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American Needle's Progeny? Tennis and Antitrust

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American Needle's Progeny? Tennis and Antitrust

Abstract

Decided in the shadow of the U.S. Supreme Court's May 2010 decision in *American Needle v. NFL*, Ryan M. Rodenberg and Daniel Hauptman analyze *Deutscher Tennis Bund v. ATP World Tour* (hereinafter *DTB v. ATP*) and aim to explain its implications for individual sports (e.g. tennis and golf) and sport governance generally. Treatment is afforded to both the District Court's jury verdict and the Third Circuit's appellate decision in *DTB v. ATP*. Despite being the first federal appellate sports antitrust decision rendered following *American Needle*, this article concludes that *DTB v. ATP* should not be considered an offspring of *American Needle*. More specifically, this article posits that the: (i) Third Circuit correctly applied relevant antitrust precedent in upholding the governing body's unilateral decision to demote the German-based tournament to second-tier status as part of the ATP's overall administration of men's professional tennis globally; (ii) case would have been decided the same way notwithstanding *American Needle*; and (iii) *DTB v. ATP* holding is consistent with the Supreme Court's ruling in *American Needle*. Part II of this paper will provide background information on the ATP as well as the Sherman Act. Part III will discuss both court rulings – the jury trial in the District Court and the Third Circuit's affirming opinion – in which the ATP prevailed. Next, Part IV will analyze the pivotal legal issue that ultimately led the case to be decided in favor of the defendants, as well as provisionally explore how this dispute may have been decided under EU competition laws. Finally, Part V will conclude by examining how this vital antitrust ruling has affected the Hamburg tennis tournament and the ATP.

Keywords

antitrust, sports

Cover Page Footnote

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American Needle's Progeny? Tennis and Antitrust

Ryan M. Rodenberg* and Daniel Hauptman**

I. Introduction

In the summer of 2008, the ATP World Tour (“ATP”), the governing body of men’s professional tennis worldwide, was a defendant in a soon-to-be-heard antitrust lawsuit filed by one of its constituent tournaments that was being billed as a case that would decide “[n]ot just the future of men’s tennis, but perhaps the governance of all non-team sports.”¹ More specifically, the case was positioned as one that could “determine just how far a rule-making body can go in setting tournament schedules, compelling players to compete in certain events, establishing a ranking system, and awarding sanctions.”² The lawsuit was brought by a trio of plaintiffs: (i) Deutscher Tennis Bund, the German tennis federation; (ii) Rothenbaum Sports GMBH, a sports marketing firm from Germany that promoted the tournament; and (iii) Qatar Tennis Federation, the Middle East nation’s tennis governing body that owned and operated the long-running annual men’s professional tennis event in Hamburg, Germany. The genesis of the lawsuit was the ATP’s 2007 move to streamline its tournament calendar as part of its “Brave New World” promotional campaign. Part of the contraction involved downgrading the Hamburg tournament to second-tier status and moving it from a desirable May date to a post-Wimbledon July placement on the ATP’s calendar of events. This shift allegedly created a severe hardship

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¹ Daniel Kaplan, *ATP Lawsuit Could Remake Non-Team Sports*, SPORTS BUS. DAILY (July 7, 2008), <http://www.sportsbusinessdaily.com/Journal/Issues/2008/07/20080707/This-Weeks-News/ATP-Lawsuit-Could-Remake-Non-Team-Sports.aspx>.

² *Id.*

for the organizers of the clay-court tournament, as prior to the change, the Hamburg event was strategically held before the French Open. In addition, given the ATP's ranking point and prize money classification system for tournaments, the demotion downgraded the tournament from a prestigious "Masters 1000" tournament to a lesser "ATP 500" event.

The owners and promoters of the Hamburg tournament, frustrated and purportedly damaged by the demotion, filed a federal lawsuit in Delaware against the ATP and several individual board members.³ The complaint against the ATP alleged a number of antitrust law violations under the Sherman Act.⁴ Fiduciary duty violations were the basis of the allegations levied against certain board members of the tour.⁵ The plaintiffs' anti-competitive claim was largely based on the Sherman Antitrust Act of 1890. The Sherman Act section 1 claim contended that the ATP "conspired and combined to control the supply of top men's professional tennis players' services..."⁶ The complaint's Sherman Act section 2 claim alleged "monopolization, attempt to monopolize, and conspiracy to monopolize the market for men's professional tennis players' services."⁷

Decided in the shadow of the U.S. Supreme Court's May 2010 decision in *American Needle v. NFL*, (hereinafter "*American Needle*"),⁸ this article analyzes *Deutscher Tennis Bund v. ATP World Tour* (hereinafter "*DTB v. ATP*") and aims to explain its implications for individual sports (e.g. tennis and golf) and sport governance generally. Treatment is afforded to both the District Court's jury verdict and the Third Circuit's appellate decision in *DTB v. ATP*. Despite being the first federal appellate sports antitrust decision rendered following *American Needle*,

³ *Id.* See also Michael Brick, *Lawyers for a Tournament Promoter Accuse the ATP of Manipulating Top Players*, N.Y. TIMES (July 22, 2008), http://www.nytimes.com/2008/07/22/sports/tennis/22tennis.html?_r=1&ref=sports&oref=slogin.

⁴ *Deutscher Tennis Bund v. ATP Tour, Inc.*, CIV A 07-178, 2009 WL 3367041 (D. Del. Oct. 19, 2009).

⁵ *Id.* at 1.

⁶ *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 827 (3rd Cir. 2010) [hereinafter *DTB v. ATP*].

⁷ *Id.*

⁸ *Am. Needle v. Nat'l Football League, et al*, 130 S.Ct. 2201 (2010) [hereinafter *Am. Needle*].

this article concludes that *DTB v. ATP* should not be considered an offspring of *American Needle*. More specifically, this article posits that the: (i) Third Circuit correctly applied relevant antitrust precedent in upholding the governing body's unilateral decision to demote the German-based tournament to second-tier status as part of the ATP's overall administration of men's professional tennis globally; (ii) case would have been decided the same way notwithstanding *American Needle*; and (iii) *DTB v. ATP* holding is consistent with the Supreme Court's ruling in *American Needle*. Part II of this paper will provide background information on the ATP as well as the Sherman Act. Part III will discuss both court rulings – the jury trial in the District Court and the Third Circuit's affirming opinion – in which the ATP prevailed. Next, Part IV will analyze the pivotal legal issue that ultimately led the case to be decided in favor of the defendants, as well as provisionally explore how this dispute may have been decided under EU competition laws. Finally, Part V will conclude by examining how this vital antitrust ruling has affected the Hamburg tennis tournament and the ATP.

II. Background

A. The ATP World Tour and the Hamburg Downgrade

At the time of the litigation, the ATP had a membership consisting of over 400 professional tennis players and 61 tournaments.⁹ The tour's implementation of the "Brave New World" campaign involved branding the most prominent tournaments under the "Masters 1000" label, the designation the Hamburg tournament enjoyed prior to its demotion. In addition to the Masters 1000 tournaments, there are a handful of middle-tier "ATP 500" events and several

⁹ *DTB v. ATP*, 610 F.3d at 825.

dozen bottom-tier “ATP 250” tournaments.”¹⁰ The number of “ATP ranking points determine each player’s world ranking ... [and] player rankings are important because they govern entry into and seeding in the Grand Slams as well as ATP top-tier tournaments.”¹¹ The ATP’s apparent objective in designing the “Brave New World” plan was to increase the appeal and value of “Masters 1000” top-tier events by requiring the elite players to enter. Accordingly, the ATP amended its “rules so that qualifying players were required, under threat of sanctions – suspension, loss of ranking, and loss of ability to earn ranking points – to play all Tier I events, at least four Tier II events, and at least two Tier III events.”¹²

Since the top eligible players are not required to participate in tournaments worth 500 and 250 ranking points, such lower-tier events often must entice noteworthy players with appearance fees or guaranteed payments in addition to whatever prize money the tournament offers. This added cost is noteworthy in this case because the annual clay-court tournament in Hamburg, Germany was considered a top-tier event from 1990 until its demotion to “ATP 500” status beginning in 2009. As part of its “Brave New World” plan, the ATP kept the overall number of Tier I events at nine, replacing the Hamburg event with a tournament in Shanghai, China. In addition, the number of Tier II tournaments increased from nine to eleven, which includes an event in Monte Carlo that has a hybrid status – it awards 1,000 ranking points but is not a mandatory tournament – following a settlement between the tournament and the ATP.¹³

The ATP justified its power to rearrange its tournament schedule by citing its duly-authorized board of directors’ right to make sound business decision in response to dynamic

¹⁰ *Id.* at 826. The numeric designations refer to the amount of ranking points available to players in each tournament.

¹¹ *Id.* at 825.

¹² *Id.* at 826.

¹³ *Id.* at 826-827. See also Neil Harman, *ATP’s Power is Under Threat from Lawsuit*, THE TIMES (UK), July 21, 2008.

market demands. As highlighted by the Third Circuit in its opinion, such right is memorialized in the ATP's Bylaws, which "give the ATP Board discretion over the Tour's format."¹⁴ Furthermore, the ATP offered evidence that the parties to the litigation have actually entered into an agreement whereby the plaintiffs acknowledged the ATP Board's authority to make scheduling decisions unilaterally. In this way, the ATP World Tour contended that it used its discretion to downgrade the Hamburg tournament second-tier status because of its lack of significant investment, a decrease in attendance, unfavorable weather, and the decline of interest in tennis in Germany.¹⁵

B. Sections 1 and 2 of the Sherman Act

The Sherman Act was the first federal statute aimed at regulating cartels and prohibiting abusive monopolies.¹⁶ As applied to professional sports, "courts have historically subjected sports leagues to antitrust scrutiny under section 1 of the Sherman Act."¹⁷ In *DTB v. ATP*, the plaintiffs claimed that the ATP violated section 1. In relevant part, section 1 states: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹⁸ This section targets specific categories of restraints, such as market allocation agreements among competitors and horizontal price-fixing, which are presumed to be unreasonable because they have a pernicious effect on competition.¹⁹

¹⁴ *Id.* at 825.

¹⁵ *Id.* at 827.

¹⁶ See *Antitrust Laws And You*, UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/atr/about/antitrust-laws.html> (last visited Mar. 25, 2012) [hereinafter U.S. Department of Justice].

¹⁷ *DTB v. ATP*, 610 F.3d at 836.

¹⁸ Sherman Act, 15 U.S.C. § 1 (2012).

¹⁹ *DTB v. ATP*, 610 F.3d at 830.

Importantly, section 1 “applies only to concerted action and does not proscribe independent action by a single entity, regardless of its purpose and effect on competition.”²⁰ Furthermore, after *Copperweld v. Independence Tube*,²¹ a landmark U.S. Supreme Court decision, there are certain situations where “distinct legal entities are incapable of concerted action for the purposes of section § and must be viewed as a single entity.”²² As discussed below, that is one argument that the defendant ATP offered in the case.

Unlike section 1 claims, a business deemed to be a single entity could still have its independent actions scrutinized under section 2 of the Sherman Act.²³ Here, the plaintiffs claimed that the ATP also violated section 2 of the Sherman Act, which “makes it a crime to monopolize any part of interstate commerce.”²⁴ In relevant part, section 2 states, “[e] very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”²⁵ According to the U.S. Department of Justice, “[a]n unlawful monopoly exists when one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct.”²⁶

²⁰ *Id.* at 834.

²¹ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

²² *DTB v. ATP*, 610 F.3d at 834.

²³ *See Fineman v. Armstrong World Indus. Inc.*, 980 F.2d 171, 205 (3rd Cir. 1992).

²⁴ U.S. DEPARTMENT OF JUSTICE, *supra* note 16.

²⁵ Sherman Act, 15 U.S.C. § 2 (2012).

²⁶ U.S. DEPARTMENT OF JUSTICE, *supra* note 16.

III. Trial Court Jury Verdict and Appeal

A. Judge and Jury Rule in Favor of the ATP

On July 21, 2008, one year before the Hamburg tournament's planned demotion, a jury trial began in the U.S. District Court for the District of Delaware. After ten days, Chief Judge Sleet "granted ATP's motions for judgment as a matter of law, dismissing the personal liability claims against [several ATP] Directors for alleged antitrust violations and breach of fiduciary duty."²⁷ The antitrust claims against the ATP were submitted to the jury on August 5, and the seven "[j]urors deliberated about nine hours before upholding the [ATP's] tournament restructuring."²⁸ The jury rejected both of the plaintiffs' antitrust claims, concluding that the plaintiffs "failed to prove ATP entered into a contract, combination, or conspiracy with any separate entity under § 1."²⁹ In addition, the jury determined that the plaintiffs did not establish a relevant product market as required under antitrust jurisprudence.³⁰

One of the main issues at trial was whether the ATP functions as a league. One commentator opined that "[i]f individual sports leagues are not single entities, they face a number of difficult issues."³¹ Chief Judge Sleet "instructed the jury to determine whether the ATP 'functions as a single business entity' regarding the management of various facets of the

²⁷ *DTB v. ATP*, 610 F.3d at 824.

²⁸ Associated Press, *Jury Rejects German Federation's Claims of ATP Antitrust Violations*, ESPN.COM (Aug. 5, 2008), <http://sports.espn.go.com/espn/print?id=3520923&type=story>.

²⁹ *DTB v. ATP*, 610 F.3d at 824.

³⁰ *Id.*

³¹ Kyle L. Schriener, *The Single-Entity Defense is Hotly Contested in Sports Leagues*, HOLME, ROBERTS & OWEN LLP Q. ANTITRUST BULL. (Third Quarter 2008), available at <http://www.hro.com/files/file/publications/Alert-3rdQtrAntitrustBulletin.pdf> [hereinafter Schriener].

ATP,”³² including the “core functions of a global professional tennis tour.”³³ Another commentator posited that ATP prevailing at trial “allows the ATP [and other individual sports leagues] to have complete control over tournament sanctioning, tournament scheduling, ranking points, and broadcasting and merchandising rights.”³⁴ In connection with the plaintiffs’ section 2 monopoly-related claim, “[t]he jury also unanimously found that plaintiffs failed to prove by a preponderance of the evidence ‘the existence of any relevant product market(s) within any relevant geographic market(s).’”³⁵ This finding was re-affirmed by the Third Circuit, as discussed in detail *infra*.³⁶

How the opposing attorneys define a relevant market is often the central issue in many antitrust disputes: “[a]lthough the courts have identified basic methodologies and factors to be considered in defining a market, applying these principles in particular cases often proves difficult and complex.”³⁷ There are two extreme theories that shape how litigators define a relevant market in antitrust cases:

In concept, at one extreme a relevant market could be restricted to perfect substitutes... At the other extreme, one could expand the market to encompass an entire economy in which any product is potentially substitutable for another, if only in the most tangential and infinitesimal way, in competition for society’s scarce resources. The relevant market definitions are framed between these two extremes.³⁸

In addition, a relevant market has two aspects – (i) the relevant product market and (ii) the relevant geographic market.³⁹

³² Amy D. Gibson, *The Association of Tennis Professionals: From Player Association to Governing Body*, J. APPLIED BUS. ECON., available at <http://www.na-businesspress.com/JABE/Jabe105/GibsonWeb.pdf> [hereinafter Gibson].

³³ Schriener, *supra* note 31.

³⁴ Gibson, *supra* note 32, at 7.

³⁵ Schriener, *supra* note 31.

³⁶ *DTB v. ATP*, 610 F.3d at 820.

³⁷ Debra J. Pearlstein, *Antitrust Law Developments*, ABA SECTION OF ANTITRUST LAW 525 (5th ed. 2002).

³⁸ *Id.*

³⁹ *Id.*

In the jury instructions for the section 2 claim,⁴⁰ the “plaintiffs defined the relevant product markets as ‘the market for the production of top-tier men’s professional tennis, the market for player services for top-tier men’s professional tennis, the market for hosting top-tier men’s professional tennis, and/or the market for live top-tier men’s professional tennis.’”⁴¹ The plaintiffs’ narrow definition of relevant product markets derived from the testimony and analysis of their expert witness, economist Andrew Zimbalist. The plaintiffs carry the burden to show that the harm to competition occurred in a relevant market.⁴² At trial, the ATP asserted that the plaintiffs’ relevant product market definition was incorrect given its failure to include substitutes.⁴³ The jury agreed, finding “the relevant product market to be more expansive than the narrow markets asserted by plaintiffs” and cited other forms of entertainment available to consumers other than elite-level men’s professional tennis.⁴⁴

B. Third Circuit Affirms

The plaintiffs appealed the district court ruling and the U.S. Court of Appeals for the Third Circuit heard oral arguments November 2, 2009. The Third Circuit’s three-judge panel issued its ruling on June 25, 2010, affirming the lower court’s jury verdict as well as the trial court judge’s dismissal of a breach of duty of loyalty claim against an ATP director.⁴⁵ The unanimous 45-page opinion by Chief Judge Scirica reaffirmed the ATP’s right to augment its tournament schedule as a duly-authorized sports league, but cautioned that such right has certain

⁴⁰ Jury instructions #18 through #27 were specific to the plaintiffs’ section 2 claims.

⁴¹ Schriener, *supra* note 31.

⁴² *DTB v. ATP*, 610 F.3d at 828.

⁴³ Schriener, *supra* note 31.

⁴⁴ *Id.*

⁴⁵ *DTB v. ATP*, 610 F.3d at 820 (noting that the Third Circuit heard the *DTB v. ATP* oral arguments nearly two months before *American Needle* was argued in front of the U.S. Supreme Court. However, the Third Circuit did not issue a ruling until more than one month after the *American Needle* decision.).

limits.⁴⁶ *DTB v. ATP* was the first sports-related antitrust case to be decided after *American Needle*. In *American Needle*, the Court “rejected the National Football League’s request for broad antitrust law protection . . . saying that it must be considered 32 separate teams – not one big business – when selling branded items like jerseys and caps.”⁴⁷ Justice John Paul Stevens wrote the 9-0 decision. Specific to the scheduling issue central in *DTB v. ATP*, Justice Stevens found: “[t]he fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.”⁴⁸ Thus, despite the *American Needle* decision being adverse to sports leagues on the topic of antitrust immunity for collective intellectual property licensing, the Supreme Court notably alluded to joint scheduling decisions inherent in the operation of sports leagues.

The Third Circuit sidestepped the single entity issue that was so contentious at trial. Chief Judge Scirica wrote: “we need not decide whether the single enterprise instruction was given in error . . . [because] even if the jury had found concerted action, the [plaintiffs’] antitrust claims still fail because they did not satisfy their burden of proving a relevant market.”⁴⁹ Defining a relevant market is vital under section 1 of the Sherman Antitrust Act, which “prohibit[s] only those contracts or combinations that are ‘unreasonably restrictive of competitive conditions.’”⁵⁰ With most restraints analyzed under antitrust law’s rule of reason standard, “[t]he plaintiff bears an initial burden under the rule of reason of showing that the

⁴⁶ *Id.* at 837.

⁴⁷ John Clayton, *Court: NFL is 32 Teams, Not One Entity*, ESPN.COM (May 25, 2010), <http://sports.espn.go.com/nfl/news/story?id=5214509>.

⁴⁸ *Am. Needle*, 130 S. Ct. at 2216.

⁴⁹ *DTB v. ATP*, 630 F.3d at 837.

⁵⁰ *Id.* at 829 (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911)).

alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets.”⁵¹ Chief Judge Scirica concluded that:

the [plaintiffs] could not have succeeded on their Sherman Act § 1 claim because they failed to prove ‘the existence of any relevant product market(s) within any geographic market(s).’ On the § 1 claim, the jury found no concerted action, so it did not reach the issue of relevant market. But on the Sherman Act § 2 claim, the jury did find the Federations failed to prove the existence of a relevant market.⁵²

The plaintiffs also argued on appeal that the district court was in error in not instructing the jury to conduct a “quick look” antitrust analysis, a truncated procedure which does not require a detailed evaluation of the market at issue.⁵³ On the issue of the applicability of quick look antitrust analysis, the Supreme Court has concluded that the lines separating the three modes of antitrust analysis are somewhat blurry.⁵⁴ In addition to the traditional “rule of reason” standard, courts sometimes analyze section 1 claims using a *per se* rule, where some categories of restraints, such as horizontal price-fixing and market allocation agreements among competitors, are deemed to be “illegal *per se*.”⁵⁵ A third alternative is the so-called “quick look” rule of reason analysis.⁵⁶ The quick look approach, as an intermediate standard, “applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint.”⁵⁷

⁵¹ *Id.* at 830 (quoting *United States v. Brown Univ.*, 5 F.3d 658, 668 (3rd Cir. 1993)).

⁵² *Id.* at 828-829 (stating that both “jury verdict forms posed the same question regarding proof of the relevant market for the purposes of §§ 1 and 2 claims: ‘Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market?’”). *See also* *Fraser v. Major League Soccer*, 284 F.3d 47, 59-61 (1st Cir. 2002) (affirming the judgment on section 1 claims based on the jury finding that plaintiffs failed to establish a relevant market under section 2).

⁵³ *DTB v. ATP*, 610 F.3d at 829.

⁵⁴ *Id.* at 831 (quoting *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents Univ. Okla.*, 468 U.S. 85, 104 (1984)).

⁵⁵ The Third Circuit held “the *per se* rule does not apply because for a tennis tour, like other sports leagues, horizontal restraints on competition are essential if the product is to be available at all.” *Id.* at 831.

⁵⁶ *See Id.* at 830.

⁵⁷ *Id.* (quoting *United States v. Brown Univ.*, 5 F.3d at 669).

In *DTB v. ATP*, the Third Circuit held that “[t]he jury was properly instructed to analyze the alleged restraints under the rule of reason,”⁵⁸ not the quick look approach advocated by the plaintiffs. The court’s reasoning was multi-pronged:

[The] ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events. In fact, the [plaintiffs] seem to concede that ATP offered procompetitive justifications... Once a defendant comes forward with plausible procompetitive justification for the challenged restraint, the quick look presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis.⁵⁹

The Third Circuit also looked to the ABA’s Model Jury Instructions in Civil Antitrust Cases for the proposition that the appropriateness of the quick look analysis is a question of law for the court to decide, not the jury.⁶⁰

IV. Analysis

A. Failure to Define a Relevant Product Market Doomed Plaintiffs

The Hamburg tournament owners’ failure to precisely define a relevant product market ultimately led to the dismissal of their claims under sections 1 and 2 of the Sherman Act. The plaintiffs claimed that the Brave New World Plan restrains the market for the player services because it “obviates competition among favored tournaments for the player services vital for success, while making it impossible for other tournaments ... to compete for such services.”⁶¹

The jury was correct in ruling that this relevant product market was not sufficient, however, because the ATP’s tournament members are each “dependent on the others to produce a common product – a marketable annual professional tennis tour that competes with other forms of

⁵⁸ *Id.* at 833.

⁵⁹ *Id.* at 832-833 (citations omitted).

⁶⁰ *Id.* at 833 (quoting ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, A-8, n.2 (2005)).

⁶¹ *Id.* at 831.

entertainment, within and without the sports arena.”⁶² The jury clearly agreed with the ATP’s claim that the adoption of the Brave New World marketing and tournament re-scheduling plan was central to the production of the men’s professional tennis product.⁶³ The jury’s decision, coupled with the Third Circuit appellate opinion, are consistent with *American Needle’s* explicit approval of collective decision-making with regards to the “production and scheduling of games.”⁶⁴

B. EU Competition Law Overview

Rule 8.06 of 2010 ATP Official Rulebook states:

Any dispute between or among the ATP, its Tournaments or its players (with the exception of any dispute relating to or arising out of a change in tournament class membership status) arising out of the application of any provision of this Rulebook which is not finally resolved by applicable provisions of the Rulebook shall be submitted exclusively to the Court of Arbitration for Sport...⁶⁵

This dispute *was* “a change in tournament class membership status.” As a result, it was decided in the federal court system because the ATP is a non-profit membership corporation that is organized under Delaware law.⁶⁶ However, if the plaintiffs had been able to bring this matter in Germany or elsewhere in the EU, the dispute would likely “have been handled under antitrust rules which prohibit anti-competitive agreements and practices (Article 81 EC Treaty), as well as abuse of dominant position (Article 82 EC Treaty).”⁶⁷ Furthermore, “[s]port-related cases of national or local character will normally be dealt with by the national competition authority in

⁶² *Id.* at 835.

⁶³ *Id.*

⁶⁴ *Am. Needle*, 130 S.Ct. at 2216 (It is our understanding that “games” in the football context are analogous to “tournaments” in professional tennis).

⁶⁵ *The 2010 ATP Official Rulebook*, § 8.06 at 166, available at http://www.dtb-tennis.de/2010_ATP_Rulebook.pdf.

⁶⁶ *DTB v. ATP*, 610 F.3d 820 (3rd Cir. 2010).

⁶⁷ *Competition Law*, EUROPEAN COMMISSION SPORT (Jan. 19, 2012), http://ec.europa.eu/sport/what-we-do/doc65_en.htm.

the Member State concerned, while the [European] Commission will be well placed to deal with cases which have effects in a large number of Member States.”⁶⁸ The global impact of the ATP, which sanctions dozens of tournaments every year in Europe, would likely lead to disposition by the European Commission, not the national-level German Bundeskartellamt⁶⁹

In terms of prohibiting anti-competitive agreements under Article 81 EC, the components of the violation are analogous to a Sherman Act section 1 claim, where “there must be two or more participants, as unilateral conduct is not prohibited.”⁷⁰ As to the vital single-entity issue for sports organizations, “Europe has adopted a reticent attitude with respect to the one-undertaking concept.”⁷¹ The joint nature of any cooperation “has some validity where the exploitation of the competition is concerned...because clubs will never be able to realize the product (the competition) individually.”⁷² An Article 82 EC claim differs from a Sherman Act section 2 claim in that European law has no “attempt to monopolize” claim.⁷³ Below is how the European Commission detailed the process of defining relevant markets under Article 82:

[O]n the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets.⁷⁴

⁶⁸ *Id.*

⁶⁹ See generally *Control of Abusive Practices*, BUNDESKARTELLAMT, http://www.bundeskartellamt.de/wEnglisch/Missbrauchsaufsicht_e/missbrauchsaufsicht_e.php (last visited Mar. 26, 2012).

⁷⁰ Georgios I. Zekos, *Antitrust/Competition Arbitration in EU versus U.S. Law*, J. INT’L ARB., at 11 (2008), available at http://www.competitionlaw.cn/upload/temp_08032317409602.pdf [hereinafter Zekos].

⁷¹ Marjan Olfers, *Sport and Competition Law: An Interesting Twosome*, 1-2 INT’L SPORTS LAW J. 457, 460 (Jan. 29, 2009), available at http://dare.uvu.vu.nl/bitstream/1871/15694/4/4abstract_english.pdf.

⁷² *Id.*

⁷³ Zekos, *supra* note 70, at 14.

⁷⁴ European Commission, *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*, CHAPTER 26 (Sept. 1997), [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:NOT).

The relevant product market definition requirement would likely be analyzed the same in Europe as it was in Delaware. As such, the pro-ATP decision would likely have been the same, as the plaintiffs failed in their bid to define the relevant market.

V. Conclusion

DTB v. ATP was billed as a case that would tremendously impact “all individual sports, like golf, track and field, and swimming,” if plaintiffs won.⁷⁵ On November 29, 2010, the U.S. Supreme Court denied the plaintiffs’ petition for *writ of certiorari*, effectively ending the Hamburg event owners’ antitrust lawsuit.⁷⁶ Given the favorable result for defendant ATP – one that was consistent with both *American Needle* and current antitrust law as applied to the sports industry – the case turned out to be a strong re-affirmation of the status quo. While it was generally understood, even before *American Needle*, that sports leagues could unilaterally alter their game, tournament, or event schedule, the Third Circuit’s opinion memorialized this practice with the requirement that the sport’s governing body could proffer evidence of procompetitive justifications for any such plans.⁷⁷ As such, despite the pro-ATP language in *American Needle* outlined *supra*, it seems likely that *DTB v. ATP* would have been decided in a similar fashion notwithstanding the Supreme Court’s inquiry into sports league antitrust matters.

Given the fact that this case is so recent and the large amount of underlying censored data that would be involved, a conclusive judgment on the efficacy of the ATP “Brave New World” schedule makeover is years away. Nevertheless, trace evidence has trickled in: “[t]he ATP World Tour reported a \$28 million profit for 2009, reaping the financial benefits of its calendar

⁷⁵ Kaplan, *supra* note 1, at 1.

⁷⁶ See *DTB v. ATP*, 131 S. Ct. 658 (2010).

⁷⁷ *DTB v. ATP*, 610 F.3d at 832.

restructuring program...⁷⁸ More importantly, for the foreseeable future, all leagues governing individual sports have not had to deal with the expensive and potentially debilitating consequences that a verdict in favor of the plaintiffs in *DTB v. ATP* would have produced.

⁷⁸ Daniel Kaplan, *ATP World Tour Reports \$28M Profit For '09; Helfant Earned \$1.4M*, SPORTS BUS. DAILY (Nov. 23, 2010), [http://www.sportsbusinessdaily.com/Daily/Issues/2010/11/Issue-52/Leagues-Governing-Bodies/ATP-World-Tour-Reports-\\$28M-Profit-For-09-Helfant-Earned-\\$14M.aspx](http://www.sportsbusinessdaily.com/Daily/Issues/2010/11/Issue-52/Leagues-Governing-Bodies/ATP-World-Tour-Reports-$28M-Profit-For-09-Helfant-Earned-$14M.aspx).