Insight

Congress Eyes Sports Antitrust Exemption

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Executive Summary

- The House Judiciary Committee recently launched a review of existing antitrust exemptions in professional sports, looking in particular at joint agreements among teams to sell television broadcasting rights.
- While the Sports Broadcasting Act (SBA) specifically exempts professional sports leagues from antitrust scrutiny for their television deals, the law only applies to broadcast television, and therefore, depending on the conclusions of the committee's review, existing deals with cable channels and streaming services could be in jeopardy.
- Congress should update the rules to create parity among technologies, and while it could extend the provisions of the SBA to non-broadcast mediums, legislators should consider eliminating the exemption altogether and applying existing antitrust law to all sports leagues.

Introduction

In August, the House Judiciary Committee launched a review of antitrust exemptions in professional sports. In particular, the committee is planning to examine how leagues jointly negotiate broadcasting rights with television stations, and whether changes to regulations are needed as viewers shift to digital mediums.

Professional sports franchises are currently exempt from antitrust liability for joint agreements to sell television rights. Courts have generally held that for professional sports leagues, franchises are individual competitors, and thus leaguewide television deals constitute an agreement in restraint of trade. Congress, in an attempt to address a perceived power imbalance between broadcasters and professional sports franchises,

passed the Sports Broadcasting Act (SBA) in 1961, creating a statutory exemption for every major sports league (though baseball's judicial exemption has been in place much longer). But the SBA only applies to television broadcasting rights, leaving leagues and teams in a state of legal uncertainty regarding their current deals with paid services such as cable television and digital streaming services.

Congress has two main avenues for reform. First, it could extend the exemption to other forms of media, allowing leagues to jointly negotiate with digital streaming services and cable channels as they can currently do with broadcast television. This approach, however, would ignore anticompetitive conduct from the leagues by foreclosing any and all analysis of conduct. Instead, Congress could revoke the antitrust exemption entirely, allowing courts to review individual transactions under the rule of reason. This approach would still allow leagues to jointly negotiate with broadcasters, but it would also allow anticompetitive agreements to be subject to judicial review, as with every other joint venture.

Background

Professional sports leagues such as Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA) currently generate a significant portion of their revenue from the licensing of television distribution rights. Though each team is an individual entity, the leagues jointly negotiate a contract with broadcasters and media companies to provide games to consumers. Leagues generally share the revenue among the teams to promote competitive integrity and balance. While this helps the leagues, it also benefits consumers, as broadcast networks can choose which games to broadcast nationwide, meeting consumer demand.

Traditionally, these video deals were mainly for television broadcasting rights, allowing local broadcasters to air the games free to their viewers and supported through advertising revenue. While teams could negotiate for their own broadcasting rights, leagues were concerned that larger market teams with a wider appeal would obtain more favorable deals and "steal" fans , driving smaller market rivals out of business. Without balanced competition, the competitive integrity of the leagues could be jeopardized. Therefore, leagues began jointly negotiating with broadcasters to allow the leagues to implement revenue-sharing models, largely to help maintain healthy competition and improve the quality of the sport for fans.

Courts' Interpretations and Congressional Action

Because the deals were essentially agreements among competing teams to set prices, they raised significant antitrust scrutiny. Section 1 of the Sherman Act prohibits agreements in

restraint of trade, and courts have held that leagues are made up of individual franchises (i.e., the teams) that compete with one another. Because teams are individual franchises, the leagues are joint ventures that could violate the Sherman Act. Professional sports leagues, however, are largely exempt from antitrust scrutiny for their television deals, and when not exempt, courts have generally examined the conduct under a rule of reason analysis (which examines the relative competitive effects of conduct to determine whether they are unreasonable restraints of trade).

There are two main antitrust exemptions for professional leagues. First, the Supreme Court created a judicial exemption for the MLB under the logic that baseball, and MLB specifically, wasn't interstate commerce, and thus not subject to federal antitrust laws. The Court's subsequent decisions have made clear that it would not reach the same conclusion today; nevertheless, it has upheld the exemption under the theory of *stare decisis* (essentially just deferring to precedent). Courts, however, did not extend this exemption to other leagues, and in 1961 the Department of Justice successfully blocked the NFL from entering into a nationwide contract with CBS.

In response to these cases, Congress passed the SBA, formally allowing professional sports leagues to pool their broadcasting rights and sell them as a whole. This allowed sports leagues to have more negotiating power with the broadcast channels and also created a system in which broadcasters could provide their viewers with games from across the country without having to make individual deals with each club.

As technology advances, however, the provisions of the SBA have begun to fall behind the times. The SBA only applies to professional sports leagues and only covers the joint negotiations for television broadcasting rights. That means current deals such as NFL's contract with Prime Video or Netflix could face antitrust scrutiny moving forward. Even Monday Night Football, which has long been aired over the cable television network ESPN, may be subject to antitrust review, though the current deal has never been challenged.

Most notably, NFL's Sunday Ticket, which is a joint package for all the NFL's games over DirectTV's satellite television service, is currently undergoing a legal challenge under the rule of reason, and the outcome is uncertain. As such, the House Judiciary Committee has launched an investigation of the SBA and its application to streaming services and non-broadcast television.

Paths Forward for Congress

Having inconsistent laws, both in terms of to which technologies the laws apply and the types of entities that enjoy exemptions, creates uncertainty and distortions in the market.

Congress has two primary options to standardize the rules. First, it could extend the provisions to paid TV and digital mediums. This, however, could result in harm to consumers because the examination of effects is entirely foreclosed. Second, it could eliminate the exemption altogether and allow individual deals to proceed under the traditional "rule of reason" analysis. This would allow leagues to continue to negotiate joint contracts and for courts to review existing joint agreements to examine competitive effects, as done in other sectors of the economy.

Extend the Provisions of the SBA to Non-broadcast Television

The first option for Congress would be to extend the SBA to non-broadcast mediums. If Congress determines that leagues need clarity regarding potential antitrust scrutiny, it could simply extend the antitrust exemption to streaming services, as well, and clarify whether it applies to paid TV such as cable and satellite. By extending these provisions, Congress could give certainty to leagues that their current deals, as well as future deals with streaming services, will not violate antitrust law.

For consumers, this would allow for leagues to make their content available on more services. Currently, leagues have begun to make exclusive deals with streaming services, but additional certainty could spur further growth in digital markets. Consumers who rely on these markets, such as cord-cutters who no longer pay for cable television or lack a broadcast receiver, will be able to watch more games.

Eliminate the Provisions Altogether

While exempting leagues from antitrust scrutiny provides certainty to leagues, it could harm the competitive process. Antitrust law does not prohibit joint ventures, and only those joint ventures that harm competition without countervailing consumer benefits are declared illegal. For example, streaming services could acquire broadcasting rights for a smaller subset of teams at a lower cost, which in turn would allow them to offer the streaming service to consumers at a lower price. But if league rules prohibit teams from making these deals, the SBA effectively allows a legal challenge that could examine why the league believes the rules create value for consumers and whether those benefits outweigh the competitive harms. By creating exemptions to antitrust law, Congress inevitably risks allowing anticompetitive conduct that harms consumers because the analysis of the effects is foregone.

Further, while an antitrust exemption clearly benefits the leagues, it may harm individual franchises, and more important, their fans. If some of the restrictions the leagues put on individual teams were challenged and struck down as anticompetitive, individual teams

could make their own deals in conjuncture with national deals. While sports fandom has traditionally been very geographical in nature, this is increasingly not the case. Fans of the Dallas Cowboys, for example, are a sizeable population in most major U.S. markets, and the Cowboys and their fans would benefit from individual deals that allow fans to watch its games regardless of the market. It could also provide an opportunity for non-network affiliated broadcasters to make deals with out-of-market franchises, increasing consumer choice and helping support an industry currently struggling with technological change.

Finally, even though there is some legal uncertainty regarding the applicability of the SBA to cable television, many current deals outside of the NFL Sunday Ticket largely haven't been challenged. This could be in part because plaintiffs think the odds of winning a lawsuit are low with the SBA overhanging the case, but the lack of meaningful litigation may indicate that these deals are largely pro-competitive. Even if the antitrust exemptions are eliminated, it is unclear that professional leagues will be drowned in litigation.

Conclusion

The House Judiciary Committee's decision to launch a review of the SBA and sports broadcasting deals is timely and could provide valuable insights into live sports and digital markets. As new services compete with legacy media, it is important to ensure antitrust law promotes competition and benefits consumers. Antitrust exemptions come with risk, however, and it may be time for Congress to eliminate the statutory exemptions and allow courts to examine individual conduct on the merits. Regardless of what Congress decides to do, it should ensure parity among leagues and technologies to unify regulations and promote competition.