small size.¹³⁵

An interesting dilemma would have arisen had a Continental media conglomerate attempted to take over a British football club. While an MMC recommendation with the subsequent assent of the Secretary of State clearly could stop a British media group from taking over a British football club, significant tensions between the British government and the European Union (EU) would likely develop should a Continental media conglomerate attempt such a merger with an English Premier League team.¹³⁶ Such a transaction would then presumably fall outside Great Britain's jurisdiction, and, due to the more liberal position of the Continental nations on media ownership of football clubs, the British position prohibiting such ownership might be overruled by an EU decision.¹³⁷ On the other hand, the fact that the MMC's

135. While no European law was truly implicated in the MMC's consideration of the attempted takeover of United, individual European countries have interpreted the risks posed by such an integration of sports and media quite differently. See *infra* Part V. Further, although the United transaction itself was not sufficiently large to trigger European involvement, the RPC's analysis of Sky's collective broadcasting arrangement with the Premier League was much closer to implicating EU regulations and policy. See *infra* Part V.B. (discussing RPC decision and the value of Sky's contract with the Premier League).

The European Union has clearly signaled its intention of greater involvement in regulating television companies that obtain the exclusive rights to broadcast sporting events for longer than a year. See *Analysis: Regulating Sport of Europe's TV Channels*, BBC'S WORLDWIDE MONITORING, Apr. 16, 1999. Karel Van Miert, the EU Commissioner for Competition, prior to the outcome of the RPC case, voiced his opinion that long-term sports contracts are likely to be outlawed, unless "demonstrably good" reasons can be shown for such deals. See *id.* "BSkyB got five years of rights in Britain because there was an emerging market. In the future, exclusivity periods will not be sanctioned without scrutiny if they exceed a year." *Europe Plans to Join the Sky Wars* (visited Aug. 12, 1999) <<http://www.soccernet.com/english/news/ENG-102-12899.htm>> (website no longer accessible, copy of the document is on file with the author). In response, television companies have argued that they need long-term contracts to justify large investments in rights and programming, while they also provide sports bodies with assured revenue flows. See *id.*

136. See Tony Fraher, *Media Groups Still Hope to Net Football Clubs; A Change in Britain's Competition Law and a Challenge at the European Commission May Open the Way for Sky to Try Again*, INDEPENDENT (London), Aug. 15, 1999, at 6 (Business).

137. A similar scenario might arise in the context of the RPC decision as well. For a discussion of the arguments presented in this dispute, see *infra* notes 287-94 and accompanying text. The decision of the RPC to uphold the legality of Sky's collective arrangement with the Premier League was at odds with the EC and European nations' competition authorities which have in policy if not in practice condemned this type of arrangement. See *infra* notes 239-45 and accompanying text.

conclusion in the United transaction cut in sharp contrast to the current European view on media-sports integration may serve to reopen Continental debate on this issue.

C. *The New Competition Act*

With the introduction of the new Competition Act, the nature and structure of the British competition authority has significantly changed since the investigation of the United transaction.¹³⁸ As a result, the specific functions and characteristics of the MMC are no longer completely relevant to any new predictive analysis. However, these recent changes did not impact the MMC's procedures during the course of its investigation or alter the value of the MMC's determination as to Sky's purchase of United.¹³⁹ Moreover, as the goal of the new regime is to build on the best attributes of the MMC in guiding British competition law into the next millennium, the United investigation remains important and will inevitably serve as a model for similar future inquiries.¹⁴⁰

In late 1998, the Chairman of the MMC announced the introduction of a new Competition Act, praising it as "an overdue and significant toughening of U.K. competition law."¹⁴¹ Under the Competition Act, the new Competition Commission replaced the MMC on April 1, 1999 and took over its functions, including

A European Commission ruling on such collective selling—which has already been challenged in Italy, the Netherlands, Spain, Germany, France, and Greece—would take precedence over a contradictory British decision. See Fraher, *supra* note 136. "Add to all of this the fact that the Restrictive Practices Act, under which the Premier League case was heard, is due to disappear in March next year, to be replaced by the Competition Act that is far more Euro-friendly, and the potential for a complete overturn of the current situation with the Premier League increases very significantly." *Id.*

138. See *Monopolies and Mergers Commission, MMC Chairman Welcomes Toughening of U.K. Competition Law* (visited Dec. 3, 1998) <<http://www.mmc.gov.uk/news2.htm>> (speech of Dr. Derek Morris—Chairman of the MMC) (website no longer accessible, copy of document on file with author).

139. See *id.*

140. See *infra* note 162 and accompanying text. Although many of Sky's rival broadcasters were awaiting the green light from the MMC to purchase their own Premier League clubs, the Commission's red light recommendation on the United deal did not necessarily rule out the merger of less dominant entities in the two industries. See *id.* As a result, NTL (England's third largest broadcaster) and Newcastle United (a top British club) had pushed forward with their merger negotiations until their merger was also referred to the Competition Commission. See *id.* Soon after, NTL chose not to exercise its option to buy a majority stake in the club. See *id.* Apparently, it was clear to NTL that, even though the new Competition Commission would be conducting the inquiry, it was unlikely that a conclusion different from the MMC's would be reached so soon after the denial of the Sky-United merger.

141. *Monopolies and Mergers Commission, MMC Chairman Welcomes Toughening of U.K. Competition Law*, *supra* note 138.

Fair Trading Act inquiries into mergers and monopolies.¹⁴² The new Competition Commission also has the power to hear appeals against decisions made by the Director General of Fair Trading or sectoral regulators under the prohibition provisions of the new Act.¹⁴³

In the course of its reform, the new Competition Act makes an important distinction between (1) fines on and prohibitions of anti-competitive agreements and the abuse of a dominant position and (2) structural issues relating to mergers and monopolies in which a prohibition regime is now viewed as inappropriate.¹⁴⁴ Among the further distinctions between the traditional role of the MMC and the new role of the Competition Commission's appeal tribunals are that (1) the tribunals' role is not investigatory, (2) the tribunals are subject to European jurisprudence rather than ministerial discretion, (3) the criteria the tribunals apply are not those under the public interest provisions of the Fair Trading Act, and (4) the tribunals may ultimately operate on different timescales than the MMC used.¹⁴⁵

As a result of these changes, the investigation by the MMC of Murdoch's attempted acquisition was one of its last. Although the efficacy of the MMC's final determination was not undermined by the new agency structure, it was initially unclear as a direct result of these changes whether future controversies such as those surrounding the United transaction would receive the diligent and expert review normally accorded by the MMC to such matters. Although the new Act may be much more Euro-friendly, it might possibly allow potentially anti-competitive transactions to go through unreviewed because of (1) the new Commission's willingness to defer to European precedent, (2) the exclusion of ministerial and political involvement in the process, and (3) the refusal to consider such transactions in light of the broad public interest standard.

While the United matter exposed most of these alleged deficiencies in the traditional MMC approach, it may have been exactly those deficiencies that allowed for such an intriguing and thoughtful review of a merger that apparently possessed far-ranging anti-competitive ramifications.¹⁴⁶ Thus, although the structure and responsibilities of the new British competition

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.*

146. The referral to the MMC was made in large part as a result of the political uproar the attempted takeover created around Great Britain and also due to the vague parameters of the public interest that could be harmed by the merger. See *supra* note 107 (discussing the public interest standard); *infra* Part III.D.

authority will be dramatically different from the MMC's, the heightened political climate and diverse economic concerns surrounding the United transaction will likely make the MMC's recommendation a landmark decision and exceedingly difficult to overturn or stray from in subsequent proceedings brought before the new Competition Commission and its tribunals.¹⁴⁷

D. *The Political Debate*

Another set of issues raised by the United transaction were the political controversies surrounding the OFT's, MMC's, and Secretary's decisions. Murdoch alleged the referral by the OFT and Secretary to the MMC was politically motivated—an attempt by the new majority Labour Party to appear publicly willing to stand up to Murdoch, whose newspapers' support of the Party had been influential in putting Labour in power in the past election.¹⁴⁸

Further, a growing political backlash developed amongst the general public against the United takeover.¹⁴⁹ Major attacks against the transaction were launched from a variety of angles when the MMC made itself available to comments from interested parties.¹⁵⁰

The debate over the referral was complicated additionally by Peter Mandelson, the Secretary at that time, who was openly known to be close friends with Elizabeth Murdoch, Sky's network manager and the daughter of majority shareholder Rupert

147. See *infra* Part III.D. In fact, one of the new Competition Commission's first referrals was the proposed merger between NTL and Newcastle United. See *infra* note 162 and accompanying text.

148. See Alderson et al., *supra* note 31 (explaining Murdoch's relationship with the Labour party).

149. See Potter, *supra* note 17.

150. Among the most strenuous and well-reasoned protests were those offered by:

- (1) A December report from the government sponsored Football Taskforce on the commercialization of the game based on the fan's views of how stock market floatations of clubs have affected the sport;
- (2) An influential academic conference in London, led by Professor Jonathan Michie, a member of Shareholders United Against Murdoch (SUAM) and consisting of various economists, accountants, and competition experts; and
- (3) Representations to the MMC by other clubs, organizations, and individuals opposing the deal, which include among them the Independent Television Commission (ITC), the U.K.'s commercial television regulator, which informed the MMC that it felt mergers such as Sky/United would impede the sale of broadcast rights.

Murdoch Critics Unite on Sky Bid, OBSERVER (London), Nov. 1, 1998, at 1 (Business).

Murdoch.¹⁵¹ Mandelson ultimately resigned due to other political difficulties just after the new year and was replaced by Stephen Byers.

Before leaving office, however, Mandelson had ordered his officials to draw up a paper that would examine ways of placing merger referrals outside the political arena.¹⁵² Under the system in place at the time, Mandelson was advised whether to refer a large merger to the MMC by the Director General of the OFT John Bridgeman, but, as noted above, Mandelson was free to ignore such advice.¹⁵³ Further, if such a merger went on to the MMC, Mandelson was also free to ignore the MMC's ultimate recommendation unless the MMC advised him that the merger should go ahead without conditions.¹⁵⁴

Ironically, at the end of the day, Mandelson himself chose the politically savvy approach to his duties by referring the matter in the name of public interest to the MMC. By passing the matter on to the MMC, Mandelson headed off a political uproar—almost forty Labour Members of Parliament had already signed a Commons' motion calling for an inquiry by the MMC.¹⁵⁵

An additional political issue raised by the United transaction was the inherent vagueness of the public interest standard, which perhaps enabled a matter to reach the MMC that might not otherwise have been referred. Reports suggested that although the OFT originally saw no competition grounds for referring Sky's bid to the MMC, it changed its recommendation under pressure from officials at the Department of Trade and Industry and the Department for Media, Culture, and Sport.¹⁵⁶

However, while the intense political turmoil surrounding Sky's attempted takeover of United may have exerted more influence than warranted on the referral process, the political

151. See David Walker, *Ambiguous Roles Mean Muddle*, GUARDIAN (London), Dec. 23, 1998.

152. See Nicholas Watt, *Mandelson Aims to Take Mergers out of Politics*, GUARDIAN (London), Nov. 30, 1998, at 9. Mandelson said his instinct was to take decisions about mergers away from politicians who often faced criticism for showing favoritism to business friends. See *id.* "I want to put everything under the microscope. I want to test whether the way we do things in Britain is the best we can do." *Id.*; see also *Murdoch Critics Unite on Sky Bid*, *supra* note 150.

153. See *supra* Part III.A.3.

154. See Watt, *supra* note 152.

155. See *id.* Additionally, more than five hundred individuals and groups bombarded the MMC with objections, the most ever against a British takeover. See Brian Roberts et al., *Sky Falls on Murdoch Utd; Tycoon Rocked as his Old Trafford Takeover Bid Blocked*, MIRROR (London), Apr. 10, 1999, at 1, 11.

156. See *id.* This view is supported by the fact that John Bridgeman, the OFT's Director General, pointed to the public interest issues raised by the bid as a reason for recommending an MMC reference. See *id.* The OFT normally makes its decisions purely on competition grounds, leaving it to the government to decide on the public interest matters. See *id.*

controversy ultimately may have been invaluable both preceding and during the actual MMC investigation. First, without such political involvement, a merger in an area so important to the general public but which raised only dubious competition concerns might not otherwise have been forced to undergo any government scrutiny whatsoever. Second, it was only through the unprecedented publicizing of the Sky-United issues letter¹⁵⁷ and the resulting forum created for both public and private opinion on the matter that the MMC was able to thoroughly evaluate the circumstances under which the transaction should be permitted or prohibited and thereby discern the true public interest.

E. *Structural and Political Impact on the MMC's Decision*

Many critics have suggested that no better argument exists for depoliticizing merger policy than the United matter itself, as Secretary of State Byers was faced with the choice of blocking the deal and displeasing Murdoch, who controls substantial British press influence or letting it through and displeasing most football fans and many members of the British Parliament.¹⁵⁸

The new Competition Commission offers numerous subtle changes that attempt to either alleviate or extricate the dangers posed by such political involvement in the antitrust review process.¹⁵⁹ However, a concern remains that, without such political involvement, business trends with effects potentially detrimental to fair competition and to the public interest¹⁶⁰ may be overlooked and not accorded any sort of thorough or well-reasoned review and analysis.

Obviously, the circumstances surrounding the United transaction neither regularly arise nor occur with such frequency as to require the substantial alteration of the review process mergers typically receive. However, the Sky-United merger may have served to alert the government and the public to special instances in which such an investigation is appropriate both to allay public concern and to address potentially dangerous trends that otherwise may be exacerbated under the current, allegedly anti-competitive conditions.

157. See *infra* notes 163-66 and accompanying text.

158. See *Byers and Sellers*, *ECONOMIST*, March 20, 1999, at 61. Secretary Byers described his determination as "the loneliest decision I have ever made." Alderson et. al., *supra* note 31.

159. See *supra* Part III.C.

160. Secretary Byers recently suggested the replacement of the public interest test with a new set of criteria based on competition and the consumer as well as on economic efficiency. See Gow, *supra* note 99. Competition would be considered in a European or even global context. See *id.*

The MMC's investigation, therefore, may have a much more enduring effect than merely its recommended prohibition of the merger between Sky and United. The same day that Secretary of State Byers announced his agreement with the MMC recommendation, "[t]he Department of Trade and Industry also ordered a review of the nation's merger laws to ensure that takeovers of British football teams could automatically be examined by antitrust authorities in the future."¹⁶¹ As an initial step towards this goal, the Department of Trade and Industry called for an extended antitrust review of the proposed purchase of Newcastle United (Newcastle) by the New York-based NTL, Inc. (NTL), Great Britain's third largest cable company.¹⁶²

Thus, as a result of these recent developments, while the new Competition Commission might not have otherwise been referred additional football-media mergers due to the recent changes to

161. See *Britain Blocks B SkyB Effort to Take Over Soccer Team*, *supra* note 35. As part of a consultation document released the first week of August, 1999, Secretary Byers suggested two major reforms: (1) lowering the £ 70 million combined asset value threshold on referring mergers to the Competition Commission and (2) removing ministers from policing most bids. See *As the Government Moves to Shake up Mergers Referral Policy by Cutting the Asset Threshold and Changing Ministerial Roles on Bids, the Forum Asks if the Changes Mean Rich Pickings or More Red Tape*, *LAWYER*, Aug. 9, 1999, at 12. However, such a change in the threshold has been criticized as more harmful than beneficial, in that many more mergers will be referred to the Commission. See *id.* A "turnover" test has been suggested as more useful and accurate, especially if the goal is to ensure review of mergers in particular sectors such as media and football clubs. See *id.* Additionally, it has been argued that a lowering of the asset threshold is not necessary, in that a second test exists for company dominance which automatically refers to the Commission mergers that would result in a market share of more than twenty-five percent (25%). See *id.*

162. *Britain Blocks B SkyB Effort to Take Over Soccer Team*, *supra* note 35. Prior to the MMC's recommendation, Newcastle had maintained that its proposed takeover by NTL was factually distinguishable from the Sky-United transaction. See Justin Strong, *Confusion Over United Buyout—US Firm's Takeover Plan Referred to Competition Commission*, *JOURNAL* (Newcastle), Apr. 10, 1999, at 1. Both NTL and Newcastle emphasized that neither was as dominant or powerful in its respective industry as was Sky or United. See *id.*

Yet, once the United deal was blocked and the Newcastle merger was referred to the Competition Commission, NTL determined that the MMC's general comments about the merger of broadcaster and football clubs would lead the Competition Commission to prohibit its bid as well (even though NTL had no Premier League rights). See Keith Weir, *Cable Company NTL Pulls Out of Newcastle Deal* (visited Aug. 11, 1999) <www.soccernet.com/english/nutc/news12.htm> (website no longer accessible, document available on file with author). However, in light of the continuing uncertainty surrounding the precedential effect of the Sky-United ruling, NTL has considered reviving its bid. See *Media Moguls Left Waiting in the Wings*, *FIN. TIMES* (London), Aug. 6, 1999, at 11.

Other broadcasters who at least temporarily put on hold their attempts to acquire football clubs include Granada, who acquired a 9.9% stake in Liverpool and Carlton Communications, which sought to become involved with Arsenal. See *id.*

the British antitrust system, the specific integration of sports and media entities in Great Britain is likely to continue to receive diligent and thorough antitrust review due to the heightened awareness of such issues created by the Sky-United investigation.

IV. THE MMC INVESTIGATION

Due to the unusually intense public interest surrounding the Sky-United deal and the government's desire to make its proceedings more transparent, the MMC took unprecedented action in making *public* the Sky-United issues letter,¹⁶³ which detailed the full range of concerns raised by the United takeover.¹⁶⁴ Though the MMC invariably notifies the entities involved of the specific issues under its consideration, this was the first time that it had ever made such an issues letter public in a merger.¹⁶⁵

A. *The Issues Letter*

Among the broad range of topics covered in the issues letter were: (1) the impact Sky and United could have in their respective markets following the acquisition; (2) the influence Sky and United might have on key issues such as competition; (3) whether the transaction could lead to higher prices for supporters to watch games, either at Old Trafford (United's stadium) or through Sky television channels; (4) the potential spending on the players (whether more money would be invested in the team after the merger, giving United the chance of winning more matches or whether less would be spent to maximize profits); (5) whether the merger would give Sky an advantage over other broadcasters in bidding for rights to televise matches in the Premier League (where United is arguably the biggest attraction) if the rights were sold collectively, as at present, or on a club-by-club basis; (6) whether the combination of United and Sky would have a

163. See BSkyB/Manchester United Merger Inquiry: MMC Writes to the Main Parties (visited Dec. 9, 1998) <<http://www.worldserver.pipex.com/coi/depts/6mm/coi9072e.ok>> (website no longer accessible, copy of document on file with author). "It is normal practice, following preliminary investigation in any inquiry for the MMC to send an 'issues letter' to the main parties involved in an investigation." *Id.* The Sky-United issues letter was made public "to inform other parties interested in making submissions to enable them to tell the MMC if they think any important points have been missed." *Id.*

164. See *id.*

165. See Mark Milner, *The MMC Plays an Open Game over Man U Takeover*, FOOTBALL.GUARDIAN, Dec. 10, 1998 <http://reports.guardian.co.uk/sp_reports/manutd/1708.html> (website no longer accessible, copy of document on file with author).

disproportionate influence over the football authorities in England; (7) whether Sky would use its position to block the access of newspapers and other television companies to the club's star players; and (8) whether the merger would speed up the development of pay-per-view television.¹⁶⁶

B. *The Report on the Proposed Merger*

In recommending that the takeover of United by Sky should not go forward, the MMC's report focused predominantly on the advantage the merger would give Sky over other broadcasters in bidding for rights to televise matches in the Premier League. In addressing this issue, the MMC first discussed the economic status and market power possessed by the two entities in their relevant markets.¹⁶⁷

The Commission described Sky as a vertically integrated broadcaster that: (1) purchases television rights, including those for sporting events, (2) makes some of its own programs, (3) packages a range of programs into various channels, (4) distributes and retails these channels to its subscribers using its direct-to-home satellite platform, and (5) sells them wholesale to other retailers using different distribution platforms.¹⁶⁸ United was found by the MMC to be the "strongest English football club," the football-related activities of which include the supply of the television rights to its matches.¹⁶⁹

166. The issues letter, detailed briefly in this Note, was previously made available in its entirety at the MMC website: <<http://www.worldserver.pipex.com/coi/depts/6mm/coi9072e.ok>> (website no longer accessible, copy of document on file with author) or may be obtained in writing from David Peel, The Reference Secretary (BSkyB/Manchester United), Monopolies and Mergers Commission, Room 503, New Court, 48 Carey Street, London WC2A 2JT.

167. Delineation of the relevant markets in which the entities participate is essential for a determination of the economic effect their alleged anti-competitive activities may have. Establishing the scope of the market is also necessary for a determination of whether such entities possess market power in their respective markets. See *infra* note 166.

An evaluation of market power is extremely important to any antitrust analysis. See SULLIVAN & HOVENKAMP, *supra* note 80, at 597. An assessment that a firm (or group of firms) possesses such power implies an ability to set prices for, or otherwise control, the entire market. See *id.* Market power itself is not illegal, but a finding of such power heightens the reviewing authority's awareness of the anti-competitive dangers presented by the entities' activities and the inherent potential for abuse of that power. See *id.*

168. See *British Sky Broadcasting Group PLC and Manchester United PLC: A Report on the Proposed Merger* (April 17, 1999) <<http://www.mmc.gov.uk/bskyb.htm>>.

169. *Id.* The MMC also emphasized that the rights to these matches were currently sold collectively by the Premier League, and the arrangement between the Premier League and Sky was at that time subject to a Restrictive Practices Court case brought by the Director General of Fair Trading. See *id.*

As to the relevant markets in which United and Sky operate, the Commission concluded that United's market stretches no further than that of the Premier League matches themselves,¹⁷⁰ and Sky's broadcasting market was specifically that of sports premium television channels.¹⁷¹ In the premium sports channel market, Sky was the only provider of such channels, with the exception of small, niche offerings.¹⁷² Entry into this market was determined by the MMC to be crucially dependent on the ability of a channel provider to obtain the appropriate live television sports rights.¹⁷³ Accordingly, as the Commission determined that the amount of rights presently existing were insufficient to sustain more than a few sports premium channels and as Sky presently provided three such channels, Sky was found to possess market power in the sports premium channel market.¹⁷⁴

In considering the public interest consequences of the transaction, the MMC placed its primary emphasis on the effects on competition among broadcasters for live Premier League rights.¹⁷⁵ Due to the uncertainty surrounding the outcome of the RPC case, however, the MMC considered *all* possible scenarios in analyzing the post-RPC competitive impact of a Sky-owned United.¹⁷⁶

C. *The Four Scenarios Explored by the MMC*

Of the four scenarios hypothesized by the MMC, the first involved the continuation of the existing *collective* arrangements for broadcasting the Premier League matches and contemplated *no* additional mergers between broadcasters and Premier League clubs.¹⁷⁷ Under this first scenario, the MMC found that Sky, as a

170. *See id.*

171. *See id.*

172. *See id.* Assessment of the ease or difficulty of market entry is very important to antitrust review. *See* SULLIVAN & HOVENKAMP, *supra* note 80, at 669-74. Entry analysis often provides indication of the whether questionable practices by one or several entities within an industry may adversely impact competition within that industry. *See id.* As the surest way to reduce or eliminate competition is to prevent others from competing, barriers to entering the market are often maintained by businesses seeking to preserve the current anticompetitive status quo. *See id.* Additionally, if the market contains only a few competitors, each individual competitor's actions will substantially impact all others in that market. *See id.*

173. *See British Sky Broadcasting PLC and Manchester United PLC: A Report on the Proposed Merger, supra* note 168.

174. *See id.*; *see also supra* note 167 (discussing the importance of a finding of market power).

175. *See British Sky Broadcasting Group PLC and Manchester United PLC: A Report on the Proposed Merger, supra* note 168.

176. *See id.*

177. *See id.*

result of its takeover of United, would acquire influence over and information about the Premier League's negotiations and agreements that would not be available to its competitors.¹⁷⁸ Sky would also have benefited through its incumbent ownership stake in the Premier League rights, providing a further advantage in the bidding process.¹⁷⁹ As a result, Sky's ability to secure future Premier League broadcasting rights would be augmented significantly. The MMC voiced additional concern that Sky's improved position would exacerbate competition problems because Sky's competitors, wary of Sky's inherent advantage, would likely bid much more cautiously for Premiership rights or perhaps not bid at all.¹⁸⁰

Ultimately, under this first scenario, the MMC found that by acquiring United, Sky would dramatically enhance its already strong position arising from both its market power as a sports premium channel provider and from its status as the current broadcaster of Premier League matches.¹⁸¹ Thus, the effect of such a merger would be to *reduce* competition for Premier League rights, leading to *less* choice for the League and also *less* scope for innovation in the broadcasting of Premier League football.¹⁸²

The second scenario contemplated by the Commission was one in which the live broadcasting rights to Premier League clubs' matches were required to be negotiated and sold on an *individual* basis and *no* further broadcasting/club mergers occurred. Here, Sky would have a similarly substantial advantage over other broadcasters competing for those rights.¹⁸³ Adverse consequences similar to those discussed under the first scenario would eventuate.¹⁸⁴

The third scenario considered by the MMC involved the *continuance* of existing selling arrangements continued and the inducement by the Sky-United merger of a subsequent merger between another broadcaster and club. The MMC found that the anti-competitive effects here would again be quite similar to those present in the first scenario.¹⁸⁵ If several mergers were to occur under the existing collective rights offering, the MMC determined that such collective selling could only continue if broadcasters agreed to share the rights, creating at least as disruptive an impact on competition as in the initial scenario.¹⁸⁶

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

The final scenario evaluated by the MMC involved a situation in which broadcasting rights were required to be sold on an *individualized* basis by the various clubs and the Sky-United merger precipitated *several* other broadcaster/club integrations. The MMC determined that *all* of the feasible outcomes would be less competitive than if rights were individually sold and *no* such broadcaster/club mergers were entered into.¹⁸⁷

Thus, in each of these above described scenarios, the MMC concluded that Sky's acquisition of United would enhance Sky's ability to secure Premier League rights in the future.¹⁸⁸ It followed from this analysis, according to the Commission, that such an enhanced ability would further restrict entry to the sports premium channel market by new channel providers, thus causing the prices of Sky's sports channels to be higher and choice and innovation to decrease.¹⁸⁹ Reduced entry by other premium sports channel providers would also ultimately result in reduced competition in the wider pay television market.¹⁹⁰

While focusing predominantly on the effects of the Sky-United transaction on competition among broadcasters, the Commission also based its public interest conclusions on the adverse effects it predicted the transaction would have on the sport of football in general.¹⁹¹ First, it was apparent to the MMC that the takeover would reinforce the existing trend towards greater inequality of wealth between clubs, thus weakening the smaller ones.¹⁹² Second, the acquisition of United was found by the MMC to give Sky additional influence over Premier League decisions relating to the organization of football, leading to some decisions which might not reflect the long-term interests of the sport.¹⁹³ On both of these counts, the merger of United and Sky could be expected to damage the quality of English football.¹⁹⁴ This adverse effect clearly would become further pronounced if the merger precipitated other mergers between broadcasters and Premiership clubs.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.* *See* Larsen, *supra* note 39 (discussing the growing schism between the professional sports "haves" and "have-nots").

193. *See British Sky Broadcasting Group PLC and Manchester United PLC: A Report on the Proposed Merger, supra* note 168.

194. *See id.*

D. Conclusions of the MMC

As the MMC was unable to identify any public interest benefits from the proposed merger and in light of the numerous and detrimental attributes of the transaction discussed above, the MMC concluded that the proposed merger between British Sky Broadcasting and Manchester United could be expected to operate against the public interest.¹⁹⁵

Additionally, the MMC determined that such a merger should be prohibited *outright*.¹⁹⁶ Although the Commission considered whether the adverse effects of the transaction could be mitigated or remedied through undertakings by Sky and United,¹⁹⁷ it found none it regarded as effective.¹⁹⁸ As a result, the MMC recommended prohibiting the merger as both an appropriate and proportionate remedy. The Secretary of State accepted the MMC's findings and made the final decision to block the Sky-United takeover.

The British government's decision to stop Sky's takeover of United and the Secretary's subsequent decision to refer the NTL-Newcastle proposed merger to the new Competition Commission made it clear that Great Britain does not wish to follow the Continental example of permitting the ownership of football clubs by media groups.¹⁹⁹ However, as the European Union continues to solidify, some uniform determination must eventually be reached as to the best framework for the continued development of both the sports and broadcasting industries. Although Great Britain was the first nation to officially evaluate the anti-competitive dangers of the vertical integration of sports and broadcasting entities, an examination of other nation's views and experiences may provide greater insight into the eventual and proper resolution of this issue.

195. See *id.*

196. See *id.*

197. See Vivek Chaudhary, *Takeover Promises 'Stretched Credibility'*, *GUARDIAN* (London), July 9, 1999, at 31 (discussing the difficulties with undertakings in the Sky-United scenario); see also discussion *infra* note 257.

198. See *U.K. Government Blocks B Sky B Takeover of Manchester United*, *AFX NEWS* (London), Apr. 9, 1999; see also *infra* note 257 (examining additional means of limiting the anti-competitive effects of the transaction).

199. See *infra* Part V.B.3. (noting several Continental instances of media ownership of professional football clubs).

V. DOMESTIC AND INTERNATIONAL PRECEDENT

Although Great Britain's antitrust authorities identified substantial anti-competitive problems with the integration of sports and media in England, continued integration still lurks on the global horizon. Thus, the MMC's review of the United takeover was perhaps the one chance to evaluate the implications of such consolidated ownership before the sporting world plunges headlong into it. During *intranational* antitrust analysis of such transactions, domestic concerns are typically the predominant factors in determining the proper outcome, but the *international* implications of permitting the integration of sports and media must also be explored as well.²⁰⁰ It is only through such a transnational analysis that the MMC's decision can be placed in proper perspective and its reasoning and precedential weight evaluated.

Perhaps the best means of undertaking such an analysis is to study the reaction of those nations that have already faced and attempted to resolve the sports/media dilemma.²⁰¹ The foreign precedent on this subject, while obviously not binding on the MMC's decision,²⁰² definitely affects the ultimate precedential weight to be attached to the Commission's recommendation to prohibit the United takeover. Further, in the event subsequent transactions are found less opprobrious to competition, such precedent may also provide examples of how the equities in such cases may be balanced to preserve free and fair competition.²⁰³

200. While the effect Sky's acquisition of United on Great Britain and its economy is the primary focus of the MMC investigation, the novelty of this issue has inspired many commentators to cite other nations' seeming acceptance of this type of vertical integration as strong indication that the United takeover would be allowed in Britain. See Gledhill, *supra* note 37.

201. Many European countries share a similar factual context within which their local sports and media interests exist. See *infra* Part V.B. (discussing France and Italy). The rapid development of information and communication technology throughout Western Europe and the strong historical and economic base of sports fans make comparisons especially useful. Further, with the ever increasing movement towards European integration, the workability of any decision on the Continent as well as in Great Britain is the key to the strength of the MMC's determination as international precedent. See *infra* Part V.B.3.

202. The actual MMC investigation is limited to domestic factors and concerns, leaving true international issues to the EC in larger and more expansive corporate transactions. See *Monopolies and Mergers Commission*, *supra* note 85 (setting out responsibilities of the MMC).

203. Although the economies of the various European nations remain somewhat diverse, there are clear parallels that may allow one country's solution to serve as a model for others.

A. U.S. Antitrust Conflicts and Controversies

The profound presence of professional sports in America is unparalleled worldwide, and the sheer size and scope of the American sports industry has virtually mandated that broadcast rights be dispersed among rival entities.²⁰⁴ Because of this dispersal of rights among American broadcasters and also because of the passion and allegiance that has surrounded the sport of football in England for over a century, the English experience cannot truly be replicated in the United States, where multiple sports enjoy the public's attention and enthusiasm.²⁰⁵ As a result, there is not the same potential in the United States as in Great Britain for one broadcasting company to dominate the market for television rights to a single, most popular sport.²⁰⁶

Further curtailing the opportunity for Murdoch-like dominance in American sports is a specific statutory enactment, the Sports Broadcasting Act (SBA).²⁰⁷ The U.S. Congress chose to enact this legislation in an effort to statutorily prescribe the manner of negotiating and selling the broadcast rights to professional sports events.²⁰⁸ The SBA creates a limited antitrust exemption for league-wide (collective) broadcasting arrangements and, until recently, maintained the age-old antitrust exemption granted specifically to the sport of baseball.²⁰⁹ However, as evidenced by Murdoch's successful expansion into American

204. With the amount of money expended to obtain rights to broadcast coverage of the four major sports leagues, it is unlikely that, even if permitted by U.S. antitrust law, a single media corporation could acquire the rights to an entire schedule of games in a single sport. See generally Cagan & deMause, *supra* note 42 (discussing current values of broadcasting rights as split among various media conglomerates).

205. Unlike England and most of Europe, where football is king, the U.S. sports fan's attention is divided among baseball, American football, basketball, hockey, golf, tennis, and numerous other sports.

206. For example, in the United States, NFL games are telecast on both CBS and FOX on Sunday afternoons, ESPN on Sunday nights, and ABC on Monday nights. Broadcasting arrangements such as these may be due in part to the Sports Broadcasting Act, see *infra* note 207.

207. Sports Broadcasting Act, 15 U.S.C. §§ 1291-95 (1994). The Sports Broadcasting Act consists of two separate provisions, the first enacted in 1961 and the second in 1966. See *id.* The original provision exempts certain agreements among professional football, baseball, basketball, and hockey teams to pool their sponsored TV broadcast rights for sale as a package. See *id.* The second provision specifically permitted the merger of the two American football leagues, the NFL and the American Football League (AFL). See *id.*

This established American legislative doctrine is in sharp contrast to the recent uncertainty created by the RPC proceeding questioning Sky's league wide arrangement.

208. See S. REP. NO. 87-1087 (1961), reprinted in 1961 U.S.C.C.A.N. 3042.

209. The baseball exemption was recently overturned statutorily by the Curt Flood Act of 1998. See 15 U.S.C. § 27(a) (1999).

sports and by his competitors' attempts to counter his advances, the anti-competitive dangers suggested by the United takeover may foreshadow similar problems in American professional sports as well.²¹⁰

Several administrative and judicial decisions exemplify the treatment of the sports broadcasting industry in the United States. While no decision truly addresses the specific concerns raised in the MMC's investigation in Great Britain, several of these disputes are relevant in examining the potential for abuse that may occur with increasing levels of technology and media ownership.

1. Shaw v. Dallas Cowboys Football Club

One dispute that illustrates the tenuous statutory hold on broadcasting deals in the United States is a recent antitrust class action brought against the Dallas Cowboys and the National Football League (NFL) alleging that those organizations conspired to fix the price of private satellite transmissions of Sunday afternoon Season Ticket telecasts.²¹¹ In 1995, the NFL had offered telecasts of regular season NFL games shown by NBC and Fox to residential and commercial satellite dish owners.²¹² The class action plaintiffs alleged that the NFL teams agreed to: (1) fix the prices at which they would sell their broadcast rights through the satellite service and (2) restrict the output of the broadcasts of

210. Murdoch's Fox SportsNet has become the dominant force in local baseball broadcasting in the United States. See Araton, *supra* note 4, at 70. However, concerns regarding the potential for this type of behavior to dominate broadcasting of a single sport are not truly relevant to this Note's discussion.

What may pose greater concern is the threat of dominance by either Fox or ABC/ESPN when the (most profitable) NFL broadcasting rights come up for renewal. Although currently divided, there remains the potential that one group's failure to renew will open the door to more control for another. The only obstacles to such an objective in the NFL is the division of the sport into two conferences which require simultaneous telecast, and the fact that almost all the games are broadcast on one day. Further the cost up until now has been prohibitive for one company's acquisition of league-wide rights. However, in the wake of Murdoch's willingness to spend billions to guarantee control in England, the stakes apparently have been raised. A similar plot, by either Murdoch or one of his chief competitors, could eventually unfold in America as well. With all the major media entertainment companies presently owning professional teams, anti-competitive issues similar to the United takeover are clearly possible.

211. *Shaw v. Dallas Cowboys Football Club, Ltd.*, No. 97-CV-5184, 1998 U.S. Dist. LEXIS 9896, at *1-2 (E.D. Pa. June 19, 1998). Season Ticket telecasts essentially allowed viewers to select which games they desired to watch during the course of a regular NFL Sunday line-up, rather than rely on only those games selected for regional coverage. See *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *2-3.

212. See *id.* at *1-2. For the 1996-97 season, the subscription rates for the "NFL Sunday Ticket" service was \$119 per year for residential use (\$139 after July 31) and from \$399 to \$29,999 for commercial establishments. See *id.* at *2-3.

their games.²¹³ Although the district court noted that Congress had granted the NFL a broadcast antitrust exemption, television satellite transmission was not covered under that exemption because the technology did not exist at the time of the exemption's enactment.²¹⁴ In its defense, the NFL maintained that the SBA specifically provided that the conduct at issue was exempt from the antitrust laws.²¹⁵

The NFL also contended that although plaintiffs alleged that the League and its member clubs "conspired to fix, raise, stabilize, and maintain prices," there was no factual support for the allegation that any individual club played any role whatsoever in setting the price for the Season Ticket telecasts.²¹⁶ Although offerings similar to the Sunday Ticket promotion remain available today, the U.S. Court of Appeals for the Third Circuit Court recently held that the NFL's exemption from antitrust laws did not extend to satellite broadcasts.²¹⁷

The *Shaw* case illustrates not only the potential for anti-competitive activity under collective broadcasting arrangements but also the difficulty of addressing the increasing potential for anti-competitive activity in light of the corresponding increase in digital and satellite broadcasting technology. These difficulties were clearly present as well in the Sky/United transaction and may signal the need for significant statutory revision in this area in Great Britain.²¹⁸

2. Prime Ticket Networks v. Mighty Ducks Hockey Club

Several other cases have recently arisen involving anti-competitive practices in the broadcasting of American professional sports. A more localized dispute but one that implicated concerns similar to those explored by the MMC

213. See *id.* at *4-5.

214. See *id.* at *11.

215. See *id.* at *6-7. Under the terms of the Act, the antitrust laws do not apply to "any agreement . . . by which any league of clubs participating in professional football . . . contests, sells or otherwise transfers all or any part of the rights . . . in the sponsored telecasting" of football games. 15 U.S.C. § 1291 (1999).

216. *Shaw*, 1998 U.S. Dist. LEXIS 9896, at *13. The argument followed that because the NFL and not the individual member clubs licensed the telecasts for re-transmittal via satellite, there was no joint action between the League and its clubs to support the plaintiff's Section 1 claim under the Sherman Act (combination or conspiracy creating an unlawful restraint on trade). See *id.*

217. See *NFL Loses Appeal in Satellite Subscribers' Antitrust Suit*, 10 ANDREWS SPORTS & ENT. LIT. REP., Apr. 28, 1999, at 3, available in LEXIS 10 No. 12 ANSPENLR 3.

218. See *infra* note 161 (discussing changes made to British competition policy and procedure in order to recognize the growing concerns in sports/broadcasting mergers).

involved a conflict between a subsidiary of Murdoch's Fox Entertainment Group and the NHL franchise owned by Disney, one of Fox's principal U.S. rivals.²¹⁹ Plaintiff Prime Ticket (d/b/a Fox Sports West (FSW)) contended that Disney sought to prevent FSW from launching a second cable regional sports network—FSW2—through Disney's counter effort to use the Anaheim Angels and Mighty Ducks (both owned by Disney) as the foundation for its own competing regional sports network.²²⁰ FSW2 featured the Los Angeles Dodgers, the Ducks, and the NBA's Los Angeles Clippers.²²¹

FSW alleged that Disney clearly comprehended the difficulty of launching its own regional sports network, a difficulty that would be increased substantially if FSW2 achieved wide distribution and extended the Ducks' contract.²²² FSW thus claimed that Disney, ESPN, and the Ducks conspired with most cable operators, including those with the largest subscriber base in southern California not to carry FSW2 and thus destroy its viability.²²³ FSW asserted that Disney possessed tremendous programming leverage over cable operators because it owned ABC, ABC affiliates, ESPN, ESPN2, ESPN News, the Disney Channel and had interests in other networks (A&E, the History Channel, and Lifetime).²²⁴ Therefore, Disney was in a position to pressure, punish, or reward the cable operators for their compliance or non-compliance with Disney's anti-competitive gambit.²²⁵ FSW's suit alleged Sherman Act and Lanham Act violations, tortious interference with contract, and unfair competition. The suit was ultimately settled, and FSW2 is now being carried on most operators' systems in southern California.²²⁶

219. See *Prime Ticket Networks L.P. d/b/a Fox Sports West v. Mighty Ducks Hockey Club et al.*, 97-1158 (C.D. Cal. filed February 24, 1997), cited in Kathleen A. Marron & Agnes E.C. Brandon, *Consumer Complaints: An Overview of Antitrust, Predatory Pricing, Competitive Access, Mergers, Overbuilds, Unfair Competition and Other Consumer Trade Issues*, in *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, Cable Television Law 1998 Update: Competition in Video Franchising, Internet and Telephony*, available in LEXIS at 535 PLI/Pat 491, 546 (Practising Law Institute, Oct. 22-23, 1998); see also *West Prime Ticket v. Mighty Ducks*, AM. LAW., May 1997, at 76 (giving a preliminary analysis of the claims and circumstances of the case).

220. See *Prime Ticket Networks*, *supra* note 219. Prior to 1997, the Ducks and Los Angeles Clippers games were broadcast on FSW. See *id.* While FSW has four million cable subscribers, FSW2 has fewer than 500,000. See *id.*

221. See *id.*

222. See *id.*

223. See *id.*

224. See *id.*

225. See *id.*

226. See *id.*

While the FSW/Disney case did not involve precisely the same issues as those present in the United dispute, it clearly illustrates several problems that inevitably arise as a result of integrated sports and media ownership.²²⁷ Further, the alleged antitrust violations voiced by FSW occurred in a U.S. market that was already greatly diversified in terms of broadcast rights. The conflicts and potential anti-competitive practices that arose out of a media company's ownership of a professional sports team in such a small, localized incident bear out the more dangerous ramifications possible in a more condensed market that is subject to exclusive broadcast rights, as is the case with football broadcasting in Great Britain.²²⁸

3. Time Warner/Turner Broadcasting Merger

Perhaps the American corporate transaction with ramifications most factually similar to Murdoch's attempted takeover of United was the recent Time Warner/Turner Broadcasting merger, which left several professional sports franchises in the hands of the multi-media conglomerate.²²⁹ Following the merger, Time Warner not only possessed several Atlanta sports franchises but held at least partial rights to broadcast sports events involving those franchises and others.²³⁰ Unfortunately, the Federal Trade Commission's inquiry into the merger of the two media giants focused predominantly on the anti-competitive implications for the broadcasting market in general and did not delve deeply into the particular area of sports broadcasting.²³¹

227. Similar concerns, such as securing future broadcasting rights, restricting entry of new channel providers, and reducing competition in the cable market, were raised in the Sky-United transaction discussed *supra* notes 188-90 and accompanying text.

228. Similarly, even if Murdoch's plan to implement a pay-per-view system solely for United's matches limits the ability of Sky to dominate the entire market for football broadcasting, there remains the possibility that News Corp. may utilize its international clout to damage its competitors.

229. "In October 1996, Time Warner shareholders ratified the acquisition of Turner Broadcasting System, Inc. for \$7.5 billion in stock, creating the world's largest media empire. The combined company will generate more annual sales—\$18.7 billion last year—than the Disney-Capital Cities combination." Conrad, *supra* note 9, at 679-80.

230. "The assets include the following: HBO, Turner's Cable News Network (CNN), WTBS, Turner Network Television (TNT), and The Cartoon Network, a library of classic films, . . . three professional sports teams (the Atlanta Braves, the Atlanta Hawks, and . . . the Atlanta Thrashers), magazines (including People, Time, and Sports Illustrated), Warner Brothers motion picture studios, and Warner Music." *Id.* at 680.

231. See *supra* Part V.A.3. Perhaps the issue of media ownership of professional athletics teams was not as clearly pronounced in a merger of two giant media entities (Time Warner and Turner) as it was when one such entity sought to directly purchase a world renowned team individually (Sky and United).

As noted above, it is unlikely that a situation such as Murdoch's could arise in the United States, due to both the intense scrutiny of United States' antitrust law and the fierce competition between rival media enterprises, including Murdoch's Fox Network, for non-exclusive broadcast rights to the various professional sports leagues.²³² Thus, the ability of a media conglomerate in the United States to gain market power in the broadcasting of one sport while simultaneously possessing the most successful club within that sport's league is highly improbable. Yet, as illustrated throughout this Part, the continued absence of such an opportunity has not immunized the broadcast of American sports from other abuses of market power by a powerful entity that synergizes media carriage and sports content, such as Fox, Time Warner, or Disney.²³³

What may truly differentiate Murdoch's potential dominance of the sports broadcasting industry in England from similar situations in the United States are the international ramifications of such dominance. While U.S. sports do not typically enjoy a worldwide fan base, soccer, *calcio*, *voetbal*, *futbol*, or however else football is known, is truly the world's game, crossing the borders of nations, continents, races, and economies.²³⁴ As a result, the potential for abuse by one ascending to a position of power in football broadcasting is tremendous, especially in light of the current and ever increasing technological capability to broadcast live pay-per-view satellite coverage of sporting events across the globe. However, while the danger of such power appears overwhelming in the Murdoch scenario, other nations in Europe have not typically shared Great Britain's concern of the potential for dominance created by the nexus of sports and media ownership.²³⁵

232. See *supra* Part V.A. Many U.S. antitrust conflicts are initiated in adversarial proceedings, which offer different advantages and disadvantages from a government instituted investigation.

233. One television executive said, "It's a bigger empire than Disney. You wonder why the media moguls don't start taking over Third World countries." See Conrad, *supra* note 9, at 680.

234. The low cost of equipment and the cultural attachments to the game that have developed over the past 150 years have created somewhat of an international obsession with the sport. See Matthew Doman, *Fox Sports Unveils New Look*, HOLLYWOOD REP., Feb. 12, 1999, at 16; see also Robert J. Saiget, *100 Million Chinese Expected to Watch World Cup Match*, AGENCE FRANCE PRESSE, July 9, 1999, (International News). The World Cup, played every four years in different venues around the globe, most recently in France in 1998, is the most watched sporting event worldwide. See *Sunday Morning: Celebrating with the French* (CBS television broadcast, July 19, 1998).

235. See *infra* notes 258-60 and accompanying text.

B. *European Antitrust Conflicts and Controversies*

The European backdrop is useful both in analyzing the harm to the broadcasting and football markets that Sky's ownership of United might have caused and in providing insight into governmental means that might successfully mitigate this perceived danger in the future. Additionally, the rise of media ownership in other world-renowned European football clubs remains important in that it reflects the competitive environment with which Murdoch's enterprise, other British broadcasters, and all British football clubs must contend following Sky's unsuccessful bid to acquire United.

1. The Television Broadcasting Market in Europe

Due in part to EC law and in part to technological development, television services have rapidly expanded throughout Europe during the past twenty years.²³⁶ The dramatic rise in the number of television channels resulting from digitalization, conditional access, and pay-television technology has tremendously increased the amount of money invested and earned throughout the industry. This has directly led to a heightened competition for advertising.²³⁷ Many of the media enterprises born of this revolution, and currently generating tremendous advertising revenues, offer television channels devoted solely to sports coverage.²³⁸ As a result of this recent technological revolution, anti-competitive practices in the broadcasting industry are becoming more common and are coming under increasingly intense scrutiny.²³⁹

Although this recent growth has occurred throughout the European Community, regulation of media in Europe has remained largely national.²⁴⁰ However, within each nation, legislation has typically been broad, with a wide variety of enactments (1) to maintain State or regional public monopolies, (2) to ensure diversity of ownership and control, (3) to ensure political impartiality and local content, (4) to limit cross-media ownership, and (5) to oblige publicly-owned broadcasters to

236. See John Temple Lang, *Media, Multimedia, and European Community Antitrust Law*, 21 *FORDHAM INT'L L.J.* 1296, 1298 (1998).

237. See *id.*

238. See *id.*

239. See *id.*

240. See Lang, *supra* note 236, at 1297. "There is no European equivalent of the United States' Federal Communications Commission (FCC)." *Id.*

obtain a minimum proportion of their programs from sources outside the broadcasting corporation itself.²⁴¹

Despite this copious history of legislation, it is only recently that broadcasting has been truly recognized as a business in Europe, as it has long been viewed in the United States.²⁴² European television has traditionally been considered more of a service-oriented means of communication and entertainment than an actual business industry.²⁴³ This perspective, however, is clearly changing, as Europe has become more unified in its approach to competition and as European cable television providers have become more advanced in conditional access technology, which is essential for offering pay-television and pay-per-view systems and for competing in both the national and international markets.²⁴⁴

2. European Commission and British Decisions and Policy

Within this developing context, Sky itself has been involved in both EC and British decisions regarding anti-competitive broadcasting arrangements. In the EC context, the *Screensport-EBU* decision²⁴⁵ analyzed the Eurosport²⁴⁶ joint venture among Sky, News International, and a consortium of broadcasters that were members of the European Broadcasting Union.²⁴⁷ While such a venture would have provided much greater access to sports programs for the members of Eurosport, other commercial sports channels would have received much less favorable

241. *See id.*

242. *See id.* at 1299. Economically modern media includes content, carriage, and software, but those companies involved in the media industry are no longer clearly divisible into any one of these three categories. *See id.* The convergence of these categories itself leads to anti-competitive problems when a company that is dominant in one area makes use of or extends its dominance into the other area, especially through joint ventures with those that dominate a separate category. *See id.* This is exactly what is occurring in Sky's attempt to purchase United—it is carriage purchasing its own ongoing content!

243. *See id.*

244. *See id.* at 1297-98. However, as media has become more recognized as a type of business or industry in Europe, it has become increasingly difficult to define product markets by program content because of the dramatic increase in the number of specialized channels, due mainly to cable and digitalization. *See id.* at 1314-15. The result of this technological development is that narrower markets are created, especially for content providers and organizers of professional sporting events who generate the content for sports channels. *See id.* at 1315.

245. *See* Commission Decision No. 93/403/EEC, O.J.L. 179/23 (1993); *see also* Lang, *supra* note 236, at 1316.

246. Eurosport was the name of the joint venture among these entities to provide satellite coverage of a wide range of European sporting events across the Continent. *See* Commission Decision, *supra* note 245.

247. *See id.*

arrangements.²⁴⁸ The request for authorization of the joint venture was ultimately denied, as the European Commission found that Eurosport would have strengthened the negotiating position of its members but distorted competition in cable television in favor of Sky.²⁴⁹ This negative impact on competition clearly necessitated denial of authorization, as the adverse repercussions substantially outweighed the benefit of a new transnational sports channel.²⁵⁰

In a subsequent domestic controversy, an investigation by Great Britain's OFT found that Sky had created significant barriers to entry in the British markets for wholesale pay television, specifically in the markets for premium sports and movie channels.²⁵¹ In order to enter these markets, an aspiring competitor must have had in its arsenal: (1) quality programming rights, (2) transponder space on a satellite capable of reaching installed disk or aerial base, (3) encryption technology compatible with that base, and (4) a subscriber management system.²⁵² These were regarded by the OFT in its investigation as barriers to entry to the premium sports and movie channel market.²⁵³ In such a marketplace, a broadcaster could enter the market with a basic channel on a cable-exclusive basis, but the investment needed to acquire all the rights necessary for a viable premium channel was so large that access to the installed aerial base of U.K. subscribers to pay-television was essential.²⁵⁴ The limited supply of suitable analogue transponders was therefore found to be a serious barrier to entry.²⁵⁵

Although Sky is apparently no stranger to anti-competitive inquiries, this legal history was in no way determinative of the recent action taken to acquire United. Not only were Sky's prior anti-competitive entanglements irrelevant, but the MMC's decision on the United deal centered solely on the specific facts and circumstances present in that transaction and not on any EC or OFT precedent.²⁵⁶ However, these prior instances of conduct did indicate Murdoch's unwillingness to compete on a level

248. See Lang, *supra* note 236, at 1362.

249. See *id.*

250. See *id.* The anti-competitive effects were out of proportion to the benefit from setting up a transnational commercial satellite television channel dedicated to sports. See *id.* Moreover, Sky had already announced that regardless of the outcome it would broadcast sports extensively. See *id.*

251. See *id.* at 1319.

252. See *id.*

253. See *id.*

254. See *id.*

255. See *id.*

256. See *supra* Part IV.A. (indicating that all the issues analyzed by the MMC were domestic concerns).

playing field and the lengths to which he had gone to gain any advantage, whether competitive or anti-competitive.

While this past propensity on the part of Sky's majority shareholder did not exist as a legal factor for consideration, it may have served to inform the MMC's practical choice to recommend the outright prohibition of the merger. If the Commission had decided to let the deal go forward, the MMC would have been faced with the choice of subjecting the transaction to certain conditions or accepting undertakings by Sky and United not to engage in certain conduct, neither of which the Commission found to be a viable nor realistic alternative.²⁵⁷ Yet, although these EC and British conflicts involving Sky clearly raised anti-competitive concerns, the potential state of competition predicted to follow the United deal has been the subject of considerable controversy, especially in light of other European countries' apparently more permissive views in this area.

3. Continental Decisions and Policy

Throughout the European Continent, similar incidents involving sports broadcasting arrangements and media ownership of athletic teams have arisen. Apparently, however, the harmful effects perceived to result from such arrangements are considered much less severe on the Continent than in Great Britain.²⁵⁸

257. See Vivek Chaudhary, *Takeover Promises 'Stretched Credibility,'* GUARDIAN (London), July 9, 1999, at 31. Nicholas Finney, a member of the panel that investigated the Sky-United transaction who retired from the MMC several weeks after the Commission's recommendation was announced, reiterated the questionable workability of undertakings and concessions. See *id.* Finney stated, "[w]e didn't believe the undertakings, given the history of the league and football. They would not have been workable. It was stretching credibility to expect parties of this nature to adhere to them and completely abstain (from television negotiations). Probably it would have worked with a nod and wink; it might not have breached the undertakings but circumvented them." *Id.*

Secretary Byers' statements also reflected this concern: "[N]o undertaking along these lines could ever prevent informal flows of information, nor would it prevent Manchester United from influencing the rights negotiations in advance of the formal negotiations." *U.K. Government Blocks BSKyB Takeover of Manchester United*, *supra* note 26.

Sky and United had suggested a number of undertakings midway through the MMC investigation. See Chaudhary, *supra*. United had promised not to take part in any future negotiations, receive no information on potential bidders, and abstain on any vote taken on the issue. See *id.* Finney commented, "[w]e looked at the record of all the parties involved. Without criticising them we concluded that there was no realistic remedies we could find that would make them stick to the undertakings. It was not about being anti-Murdoch, it was more to do with the environment BSKyB was operating in." *Id.*

258. Many British commentators questioned the controversy in Great Britain in light of the lack of it in similar instances abroad, suggesting that the

While collective broadcasting deals have been and continue to be investigated,²⁵⁹ powerful media conglomerates in both France and Italy have long possessed significant ownership interests in professional athletic teams.²⁶⁰

Focusing first on the sports broadcasting industry in general, several cases brought before the French antitrust authority, *Le Conseil de la Concurrence (Conseil)*,²⁶¹ have raised competition issues involving the acquisition, sale, or sublicensing of broadcasting rights for sporting events. In France and generally throughout Europe, competition authorities have recognized that the ability to broadcast sports events, especially football, is essential to the success of general purpose commercial television stations. This is due in large part to the consistently large audiences such sporting events attract and also to the tremendous advertising revenues that inevitably follow.²⁶²

However, under French law and policy, three characteristics of the broadcasting rights to sporting events have been perceived as especially vulnerable to anti-competitive activity.²⁶³ First, the majority of broadcasting rights in France are acquired *exclusively*; second, most often these rights are *collectively sold* by leagues or federations for a certain number of games; and finally, the rights are usually *bought jointly* by a pool of television stations.²⁶⁴ Although the *Conseil* has considered competition problems relating to these arrangements, it has demonstrated an attitude of relative restraint in imposing restrictions on vertical integration of the broadcasters and the owners of broadcasting rights (often

MMC should implicitly acknowledge this lack of precedent as an indication that no anti-competitive repercussions will ensue from the takeover of a football club by a broadcasting entity. See *infra* notes 267 and 272 and accompanying text (discussing criticism of the MMC's decision as contrary to the clear continental acquiescence to this end).

259. The practice whereby broadcasting rights to sports events are centrally marketed or sold in exclusive bundled form by a league or association has been challenged by competition authorities in the Netherlands and Germany. See *Analysis: Regulating Sport of Europe's TV Channels*, *supra* note 135.

260. See *Came et al.*, *supra* note 4. These broadcasters, however, do not possess the worldwide status and financial support unique to Sky and News Corp.

261. The *Conseil* is entrusted with the responsibility of investigating and adjudicating cases involving business practices which have the goal or effect of restraining competition. See Frederic Jenny, *Media Under French Competition Law*, 21 *FORDHAM INT'L L.J.* 679, 696 (1998).

262. See *id.*

263. See *id.*

264. See *id.* The situation becomes even more complex and troublesome when the telecasts of international sports events are involved and international treaties and jurisdictional issues come into question. See *id.* at 696-97.

separate entities in France).²⁶⁵ As a result of this attitude, rarely has the exclusivity of broadcasting rights been challenged.²⁶⁶

While collective broadcasting arrangements have been thoroughly investigated in France, other aspects of the relationship of these two industries that have not been yet addressed by the *Conseil* leave French national policy in these areas much less clear.²⁶⁷

Typically, the controversy in France has focused on the collective behavior of members of pools acquiring broadcasting rights or on the collective behavior of the owners in selling or refusing to sell them.²⁶⁸ The issue in most of these cases has

265. *See id.* at 697.

266. *See id.* The *Conseil* and the Paris Court of Appeals generally tend to take a more lenient attitude towards vertical restrictions than does the European Commission. *See id.*

267. *See id.* at 698. One of the issues the *Conseil* has yet to consider is whether a media firm's acquisition of exclusive rights for a large number of sports events or its refusal to sublicense such a catalogue to competitors would in itself fall within the ambit of the Ordinance, the guiding principle of French competition law. *See id.* at 699. In a case involving a similar issue relating to French films, the Minister of Economic Affairs and the Minister of Culture, who together are responsible for the ultimate determination on media mergers in France, have allowed the purchase by the only pay-television operator of a firm owning the broadcast rights. *See id.* The subsequent alleged refusal of this pay-television operator to sublicense its broadcast rights to a pay-per-view television operator, however, has been challenged in front of the *Conseil* as an abuse of its dominant position. *See id.*

Additionally, the question of whether joint sales of broadcasting rights in athletic events constitutes a violation of French competition law remains open to debate. *See id.* In some European jurisdictions, such joint sales agreements are considered to be contrary to competition law. *See id.*

While such joint agreements may restrict competition among sports teams in the broadcasting market; the question remains, in a country like France (where anti-competitive practices that have efficiency enhancing properties can benefit from an exemption), whether the joint sales of broadcasting rights may qualify for such an exemption. *See id.* It is likely that joint sales of rights would allow a smaller team to raise more money than it could if it had to sell its rights solely by its own efforts. *See id.* at 699-700. Some have argued that this is a distributional effect that should not be taken into consideration by competition authorities. *See id.* at 700. Others believe that the fact that smaller teams may raise more money through joint sales of their rights than without such joint sales agreements cannot be reduced to a distributional issue. *See id.*

Substantial financial support is clearly necessary to allow teams to perform better, essentially by hiring better players. *See id.* Thus, a practice that allows smaller teams better access to more resources than they would otherwise have makes such teams better able to compete with others with greater means and results in more interesting games because teams are more balanced. *See id.* In other words, the joint sale of rights to a sports event by a federation of teams, to the extent that it allows smaller teams to increase the quality of their teams, changes the quality of the competition among the teams concerned and increases benefits to spectators. *See id.* Thus, the collective sale results in efficiency value. *See id.* Similar arguments were advanced in support of Sky's exclusive agreement to broadcast Premier League matches in the RPC.

268. *See id.*

been whether the established television stations with the largest audiences have engaged in concerted actions with broadcasting rights owners, using their combined market power to prevent new commercial television stations from gaining access on fair and non-discriminatory terms to broadcast rights for sports events and competing with the established stations. The *Conseil* has examined the operation of these purchasing pools of TV broadcast rights in several decisions.²⁶⁹

While most of the issues considered by the *Conseil* in these recent disputes have more bearing on the RPC case against the Premiership, some similar issues were raised in the United transaction.²⁷⁰ Further, the dangers posed by monopolistic abuse of market power are identical, regardless of whether such anti-competitive practices are committed by several competitors uniting or by one entity possessing market power on its own.

As to the specific integration of broadcasters and professional sports teams, however, the French government's implicit acceptance of pay-television channel Canal Plus's ownership of the French first division club Paris St. Germaine²⁷¹ indicates that France's view may be more open to the vertical integration of such entities.

The apparent acceptance of these vertical arrangements is not limited to France. In fact, just a few days prior to the British government's announcement of the prohibition of the Sky takeover, the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, a quasi-judicial body, concluded that it had no power to prevent television companies from taking over sport on the Continent.²⁷² Additionally, two of the most famous and successful football clubs in Europe are also currently owned by large media enterprises. Silvio Berlusconi, media magnate and

269. See *id.* These decisions resulted from complaints by a television station, La Cinq S.A., that it had experienced difficulties in obtaining broadcast rights for major sports or entertainment events due to anti-competitive practices by the French Football Federation (FFF) and by an association of formerly public television and radio stations, the Office de Radiodiffusion et de Television Francaise. See *id.* at 700-01. La Cinq was the first privately owned free terrestrial television station to obtain a state license when the state broadcasting monopoly was abolished in the early 1980s. See *id.* at 701 n.30.

270. See *supra* notes 38-41, and 73-77 and accompanying text. See *infra* notes 278-84. The outcomes of OFT case and the MMC's investigation are closely tied.

271. See *Came et al.*, *supra* note 4. Murdoch, in fact, recently entered into merger negotiations with Canal Plus.

272. See Rob Hughes, *Fans May Have Scored an Own Goal*, TIMES (London), Apr. 10, 1999, (Home News). The CAS attempts to spare sport the cost of international disputes. See *id.* The CAS is also expected to rule on whether the ban imposed by the UEFA, football's European governing body, on clubs with common ownership playing in the same European competition is fair. See *Media Moguls Left Waiting in the Wings*, *supra* note 162.

former Prime Minister of Italy, owns Media Set and A.C. Milan, the top Italian club throughout the 1980s.²⁷³ Dutch power and recent World Club Champion Ajax Amsterdam is owned by the Philips Electronic conglomerate.²⁷⁴ Accordingly, the nexus of ownership between media entities and athletic teams appears to be somewhat of a norm throughout Europe, thus raising the question as to why any controversy should exist at all as to Sky's attempted purchase of United.

While the above examples of media ownership among football's elite clubs may imply little cause for alarm in a Sky-owned United, these same examples may also serve to demonstrate the true harm that such vertical integration may impose on the sport in general. Paris St. Germaine, A.C. Milan, Ajax, and United are all perennial champions of their respective national leagues and as a result, regular competitors in intra-European competitions.²⁷⁵ The underlying inference suggested by the corporate alliances of these world football powers and international broadcasting groups is that only teams with such financial support and guaranteed media exposure are capable of attaining and maintaining such a level of success and profitability.²⁷⁶

The risk created by the continued tolerance of, or complicity with, such a scenario is that a football club that fails to attract a media patron dooms itself to mediocrity. Likewise, a media enterprise that is forced to rent the remaining sports programming content left behind following its competitors' acquisitions is essentially barred from entering or remaining in the market. These dangers are further heightened in both industries if the controlling media groups possess substantially all the broadcast rights to entire leagues as is now officially permitted in England following the RPC decision.²⁷⁷

273. See Came et al., *supra* note 4, at 58. Murdoch and Berlusconi are the driving forces behind a yet to be realized plan to create a European superleague featuring many of the top European clubs. See *id.*

274. See *id.*

275. Among the principle European competitions are: (1) the European Champion's Cup, featuring the champion of each nation's league; (2) the European Cup Winner's Cup, in which the winner of the open tournament in each country vies for a continental title; and (3) the UEFA Cup, which counts among its participants various powerhouse clubs who failed to top their domestic league.

276. See *infra* Part VI.C. (containing additional analysis of the competitive ramifications of media owners).

277. The European Union, however, has made evident its difficulties with such long-term exclusive, collectively negotiated arrangements. See *supra* note 135.

C. *Analysis of the MMC Decision in Light of Conflicting European Views*

Although the potential for dominance and conflicts of interest may not have fully manifested itself in the Continental sports leagues, perhaps the distinguishing factor that prompted the intervention of competition authorities in Great Britain was the danger that Sky, through Murdoch, was in a position to dictate the future of the sport of football throughout Great Britain.²⁷⁸

Already in possession of league-wide broadcasting rights and the technological and financial ability to maintain possession for the foreseeable future, Sky, through its attempted takeover of United, sounded an unmistakable warning to both the government and the public as to the high potential for abuse inherent in such a position.²⁷⁹ As a result of his strategic positioning, Murdoch had acquired the capability to control the path football broadcasting was to follow in England. Regardless of the outcome of the OFT's challenge to the Premier League's current pooling arrangement with Sky, Murdoch could have either (1) possessed a seat on both sides of the bargaining table for the next Premiership broadcasting deal or (2) gained the opportunity to initiate a pay-per-view approach with United that would virtually require other clubs to follow suit.²⁸⁰

Therefore, the factor that may distinguish the recent British decisions from the current Continental practice is the specific risk that the United transaction presented. Other European nations would likely agree that *no* broadcasting company should be able to purchase a dominant professional sports team when that broadcaster already possesses the exclusive rights to the league games in which the team plays. When such broadcasting rights have been distributed amongst various competing media entities, however, as they are in the United States, the same objections do not appear as legitimate.

Even if the present practice of collectively selling exclusive, rights were the distinguishing factor between the divergent British and Continental viewpoints, such a conclusion did not mandate the invalidation of the Premier League's current collective

278. Even if Sky were forced to make concessions or accept undertakings to be allowed to even out the imbalances created by its acquisition of United, it was unlikely that such concessions would last very long after the current Premier League contract runs out.

279. While actual abuse is not inevitable, there is an overwhelming likelihood that a business entity acquiring such great market power will take unfair advantage of it to at least maintain its current level of control and in all probability to continue to expand that control.

280. See *supra* notes 68 and 72 and accompanying text.

arrangement with Sky. The RPC found only that such exclusive, collective deals were *permissible*; it did not *require* that broadcasting rights be offered in that form. As a result, when Sky's contract with the Premier League expires, many separate entities will likely compete for *non-exclusive* rights. Under the resulting diversified broadcasting package split among several media entities, the dangers of collective dealing would be substantially diminished, and Sky would likely have been much more competitively justified in its purchase of United.

If Murdoch had allowed this scenario to play itself out, he might have been able to essentially exchange his exclusive right to broadcast the Premier League matches for a non-exclusive share of the rights, plus the added acquisition of United. However, in his eagerness to protect his own interests from an adverse RPC decision, Murdoch may have set an unfortunate precedent by attempting to buy United too early and under circumstances that forced the British antitrust authorities to block the deal. In a non-exclusive scenario, the MMC might still have found conflict between a Sky-United merger and the public interest, but the anti-competitive advantage Sky would have gained would have been much less blatant, and Sky's market power might have been sufficiently diminished to allay such concerns and permit the takeover to occur. As a result, Murdoch may have damaged English football and his substantial investment in it for years to come by effectively setting the British competition policy against the concept of media ownership of athletic teams. Meanwhile, the rest of Europe reaps the (substantial, yet potentially dangerous) rewards of such integration.

To further develop this point, it is instructive to look at Murdoch's recent attempt to enter the football broadcasting market in Italy. Apparently unfazed by the government investigation of his attempted takeover of United, Murdoch undertook a similar broadcasting strategy for top division Italian League (Serie A) football.²⁸¹ Although Telepiu, a unit of France's Canal Plus, had reached individual deals with a series of top Italian clubs, including Serie A champion Juventus, Murdoch's attempt to gain a broadcasting foothold in the Italian football

281. See *News Corp. in the Run for Italian Soccer Rights: Italy to Limit Ownership*, FIN. POST, Jan. 27, 1999, at C15. Murdoch and News Corp. are apparently taking the stance that the MMC will be unable to stop them from developing a worldwide monopoly on football broadcasting regardless of the outcome in the United investigation. See *id.* They are essentially sending the message to the MMC that resistance is futile.

While many predicted that the MMC will concede to Sky and that the United deal will be allowed to go forward, few expected the takeover bid would be referred by the OFT and Secretary in the first place. See *id.*

market was met with opposition similar to that voiced in Great Britain.²⁸²

The Italian government's ruling coalition took action to curtail Murdoch's relentless pursuit of market power by limiting ownership of soccer pay-television rights by any one broadcaster to sixty percent of the total league rights.²⁸³ Such tactics came under fire by News Corp., which argued that European experience has shown that it is best to sell soccer rights exclusively to boost the product's value and benefit the consumer and the smaller teams.²⁸⁴ Nevertheless, the Italian strategy might also have been a successful alternative in Great Britain as a means of reducing the risks of dominance of the total league market by Sky, even as the owner of United.

Judging from the European Continental experience as a whole, it is clear that at least some means have been discovered to protect competition and the public interest, within the developing context of media ownership of sports teams. However, whether these alternative strategies would be the best approach in England or would achieve successful results worldwide remains open to great debate.

VI. REACHING THE RIGHT CONCLUSION

Even if one accepts the conventional capitalist theory that an unrestricted market can be relied upon to provide consumers with the best possible services at the most competitive price, it is clear that concerted anti-competitive practices can distort these beneficial effects. When business entities possessing substantial market power in particularized but related industries merge, questions immediately arise concerning the potential harm resulting from an unification to competition in those industries and to the public interest in general.

In the market for the professional sports broadcasting, specifically football, the British government's two recent inquiries were both attempts to resolve the dilemma posed by the increasing integration of the sports and broadcasting industries. In the process of determining how much, if any, government intervention is necessary to maintain a state of free competition, the MMC and RPC together have established parameters for the future integration of broadcasting and professional sports in Great Britain and have offered reason to reconsider such

282. *See id.*

283. *See id.*

284. *See id.*; *see also infra* note 295 and accompanying text.

integration throughout the rest of the world.²⁸⁵ However, in order to identify these parameters and estimate the worldwide impact of the MMC's recommendation, one must first examine the RPC's decision in the OFT case brought against the Premiership.²⁸⁶

A. *The OFT's Case Against the Premiership*

Both the OFT case before the RPC and the MMC's investigation of the United takeover were means to the common end of ensuring free competition and protecting the public interest. Yet, the arguments advanced in favor of intervention in each dispute appear to be countervailing.

In arguing before the RPC, the Director General of the OFT contended that the Premier League and its broadcasters were acting as a cartel and were responsible for inflating costs and prices.²⁸⁷ The OFT asserted that the resulting arrangement "put Sky in a position of dominance in the supply of sports channels in the United Kingdom and inhibited competition in the pay-television market, in which premium sports programming is the primary attraction."²⁸⁸ As a result, the OFT argued, many football fans find it impossible to get a ticket to a sold out stadium and are additionally unable to follow their team regularly on television.²⁸⁹

285. In the European context, a paper from the EC in September of 1998 set forth that sales of television rights and sponsorship accounted for 65-85% of the funding of sports events and have become the primary source of financing professional sports in Europe. *See Analysis: Regulating Sport of Europe's TV Channels*, *supra* note 135. However, the European Union is still debating whether the monopolistic practice of broadcasters owning the television rights and exploiting them through their own networks is compatible with EU competition policy. *See id.*

286. *See infra* Part IV.C. However, as the RPC did not decide the OFT's case until after the completion of the MMC's investigation, the MMC was forced to evaluate all possible outcomes of the OFT case. As a result, the MMC's recommendation addresses various scenarios and cannot be limited merely to the circumstances in which collective broadcasting arrangements are permissible. *See id.*

287. *See supra* notes 38-40 and accompanying text; *see also* Jonathan Miller, *Media: Pay Up, Pay Up and Play the Game: The Battle for Broadcasting Rights to Football is in Full Pitch*, INDEPENDENT (London), Feb. 23, 1999, at 12.

288. Miller, *supra* note 287, at 12.

289. *See id.*; *see also* Araton, *supra* note 4. Only 60 of the 380 Premiership games are broadcast live on Sky, and highlights of only three are available on the BBC's match of the day. *See* Miller, *supra* note 287, at 12. Yet, this inaccessibility is not due to lack of coverage. *See id.* In fact, although cameras are recording the action at all of the Premier League matches, viewers are not allowed to watch. *See id.* Instead, while Great Britain's top grounds are 94% full on a typical Saturday (with waiting lists for years for tickets), most fans must resort to watching Sky Sports Centre, in which sports journalists watch games on closed circuit and describe the action to viewers who are not allowed to see for themselves. *See id.*

The Premier League countered that the current arrangement was best for the viewers and fans, and that there was little opportunity for variation. It was the League's claim that any more football would destabilize the competition of the Premiership, virtually destroying weaker and small market clubs and strengthening the top teams to the point where they could not be seriously challenged.²⁹⁰

Under the current four-year, £743 million contract, Sky pays £670 million for the right to broadcast sixty games live with some highlights; the BBC pays £73 million for the rights to broadcast highlights solely.²⁹¹ The OFT's case was that more games could be shown on more platforms by more broadcasters.²⁹² There could be substantially more regional choice and in particular, games could be made available on a pay-per-view basis to fans who would otherwise have no opportunity to watch their favorite team.²⁹³ In effect, the OFT argued that an additional electronic, digital TV turnstile could be created at every Premier ground, through a pay-per-view system and that the public interest was deprived of such a benefit by the current League-wide agreement.²⁹⁴

Ironically, those presenting arguments to the MMC for the protection of football fans and competition have voiced almost opposite arguments in protest of Sky's acquisition of United. If Sky had taken control of United, it was argued, the broadcaster could have essentially forced the development of televised sports into an individualized pay-per-view format in which many small market teams would be cut out of the market as media giants buy out all the top clubs. Further, fans would be forced to pay an additional premium in order to view the team of their choice, and with no terrestrial option to choose from, fans' ultimate selection would still be dictated by what multiple broadcasters were inclined to offer.

B. *Pay-Per-View—The Future of Sports Broadcasting?*

Underlying the arguments presented to both the MMC and the RPC in these recent proceedings was a pervasive uneasiness surrounding the implementation of pay-per-view and digital/satellite television in the sports broadcasting industry.

290. See *id.* Thus, the League maintained that only through the collective selling of rights and the benevolent distribution of the proceeds by the league itself could the clubs and the sporting competition be sustained. See *id.*

291. See *supra* notes 30, 33 and 41.

292. See Miller, *supra* note 287, at 12.

293. See *id.*

294. See *id.*

There was little doubt in anyone's mind that Sky's acquisition of United would hasten the onset of some form of pay-per-view offering. For the MMC investigation especially, the onset of pay-per-view implicit in Sky's purchase of United dictated the competitive environment that would remain in the football broadcasting industry following a successful takeover.

Not only was pay-per-view argued to clearly affect competition in the market, it was also believed to have a substantial impact on the public interest as well.²⁹⁵ For many fans who do not or cannot travel to away games or for those who live far from the clubs they support, a pay-per-view system could be highly attractive. However, skeptics believe that in the absence of exclusive coverage of live games on terrestrial television, fans will never benefit from pay-per-view because they are the weak corner in the club-broadcaster-supporter triangle and have no hope of improving their bargaining position.²⁹⁶ Sky, however, responds that due to its more lively and exciting broadcasting approach, crowds at Premiership matches have gone up thirty percent since Sky won the rights.²⁹⁷

The theories as to the impact of pay-per-view presented before the MMC and RPC are apparently divergent (the OFT promoting the idea to the RPC as a means of benefiting competition and the public interest and the protesters' criticizing pay-per-view as detrimental to those interests). Yet the underlying rationale of both arguments was essentially the same. While pay-per-view may or may not be the optimal broadcasting arrangement for football in England, both sides agreed that the choice to move towards such an arrangement must be the result of an open market development and not merely the handiwork of market insiders seeking to create significant barriers to entry and control the development of the industry themselves. Regardless of the relative merits or demerits of pay-per-view, neither Sky nor any other broadcaster can be allowed to use market power in sports available through vertical integration with a dominant club, such as United, to gain and retain control over the

295. Moreover, while Sky has been tremendously successful in its marketing and packaging of the sport for television, the effects of a movement into pay-per-view might also have a significant impact at the gate by increasing the amount of media control over the sport in general. *See* Curtis, *supra* note 70, at 6.

"Sky packages football brilliantly and has brought a whole new dimension to the game, but they over-hype to a shocking degree, which can be a shock to the system when you go to a game and realise it is not as thrilling in the flesh as it seems on TV." *Id.* The Sky broadcasts even add crowd noise when an insufficient amount exists at the live matches. *See id.* "If the United deal goes through, expect more media control and ownership over the game and increased use of these tricks to bring viewers in." *Id.*

296. *See id.*

297. *See id.*

development of the sports broadcasting market. In other words, the problem was not with the notion of pay-per-view itself but with the ability of Sky, had it successfully acquired United, to dictate the terms of the development of pay-per-view broadcasting and to dominate the market once pay-per-view is initiated.

Therefore, while the debate over the best form of football broadcasting remains unresolved, it is clear that Sky's successful acquisition of United would have provided an ability to force the issue. This ability itself was cause for concern, considering the fact that Sky both financially and technologically was uniquely placed to benefit from an immediate move into satellite pay-per-view broadcasting. By gaining a seat at both sides of the negotiating table, Murdoch could have had his way with or without the support of the nineteen other teams. Those teams that might have declined to sign on with Sky's pay-per-view offering would have been forced into licensing or acquisition deals with other broadcasters in an effort to keep pace with United.

C. *Impact on the Sport Itself*

It should be readily apparent that an evaluation of the effects of Sky's attempted takeover of United is incomplete when limited to an analysis of the sports broadcasting industry. Additional anti-competitive concerns extend directly to the competition of Premiership clubs on the field and to the sport of football in general. Since the 1995 *Bosman* case,²⁹⁸ in which it was established that all European football players were free agents and thus unrestricted by nationality requirements, clubs have been forced to make massive commitments to player wages. The resulting profit margins are so slight and the commitments so large and long-term that finding a means of recouping such costs has quickly become a primary concern for all clubs.²⁹⁹ Submitting to media-sponsored buy-outs is an inviting solution, in that typically a reservoir of wealth is sufficiently available to ensure that the new owner's programming content is and will remain of the highest quality.

298. For an extensive review of the ramifications of the *Bosman* decision, see generally Rachel B. Arnedt, Comment: *European Union Law in Football Nationality Restrictions: The Economics and Politics of the Bosman Decision*, 12 EMORY INT'L L. REV. 1091 (1998). Essentially, the *Bosman* case ended the practice of restricting teams in a nation's top league from utilizing more than three foreigners out of eleven players on the field at any given time. See *id.* at 1104. The theory was that such a restriction would allow nation's to develop their own talented players for use in international competition and not become dependent on a few foreigners for success. See *id.* at 1010-11

299. See Miller, *supra* note 287, at 6.

If Sky had been allowed to gain control of United, it was virtually certain that a chain reaction of acquisitions of other major British clubs, such as Arsenal and Newcastle, by Sky's British broadcasting rivals would have quickly followed.³⁰⁰ As a natural consequence of such a development, the smaller market clubs would be unable to find bidders for ownership and would be forced either to unite with similarly situated clubs or succumb to a less adequate offer by a major pay-per-view broadcaster. An additional dilemma arising out of either of these arrangements would be that the ownership rights to several clubs' matches (or to the clubs themselves) might be held under one umbrella entertainment group, thereby creating numerous and substantial conflicts of interest.³⁰¹

Furthermore, with the continuing integration of the European Community, those smaller clubs unable to find a media patron in their own nation might seek the support of foreign broadcasting entities.³⁰² On the other hand, the advent of a new European super-league,³⁰³ as recently proposed, would likely relegate all but the richest clubs to subordinate status. Such a development would pervert the typical sports competition framework into one where media coverage and financial prosperity create on-the-field success rather than on-the-field success creating financial prosperity and media coverage. In such a scenario, even major domestic clubs could be left out without media dollars or other currency backing their performance on the field and over the airwaves.

300. See *supra* notes 53-54 and accompanying text. It is not at all surprising that of the six submissions received by the MMC in favor of the bid (versus thousands which objected to it, including the British Football Association itself), all six were from very strong Premier League clubs (Arsenal, Aston Villa, Leeds, Newcastle, Tottenham, and Southampton). See Mihir Bose, *Media Groups Continue Will to Woo Clubs*, DAILY TELEGRAPH, Apr. 10, 1999, at 8.

301. The Premier League has attempted to address some of these potential conflicts by mandating that no business entity (broadcasting or otherwise) may own a 10% stake in more than one Premier League club. See John Cassy & Julia Finch, *BSkyB Linked to Premiership Buying Spree*, GUARDIAN (London), Aug. 11, 1999, at 12; see also Mihir Bose, *Murdoch Sets His Sights on Leeds*, DAILY TELEGRAPH, Aug. 11, 1999, at 38. Interestingly, this rule has spawned another strategy by Murdoch to protect and augment Sky's ability to acquire future Premier League rights. See Bose, *supra*. Sky has undertaken to purchase less than 10% interests in several Premier League clubs, such as Leeds United. See *id.* While Sky would then be forced to sell off the excess of its current 14% stake in United, Murdoch apparently feels this approach will benefit Sky in the securing of future football broadcasting rights. See *id.* Unfortunately, the ultimate ramifications of this strategy will only be discernable at some point following the publication of this Note.

302. See *supra* notes 155-56 (discussing legal ramifications of such a foreign purchase of a British football club).

303. See *supra* note 67.

D. *The American Approach*

Perhaps the future of European sports broadcasting may be found in the American system that "in spite of its entrepreneurial nature has followed an egalitarian line."³⁰⁴ All American NFL football games, except one Sunday night game, are shown free on terrestrial television and are funded by exorbitant advertising slots.³⁰⁵ Television rights and merchandizing income account for about \$2-2.5 billion a year, which is shared equally among the NFL's thirty-one teams, allowing such small market franchises as Green Bay and Pittsburgh to thrive.³⁰⁶ The objective of such a system is to make any team capable of winning on any given Sunday, which preserves American football's position as the country's leading fan sport and simultaneously creates a disincentive for any one broadcaster to try to dominate the market.

This system seems to offer the best of both worlds—it protects smaller market clubs from having to compete with more popular and better financed rivals for individual broadcasting arrangements while at the same time dividing the rights among various media groups and preventing the accumulation of market power in any one broadcaster. While the current British approach could not be easily adapted to the U.S. system that also includes a yearly draft of college players to encourage greater parity of talent, a more protected free competition arrangement might eventually be viewed as feasible. This is especially true if English clubs begin to suffer on and off the field defeat at the hands of Continental rivals. However, even under the U.S. system, permitting the most powerful sports broadcaster in the country to gain control of the most powerful team in the country's top league would likely give that combined entity extraordinary control over the state of competition in both the sports and broadcasting industries.

E. *Ultimate Effects of the MMC's Recommendation*

In conclusion, the narrowest interpretation of the British government's decision to prohibit British Sky Broadcasting from purchasing Manchester United is that Sky cannot buy United. Under the specific factual circumstances, this was clearly the right decision. The fact that the subsequently proposed NTL-

304. Curtis, *supra* note 70, at 6.

305. See *supra* note 15 and accompanying text.

306. See Curtis, *supra* note 70, at 6 (now 31 teams with the addition of the Cleveland Browns).

Newcastle merger was referred to the newly created Competition Commission and the fact that the Department of Trade and Industry has recommended keeping a watchful eye on the broadcasting industry's interrelations with the sport of football further suggest that the MMC's Sky-United determination may be extended to prevent *any* British media entity from purchasing a British football team. In light of the more permissive Continental approach, however, it is much less clear that such a conclusion is the only right approach.

Additionally, as the MMC's recommendation to prohibit the United takeover cuts against this recent European acquiescence to such vertical integration of media and sports entities (of carriage and content), it remains unclear what the best approach is to resolve this dilemma on a European and global scale. Some would argue that the convergence of sports and media is inevitable and should be controlled but cautiously encouraged, if for no other reason than to keep pace with those who have already accepted it. Others contend that the inherent necessity of an even playing field as a prerequisite to the continued vitality and success of professional sports mandates that mega-media conglomerates stay on the sidelines and out of the owner's boxes. Still others suggest that these same media companies, the supposed enemies of sport, have been the reason for the phenomenal success of professional athletics—such proponents of integration espouse curtailing government intervention and allowing the market (based on this initial success) to ultimately decide who should own what.³⁰⁷ One thing is certain, however—there are many more professional sports teams than there are broadcasters willing to purchase them. It is thus extremely difficult to imagine a situation in which those teams owned by broadcasters would not have a substantial advantage over all others, and a situation in which those broadcaster/owners would not dominate the market for sports broadcasting.

Finally, even if the alleged anti-competitive implications of media ownership of professional sports teams are unfounded (or, if legitimate, can be mitigated), there still remains the issue of whether such vertical integration is detrimental to the public interest. Throughout this analysis of the recent trend of integration of the media and sports industries, the underlying

307. A writer for the Murdoch-owned *The Times* of London claimed that the government's decision to block the United deal "leaves English football dangerously isolated in Europe." Hughes, *supra* note 272. "What now has to be decided is where government intervention, leading to government control, takes British sport. The monopoly situation that many feared is still a threat, no matter who is the paymaster. A monopoly by government, itself a transient thing dependent on votes through popularity, cannot be the future." *Id.*

issue and ultimate legalism has been this concept of the public interest. While (1) price and accessibility to consumers, (2) effect on the sport as a whole, (3) impact on the negotiations and agreements between teams, leagues, and broadcasters, and (4) popular opinion have all been cited both in favor of and against the public interest, the notion remains vague and perpetually malleable by political opportunism.

F. *United Consideration as a Solution*

Regardless of whether the public outcry over the merger of sports and media is found to be an irrational and untenable reaction to the inevitable commercialization of sport or a legitimate concern for the abuse of market power destroying competition, the ultimate objective is to guide the development of the sports and media industries towards a prosperous and beneficial future for all involved—the owners, players, broadcasters, and fans. Although many European countries have implicitly acquiesced to this potentially anti-competitive integration and the U.S. market may possess inherent restraints sufficient to prevent the full manifestation of its accompanying anti-competitive effects, the issue had never received formal consideration until the MMC's investigation.

The decision of the British antitrust authorities to halt a \$1 billion takeover bid provided enough publicity and created enough intelligent debate to ensure that a carefully thought out resolution was reached. Although the method of analysis required is necessarily case-specific, and as the adage goes, "bad facts often make bad law," the OFT's suggestion and the Secretary's agreement to refer the matter to the MMC appears to have been a prudent choice. As discussed in this Note, the anti-competitive implications of the merger had the clear potential to cause irreparable damage to both industries if left unchecked. A proper investigation was necessary to determine the likelihood of such adverse consequences occurring and to explore the actual effect on the public interest, however that concept is interpreted.³⁰⁸

All in all, the diverse array of domestic, international, political, and economic issues and implications inherent in the merger of media and sports were clearly recognized and evaluated in the MMC's investigation. Both the formal mechanisms and informal solicitation of opinion established by the MMC

308. For discussion of the varying interpretations of the public interest, see *supra* note 111. For description of the difficulties establishing the scope of the market under consideration, see *supra* notes 242 and 244.

throughout the course of its investigation went a long way towards easing public concern and developing intelligent debate. Although the MMC recommended that the British Sky Broadcasting-Manchester United merger be prohibited, it will only be through the united consideration of the diverse array of issues presented by any future transaction involving sports and media that the true competition in sports will continue to be determined by “the round ball” and not “the square box.”³⁰⁹

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309. Curtis, *supra* note 70, at 6.

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