

Taking the field

The EU and the governance of European football

Oswaldo Croci

Department of political science
Memorial University
St. John's, Newfoundland, Canada A1B 3X9
ocroci@mun.ca

First draft

ECSA-USA International Conference, Madison, Wisconsin, May 31- June 2, 2001.

In the last two decades sport has undergone a process of rapid and momentous change: it has completely shed its original puritanical attitude towards money (a vestige of the days of amateurism) and has fully embraced it by unashamedly becoming itself business, and big business at that.¹ Such a transformation has been primarily the result of the marriage between sport and television, which has allowed sport events to transcend the confines of local stadiums and reach global audiences.² Football is no exception. The changes that have occurred in the world of football, and European football in particular, in the last two decades have been more significant than all the changes that occurred since football became an organised sport at the end of the 19th century. Football clubs are increasingly turning into publicly owned stock companies and either becoming part of, or entering into strategic partnerships with, telecommunication companies. The most successful among them, moreover, are already selling not only the match but also a vast array of material and symbolic commodities to a global audience.

The transformation of football into an important and global economic activity has led, among other things, to changes in its traditional form of governance. The rules of the sport, as well as the organization of events and competitions, and the administration of sport justice have traditionally been the responsibility of autonomous football organizations. National governments have usually limited themselves to a political use of the symbolic aspects of football to further their own agendas and interests. As football has turned into a full-fledged economic activity, however, political authorities, and the European Community (EC) in particular, have begun to challenge some of the rules devised and enforced by these autonomous regulatory bodies, particularly those concerning the movement of athletes across EC borders.

This paper examines the involvement of the EC in the governance of European football. The first part recounts the history of EC intervention focusing in particular on the 1995 seminal ‘Bosman ruling’ of the European Court of Justice (ECJ), and the more recent agreement on transfer rules negotiated by the European Commission (henceforth simply the Commission) with various football organizations. The second part analyses EC involvement both in terms of its motives and methods and concludes that such an involvement, far from being atypical because taking place in the era of the so-called ‘retreat of the state’, represents an instance of contemporary ‘governance’.

1. The EC takes the field

The world of football has traditionally been regulated in all its aspects (organization of events, establishment and enforcement of rules for both games and events, etc.) by a set of autonomous, interrelated organizations. Although the specific set-up has changed over the course of time and varies slightly from country to country, in general football clubs are associated in various national leagues (professional, semi-professional, amateur). Leagues, as well as national professional associations (e.g. players, coaches, referees) are represented in national football federations, which are the constituent members of six regional federations³ as well as of a worldwide football

¹ Jean-François Bourg, *L'argent fou du sport*, Paris: La table ronde, 1994.

² *Sport et télévision*, Valence: Centre de recherche et d'action culturelle, 1993; Eric Maitrot, *Sport et télé: les liaisons secrètes*, Paris: Flammarion, 1996; Emanuela Poli, “The revolution in the televised soccer market”, *Journal of Modern Italian Studies* 5, 3, 2000, pp. 371-394.

³ They are: Asian Football Confederation (AFC), Confédération africaine de football (CAF), Confederation of North American, Central American and Caribbean Association Football (CONCACAF), Confederación

federation (Fédération Internationale de Football Association or FIFA). Leagues, national federations, regional federations, and FIFA are all responsible for the regulation of football, each in its own geographical/functional sphere of competence and, theoretically at least, according to the principle of 'subsidiarity'. In practice, however, because regional federations and FIFA are responsible for the organization of international competitions at both club and national team levels, the system is skewed in their favour. As FIFA President Sepp Blatter eloquently put it: "We [FIFA] have said clearly that, within their own country, they [national federations] can play football and organise it however they like, with whatever rules they like and with whatever president they like, but they cannot expect to go OUTSIDE their country and play in OUR competitions."⁴ Regardless of the relative power of its interrelated organizations, however, the governance of football was an autonomous activity: states and other political actors or agencies, in other words, hardly played any role in it. Football organizations rules, moreover, explicitly warned against bringing disputes to ordinary courts; they were to be solved internally.

This situation has changed, most visibly, in the last decade: political authorities, and the EC in particular, have in fact entered the field of football, and sport more in general. This involvement, or encroachment for some, has been justified in terms of the "rapid [economic] development of sport, especially professional sport, and the important place occupied by sport in society."⁵ The EC has become involved primarily in four issue areas: 1) freedom of movement, 2) competition policy, 3) audiovisual policy, and 4) public health and vocational training. This paper focuses exclusively on EC involvement with respect to the first two issue areas.

1.1. The 'Walraeve' and 'Donà' cases

The ECJ first became involved in sport in 1974 with the 'Walraeve case' and then again in 1976 with the 'Donà case'. Both cases revolved around the question of nationality and free movement. The first concerned two Dutch pacesetters on motorcycles in medium distance cycle races with so-called stayers, who cycle in the lee of the motorcycle. They felt damaged by an International Cycling Union's regulation providing that as of 1973, in world championship races the pacesetters had to be of the same nationality as the stayers. The second case concerned a contract between the chairman of an Italian football club and a talent scout he had hired. The talent scout placed an advertisement in a Belgian newspaper to solicit players but the club chairman refused to pay for such an expense basing his decision on the Italian Football Federation's rule restricting team membership solely to Italian players. The scout then claimed that the Italian Federation's restriction violated Articles 7A and 48 of the Rome Treaty. In both cases the ECJ ruled that the regulations of sport organizations were subject to EC legislation insofar as sport represented an economic activity. It also suggested, however, that sport because of its nature (i.e. *qua sport*) could be entitled to "certain exceptions".⁶

Sudamericana de fútbol (CONMEBOL), Oceania Football Confederation (OFC), and Union of European Football Associations (UEFA).

⁴ "Blatter: the millennium interview", *World Soccer*, January 2000, pp.32-33 (emphasis in the original).

⁵ European Commission, Commission Staff Working Paper, "The development and prospects for Community action in the field of sport", Brussels: Directorate General X, 29 September 1998, p. 3.

⁶ C-36/74 *Walraeve v UCI* [1974] ECR I-1405; C-13/76 *Donà v Mantero* [1976] ECR I-1333

Following the Donà ruling, the Commission signalled to FIFA and UEFA the necessity to abolish a rule that put a limit on the number of foreign players a club could hire, which at the time was fixed at two. This ‘nationality restriction’ was justified in terms of the need to avoid that the richest club be able to recruit all the best European players, to maintain a minimum of national cultural identity, and to give more playing opportunities to young players, especially in those countries with strong leagues, and thus enhance the competitiveness of national teams.⁷ UEFA eventually agreed to revise such a rule and, in 1991, at the end of long negotiations adopted the so-called ‘3+2 rule’, whereby a team could field three ‘foreign’ players in any given match plus two ‘assimilated players’ (i.e. foreign players who had played in the country of the relevant national football association for an uninterrupted period of at least five years). UEFA left national federations to adopt, if they so wished, an even more liberal approach, which the British federation for instance did. In 1995, however, the so-called ‘Bosman ruling’ of the ECJ declared also the ‘3+2 rule’ illegal, at least when the adjective ‘foreign’ referred to other EC nationals. The same ECJ ruling also declared illegal the traditional FIFA/UEFA ‘transfer system’ whereby football clubs had the right to demand and receive payment for players moving to another club. This payment was due regardless of whether the player who moved was still under contract or the contract had expired. Such a system was justified in terms of the need to maintain a sort of financial and competitive balance between smaller, less financially powerful clubs, which were usually the sellers, and richer ones, which were usually the buyers.

1.2 The Bosman ruling

In the summer of 1990, the Belgian football player Marc Bosman, at the end of a two-year contract with RFC Liège and not wishing to accept the terms of a new contract, accepted the offer to move on a one-year loan to the French club of Dunkerque. Due to some misunderstandings between the two clubs, however, the transfer did not go through and Bosman found himself unemployed.⁸ Bosman then brought RFC Liège, the Belgian football federation (URBSFA), and UEFA to court demanding that they be obliged to authorize his transfer to another club.⁹ The court ruled on 11 June 1992 (and then again in appeal on 1 October 1993) that it had competence vis-à-vis UEFA, even if the latter

⁷ In Italy, for instance, it was common to identify the root cause of poor performances by the *azzurri* (the Italian national team) on the number of foreign players playing in *Serie A*. The presence of the latter was seen as making it more difficult for promising Italian players to play at such level and hence acquire experience that would benefit the performance of the national team.

⁸ Briefly, RFC Liège refused to give the green light to the Belgian football federation to issue the necessary transfer authorization because it feared that Dunkerque might not be able to honour the payment and thus requested from the Dunkerque bank a confirmation that payment could indeed be made once the transfer authorization was released. Since the contract did not specify the need of what was for all practical purposes a letter of credit, the bank refused to provide such document. As a result the transfer did not go through by the set deadline and the contract became null and void. For more details on the Bosman case (including all the legal documentation), see Roger Blanplain, *L'affaire Bosman: la fin de l'ère des transferts?* Leuven: Peeters, 1996.

⁹ The court case pitted Bosman, and the French and Dutch football players union (UNFP and VVCS) against RFC Liège, the Belgian football federation (URBSFA), and UEFA. The former were represented by member of European Parliament Janssen van Raay, former president of the international federation of football players (FIFPRO). Bosman's decision to seek legal redress made him a pariah in the football world and he ended up playing for the club Saint-Denis in the French island of Réunion.

argued that first, it was not directly involved in the Bosman case, and second that it was beyond the jurisdiction of a Belgian court since it was a Swiss legal entity (UEFA has its headquarters in Berne). The Belgian court then ruled, both in the first instance and in appeal, that the UEFA/URBSFA transfer rules were null and void because they contravened the fundamental legal principle that individuals are not commodities, as well as freedom of work laws, and the Belgian professional sportsman statute.

Before deciding on the amount of damages owed to Bosman, however, the Belgian court referred the case to the ECJ requesting a preliminary ruling on the question of the compatibility of the UEFA's transfer system with articles 48, 85, and 86 of the Rome Treaty (dealing with free movement of labour, competition, and abuse of dominant position, respectively). Somewhat surprisingly, since it was not directly in issue in the Bosman case, the Belgian court also requested a preliminary ruling on whether article 48 invalidated UEFA's nationality restrictions.

In his conclusions of 20 September 1995, the Advocate General Carl Otto Lenz declared that UEFA's transfer system and nationality restrictions violated both articles 48 and 85 of the Rome Treaty. In its sentence of 15 December 1995, the ECJ reaffirmed that UEFA rules violated Article 48. The ECJ also pointed out that the justifications for the transfer rule put forward by the football authorities (i.e. they served to maintain a financial and competitive balance between clubs, and to support the development of young players) were not convincing since such objectives could be achieved by other means without impeding the free movement of workers. The ECJ chose not to pronounce itself on Articles 85 and 86, since the violation of article 48 was sufficient to make UEFA rules invalid. The Commission, however, made it known that, in its opinion, the transfer system was in principle contrary to Article 85 of the Treaty not only when transfers occurred between clubs located within two different EC member states but also in the case of transfers within the same member state, or between a member state and a third country.

1.3 The Commission/UEFA agreement

On 19 January 1996, the Commission formally notified FIFA and UEFA that their transfer system and nationality restrictions that the Court had already found in violation of article 48 were also in violation of article 85 of the EC Treaty as well as Article 53 of the Agreement on the European Economic Area.¹⁰ The Commission gave the two football authorities six weeks to inform it of the steps they had decided to take to comply with the Court's judgment. FIFA and UEFA informed the Commission that fees would no longer apply to the transfer of players at the end of their contracts between clubs within two different member states of the European Economic Area (EEA, i.e. EC+EFTA). Likewise, the nationality restriction was going to be revoked, at least for what concerned UEFA-organized competitions between clubs. The issue thus remained open for what concerned transfers between two clubs within the same member state or between a club in one member state and one in a country outside the EEA.

On 19 June 2000 the Commission informed FIFA and UEFA that they had to change their transfer fee system by the end of the year or it would rule it illegal. In September, FIFA agreed to revise the transfer fee system lest the Commission act on its

¹⁰ K. Van Miert, "L'arrêt 'Bosman': la suppression des frontières sportives dans le Marché unique européen", *Revue du Marché Unique Européen*, 1, 1996, pp. 5-9.

threat and “throw the European game into chaos.”¹¹ After lengthy negotiations an agreement was reached in March 2001. Its key elements were: conditional international transfers for players under 18, provisions for a fixed transfer period, minimum and maximum duration of players’ contracts (one to five years), sanctions for unilateral breaking of contracts, compensation for training costs in the form of objectively calculable training fees, and creation of an international arbitration body.

1.4 Reactions to the EC intervention

The ‘Bosman ruling’ received an amount of attention by the media, the public, and political authorities, that was simply unparalleled by any other ECJ ruling.¹² This publicity, moreover, went far beyond Europe to practically everywhere in the world where football is played and European football followed. From a strictly legal point of view the ruling reaffirmed what the ECJ had already established in the Walrave and Donà cases, namely that football *qua* business activity could not claim a special status but had to abide by the rules of the EC. The ruling, in other words, definitely recognised that football is a business, players are salary-earning labourers, clubs are firms, and football federations (whether national or international) are associations of firms.

The reactions to the Bosman ruling were in general very negative. Perhaps as a lingering consequence of their original amateur status, football organizations have always felt invested with the noble mission of the defence and promotion of an activity that is supposed to unite humankind. Because of the almost mystical character of such a mission, moreover, they have traditionally also felt above the reach of nation states and their laws.¹³ Hence, national football federations, UEFA, and FIFA, although rather cautious in their public pronouncements, regarded the ‘Bosman ruling’ as undue meddling, or a ‘field invasion’ by political authorities.¹⁴

Member state politicians also reacted rather sceptically. Belgian Prime Minister Dehaene, for instance, argued that one should not disregard the principles of free movement of workers, but one should also be sensitive to the needs of sport. The challenge was to find a way to reconcile EC rules with the continuing viability of football. Similar remarks came from the Italian government. Some national politicians also lamented the excesses of a Europe that gave too much power to jurists and at least

¹¹ *Financial Times*, 1 September 2000.

¹² Alex Easson, “The Courts of Justice of the European Union: jurisprudence during 1995”, *Revue d'integration européenne/Journal of European Integration*, 20, 1(1996), p. 90.

¹³ In this context it is worth pointing out that following the Heysel disaster UEFA was condemned by a Belgian court to pay some of the money allotted to the families of the victims. UEFA refused claiming that as an association comprised of more than forty national football federations it was above Belgian laws and national laws in general. Only a threat from the Belgian Interior Minister to bring the issue to the TREVI group (and hence make it European) convinced UEFA to comply with the court order. On this episode, see Jean-Louis Dupont, “Le droit communautaire et la situation du sportif professionnel avant l’arrêt Bosman”, *Revue du Marché Unique Européen*, 1, 1996, p. 66.

¹⁴ FIFA basically argued that its status as a global body placed it above a mere regional body such as the EU. “In Fifa’s view, it is clear that a small group of countries cannot be granted an exemption from sport regulations which are effective in all parts of the world and which operate successfully and efficiently and for the benefit of football at all levels.” Quoted in John Sugden and Alan Tomlinson, *FIFA and the contest for world football: who rules the peoples’ game?* Cambridge: Polity Press, 1998, p. 50.

one member of the European Parliament denounced the 'Bosman ruling' as the result of "pro-European legal delirium."¹⁵

All critics seemed to agree on one thing: the 'Bosman ruling' would destroy football as had been known for over a century because: a) it would devastate the finances of smaller clubs by depriving them of a major source of revenue and, at the same time, make it almost impossible for them to compete in the bidding for top players; b) it would lead to a sizable increase in salaries, at least for star players, since clubs could offer in salary what they did no longer have to pay in transfer fees; c) it would remove any incentive to invest in the development of young players; d) the national teams of net importer countries would eventually suffer because of the lack of opportunities for young talent to play at a high level.

1.5 The consequences of the Bosman ruling

It is probably too early to evaluate the consequences of the Bosman ruling, but a few preliminary conclusions can be offered. Although it would appear that the consequences of the 'Bosman ruling' (and the latest agreement which expands it) might be similar to those that 'liberalisation' has had in other sectors of the economy, their significance for the continued viability of football might have been greatly exaggerated. Although the best players are lured by high salaries to the best teams playing in the financially stronger leagues (such as the Italian, Spanish, English and German ones), the technical gap between these leagues and the poorer leagues (such as the French, Portuguese, Belgian, Danish, or Swedish ones) does not seem to have changed much since the Bosman ruling.¹⁶ Within each league there is also a technical gap between a few elite clubs competing for the title and the rest, which compete solely to avoid relegation. Such a gap, however, has always existed. Money might allow a club to purchase the best players but does not necessarily buy honours on the field as teams such as Atletico Madrid, Marseille, Inter, and Milan (to name just a few) have realized all too well in recent years. So far at least, the sheer unpredictability of the game has proven sufficient to maintain a competitive balance if not among teams, at least between two sets of teams (those competing for the title and those competing not to be relegated). Briefly, as different studies have repeatedly pointed, there seems to be no correlation between types of transfer system and competitive balance in a league.¹⁷ If this ceased to be the case, one could expect football authorities to move swiftly to put into place some kind of mechanism to restore such competitive balance. Players, clubs, leagues, and federations, all know very well that lack of a sufficiently competitive balance would lead to diminishing interest, and hence diminishing financial returns. Football has undoubtedly become a hotly contested terrain in which different stakeholders compete to advance their own interests but, at the same time, cooperate in order to safeguard public support and interest, and hence the financial viability of the sport on which their own particularistic

¹⁵ "Hearing on Bosman judgment confirms differing opinions" *Reuter Textline, Agence Europe*, 22 March 1996.

¹⁶ There is no sure way to measure the technical gap between leagues. One could use, for instance, the number of "capped" players (i.e. players who also play for their national teams). The assumption would be that the higher their number in a given league, the better the league.

¹⁷ Some of these studies are reviewed in Stephan Késenne, "L'affaire Bosman et l'économie du sport professionnel par équipe" *Revue du Marché Unique Européen* 1, 1996, pp. 79-87.

interests ultimately depend.¹⁸ Hence, those who have sent out calls of distress and argued that professional teams sport would be destroyed by the “imposition of free-market logic on an industry in which collective action is essential for its long-term survival” might have spoken in haste.¹⁹

The ‘Bosman ruling’ seems on the other hand to have led to a dramatic rise in the transfer fees of those players to whom a fee could still be attached, and in the salaries of star players. No soccer player is yet among the top twenty athletes in terms of salary and endorsement income²⁰, but soccer salaries have been rising very fast. In the English Premier League, for instance, salaries went up 50 per cent in 1996/97 and 37 per cent in 1998. In Italy star players receive net yearly pay (without counting income deriving from the sale of their image) of up to 10 billion lire (Del Piero). This rise has recently led the representatives of the richest European clubs (the so-called G14) to talk about the introduction of salary ceilings.

Nothing seems to indicate that the Bosman ruling has had a negative impact on the development of young players. Traditionally, the development of young players was a kind of specialisation niche of smaller clubs that relied for their financial survival on the transfer fees of these players when they were sold to bigger clubs. Smaller clubs were expected to stop investing in youth development if bigger clubs could later cherry-pick their crop without having to pay a transfer fee.²¹ This, however, has not happened. If anything clubs that have traditionally specialized in developing young players are simply casting their net wider and recruiting a larger number of young players from abroad, especially Africa.

Debates about who or what is responsible for the poor performance of national teams will continue as they have in the past, and the ‘Bosman ruling’ will undoubtedly be an easy target. Its impact on this particular variable, if indeed it has one, would however be extremely difficult to gauge in any serious and reliable manner.

To conclude, the ‘liberalisation’ of the transfer system has certainly altered the previous financial distribution matrix of football: after Bosman, better players, better teams, and better leagues, are better positioned to claim a bigger share of the football pie than they used to. ‘Liberalisation’, however, has not yet spelled, and is not likely to spell, the end of football as its critics feared.

¹⁸ In this respect FIFA and UEFA could be seen as playing for football the same role of ‘collective capitalist’ that some neo-Marxist literature argues the ‘state’ plays in the economic field.

¹⁹ See, for instance, Bill Gerrard, “Team sports as a free-market commodity” in “Debate: the new political economy of sport”, *New Political Economy*, 4, 2 (1999), pp. 276-277.

²⁰ According to a *Forbes* magazine’ review top paid athletes are to be found in basketball, boxing, tennis, ice hockey, and motor racing. It appears that athletes that get paid the most are in sports that attract big audiences both in stadiums and via television (especially pay-TV), and perform in the United States. High endorsement income are directly linked to sports attracting high social classes (e.g. golf). See “Not just a game: a survey of sport”, *The Economist*, June 6th, 1998.

²¹ FIFA and UEFA have used the argument of the viability of smaller clubs to press the Commission (through Commissioner for Sport, Education and Culture, Viviane Reding whom Blatter called “our ambassador to the other commissioner”) for exceptions. As Blatter put it: “We want compensation for small clubs which depend on transfer fees to survive. We cannot ask the European Union to change its laws but we can ask it to make certain exceptions concerning sport. ... What’s happened is a big problem. It has even been discussed in the parliament of Spain, Italy and Portugal. We need regional and local identity brought back into football” See “Blatter: The Millennium Interview”, *World Soccer* (January 2000), p. 32.

2. Explaining the reasons and the method of EC intervention

This section is not concerned with the legal aspects of the 'Bosman ruling' and the debate it has generated,²² but with the political aspects of it. More precisely, this section addresses the question: why has the Commission decided to tread on such a dangerous ground as that of football. This question has even more relevance if one considers that the Commission has entered the field at a time when the literature on 'governance' was busy theorising the 'retreat of the state' from an increasing number of spheres of social, and especially economic, activity. Why then, has the Commission claimed this new and controversial role at a time when the trend for political institutions is to relinquish responsibilities that were traditionally and indisputably seen as their own to independent agencies and other societal actors and agencies (e.g. independent central banks, autonomous competition authorities, etc.)?

A first hypothesis could be that the Commission has decided to intervene in this field because it regards sport, and football in particular, as an effective tool to build a European identity, which is part of its efforts to increase its legitimacy and thus solve the problem of the so-called 'democratic deficit'. According to this hypothesis, then, the Commission has entered the field in order to facilitate the establishment of a permanent European-wide football league. The Adonnino report *A People's Europe* (whose recommendations were adopted by the 1985 Milan European Council) explicitly recommended the formation of European sports teams.²³ That football could help in the construction of a European identity has also been argued by some entrepreneurs who have tried to set up a permanent European football league and following UEFA's attempt to sabotage their efforts have appealed to the Commission on the basis of article 85.²⁴ That the Commission might regard football as a good vehicle of integration and look favourably upon the establishment of a European league, however, is not the same thing as arguing that the Commission acted for this reason. To promote European identity

²² For positive evaluations of the ECJ decision, see R. Blanpain, *op. cit.* and the special issue of *Revue du Marché Unique Européen* (1, 1996) entirely devoted to the Bosman ruling. For a critical evaluation see Rachel B. Arnedt, "European law and football nationality restrictions: the economics and politics of the Bosman decision" and the references therein, at <http://www.law.emory.edu/EJLR/volumes/spg98/arnedt.html>

²³ "A People's Europe. Report of the Ad Hoc Committee" *Bulletin of the European Communities*, Supplement.7/85

²⁴ AC Milan chairman Silvio Berlusconi argued, for instance, that a European championship would undoubtedly have positive political repercussions insofar as "peoples would get to know each other better." Quoted in Giorgio Ferrari, *Il padrone del diavolo: storia di Silvio Berlusconi*, Milano: Camunia, 1990, p. 134. In the summer of 1998, Media Partners, a private business group linked to the Fininvest conglomerate that owns Milan AC (and hence to Berlusconi), launched a proposal to set up a European Super League that would officially compete with, but most likely effectively replace, the current European-wide competitions organised by UEFA. To this end Media Partners tried to convince the most successful European clubs to join its Super League by promising higher financial rewards than those provided by UEFA. UEFA, supported by FIFA, countered Media Partners' initiative by threatening to ban the players of the clubs that would join the proposed Super League from all other competitions, including those reserved for national teams. Then, the clubs contacted by Media Partners used the Super League proposal to bring pressure on UEFA both to change the format of its European competitions and to secure for themselves a higher share of the financial returns they generate. Since UEFA agreed to meet most of the demands made by the clubs, the latter decided to abandon the idea of joining the proposed Super League. Media Partners, for its part, reacted by filing a complaint with the European Commission in which it argued that UEFA infringes European competition law by abusing its dominant position and preventing new organisations (such as Media Partners) to organise and market football competitions in Europe.

through football the Commission certainly did not need to go as far as forcing changes in UEFA's rules and prepare the legal ground to facilitate the establishment of a permanent European-wide league (even if this is what happened in the end). This would have been a risky route to take and very likely to backfire given that football is a highly sensitive area with European publics who in general are conservative and do not welcome changes of any kind in the game or the organisation of events. If it had wanted to promote European identity and integration through football, the Commission could have chosen the much easier route of establishing a Cup – perhaps to be called the Monnet Cup – to be assigned to the winner of a three-match series between a European 'national' team and a South American 'all-stars' team. After a couple of years, both to prolong the duration of the series and to respond to the criticisms that would inevitably have been voiced by the restless guardians of 'political correctness', it could have expanded the format of the competition to include also the 'representative' teams of the 'football-challenged' continents.

A second hypothesis is that the EC institutions are essentially neo-liberal agents ideologically committed to the dismantling of institutional rigidities limiting market discipline, and bringing into football a process that has already occurred in other sectors of the economy.²⁵ The degree of liberalism prevailing in the EC, however, is a matter of debate and is likely to vary with the eyes of the beholder. The EC might look very liberal to a Norwegian farmer or a European social democrat but looks less so to a North-American classical liberal. The EC might have adopted (classic) liberalism as its guiding principle but is certainly not run by ideology alone. Brussels is a long way from Kabul and the Commission, unlike the bearded Talibans, does not have a Directorate General of 'Vice and Virtue'. The Commission does not enforce the principles of (classic) liberalism as fiercely as the Talibans enforce their own version of Islamism. In the EC there is protectionism (e.g. agriculture) and there is ample recognition of the necessity for occasional exceptions to general rules.

A third hypothesis is that the Commission is simply engaged in a 'governance' process. The term 'governance' is used differently, and in different areas of inquiry.²⁶ At the most general level 'governance' can be defined as a sustained process of competition and coordination, conducted both through formal structures and informal processes and practices, by various actors, private and public, economic and political, national and trans-national, in order to regulate (i.e. to provide order and predictability) a specific sphere of collective activity. In the specific case of football, the Commission as the 'Guardian of the Treaties' is committed to liberal principles but promotes them while taking into considerations the values, interests, and preferences of all actors involved in a specific sector. Indeed Commissioner for Competition Mario Monti has used the term 'governance' to describe the work of the Commission and has defined it as being almost synonymous with 'self-regulation'. The Commission, he has argued, is a bit like a 'referee' who can be very discrete and almost invisible on the field is all the players

²⁵ For this hypothesis, see Fiona Miller and Steve Redhead, "Do markets make footballers free?" in John Bale and Joseph Maguire (eds.), *The global sports arena: athletic talent migration in an interdependent world*, London: Frank Cass, 1994, pp. 141-152; and George Wright, "The impact of globalisation" in "Debate: the new political economy of sport", *New Political Economy*, 4, 2 (1999), p. 269.

²⁶ See, for instance, Jon Pierre (ed.), *Debating Governance: authority, steering, and democracy*, Oxford: Oxford University Press, 2000.

respect the “ground rules” i.e. the rules of Community Law.²⁷ The promotion of liberal values is not so much enforced as it is constantly negotiated with all concerned socio-economic actors. The Commission simply shows the general direction, and waits for all actors to move along, now gently prodding the recalcitrant ones, now discretely restraining those who because of their particularistic interests would like to push too far ahead too soon. A reading of the EC involvement in football, which focuses on a longer period than the last five years provides convincing support for this hypothesis.

The ‘Walraeve and Donà cases’ established sport as a legitimate area of EC activity but left other important questions unanswered since the ECJ admitted the possibility of “certain exceptions” from EC rules for sport. As later pointed out by Advocate General Lenz in the Bosman case, those rulings did not explain clearly either the ‘principle’ or the scope of these ‘exceptions’. Were for instance, foreign players to be legally excluded only in cases of matches between national teams or could the exception also apply to club matches? Thus, the Commission rather than forcing the issue (i.e. set up a formal investigation of UEFA and possibly impose a fine, which UEFA could have in turn appealed to the ECJ), preferred to engage in negotiations with football authorities. The ‘3-2 rule’ was of course a compromise and a half measure. If the “certain exceptions” mentioned by the ECJ were to be understood as applying to any type of match, why did UEFA agree to loosen restrictions and compromise? If they were to be understood as applying only to matches between national teams, why did the Commission agree to such half a measure?²⁸

The timidity on the part of the Commission was primarily political and linked to its limited, legal ability to force the issue. The Commission could have invoked article 169 of the Rome Treaty and warned (and, if necessary, also brought before the ECJ) member states for condoning rules of a private juridical order (that of UEFA and national federations) contrary to Community law. Such a procedure, albeit juridically conceivable, would have been politically unwise precisely because this was an area of Community law not yet well entirely clarified by the ECJ. The Commission, moreover, might not have been entirely convinced that UEFA rules did not have some merits and justification. Sport authorities after all did a considerable amount of lobbying to this effect and some member states were sympathetic to their views.²⁹ France, for instance, began trying to convince other member states to insert a brief protocol in the EC Treaties recognizing sport as a sector with special needs and hence deserving exemptions. The Commission was thus more than likely to meet resistance and hence was very cautious in its proceedings. As explained by then competition Commissioner Karel Van Miert, the Commission wished to perform its duty as authority responsible for competition policy in the Community but preferred to leave the task of safeguarding the rights of individuals and firms to national jurisdictions and limited itself to signal to football authorities that they needed to move in this field.³⁰

An important reason why the Commission did not need to take a bold, legal approach to make sure that football authorities replace rules that violated Community law

²⁷ Speech 01/84 at Swissotel Brussels, 26 February 2001 at <http://europa.eu.int>

²⁸ These questions are raised in J-L. Dupont, *loc. cit.*, pp. 69-70.

²⁹ On these points, see also Paul Demaret, “Quelques observations sur la signification de l’arrêt Bosman”, *Revue du Marché Unique Européen*, 1, 1996, pp. 12-13

³⁰ K. Van Miert, *loc. cit.*, pp. 6-7.

was that it could rely on football actors themselves to take, or threaten to take, legal initiatives and thus pressure football authorities to act. Following the 'Bosman ruling' in fact both players and clubs that would stand to benefit from the application of the 'Bosman ruling' to areas which the ruling itself had not directly addressed (e.g. transfers of players hailing from EFTA countries or other countries with which the EC had an association agreement covering the treatment of labour, transfers between clubs in the EC and clubs in EFTA or associated countries, etc.) could be expected to take initiatives (legal or otherwise) to have the 'Bosman ruling', and all the legal consequences that ensued from it, respected and applied. And indeed very soon the Commission began to receive complaints by EU clubs against UEFA/FIFA and national federations on the basis of articles 85 and 86.³¹ In the end none of these clubs went as far as seizing the ECJ against UEFA/FIFA and all cases were settled by means of a compromise that had little basis in law.

These cases that UEFA/FIFA could expect to continue to be brought to the attention of the Commission (and possibly also to the ECJ) put pressure on them to establish new rules that would be acceptable to the Commission. Thus UEFA first announced that the nationality clause would be suspended for what concerned UEFA-organized club competitions and then set up a working group that included representatives from national federations and leagues as well as the players' associations (FIFPRO) to find a suitable alternative to the existing transfer system. The interests and hence the views of all these football actors were rather diverse and thus negotiations were long-drawn and heated. Member states politicians, including Tony Blair and Gerhard Schroeder, also entered the field and expressed the desire that some kind of transfer fee system be retained.³² They also continued to insist on the need for "the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue."³³ The Commission thus partially accepted the view that the rules for the

³¹ The cases that received most public attention concerned the transfer of Rumanian Georghe Hagi from Barcelona to Galatasaray of Turkey, the transfer of Croat Goran Vlaovic from Padova to Valencia, and the transfer of Ronaldo from Barcelona to Internazionale of Milan. For the details of these cases, see Juan de Dios Crespo Pérez, "Análisis de los últimos conflictos jurídicos en la era post-Bosma del fútbol profesional" *Revista General de Derecho*, 642 (March 1998), <http://www.iusport.es/OPINION/crespo97.htm>

³² The governments of some member states tend to regard football as being more akin to a cultural industry than to business. Since national governments are concerned about the impact that the current evolution might have on the future of national teams, they are more inclined to treat football as a national industry deserving special treatment and exemptions. The French government, for instance, in an attempt to stem the defection of players to richer foreign clubs, has been rumoured to be considering changing the fiscal regime for football players. According to this proposal players would be allowed to treat at least some of their earnings as royalties, like models or concert pianists, rather than salary. The view of member states carries weight and thus the Feira EU Council recommended the Commission to consider giving the sport a special status on the basis of its social significance.

³³ Quoted in Jean-François Pons, "Sport and European competition policy", European Commission, Directorate General IV, 1999, p. 5. www.wsforum.org/WSportsForum2000/jfpons.pdf The Commission's guidelines for Community action in sport explicitly recognize that any action should be concerned "to respect the independence of cooperative effort in general and in sport in particular" (*The European Community and Sport*, SEC (91) 1438 of 31 July 1991). The Commission has also set up the 'European Sport Forum, which provides a permanent arena for discussion between the Commission, people involved in sport from national ministries and non governmental organisations, as well as representatives of European and national sport federations.

organisation of sporting competitions are very different than those for competition between industrial firms, that sport represents not only an economic activity but also a social one, and that sport organisations are not simply involved in economic activities but also have an important regulative role to play. Hence the Commission had to tread the fine line of trying to put a stop to the restrictive practices of sport organisations, which have a significant economic impact while, at the same time recognising that some of these practices might be necessary for a viable organisation of the sport.³⁴

In the negotiations the Commission could be said to have played the role of an authoritative mediator among football actors while at the same time pushing them towards the adoption of a system more in accordance with the principles and legal order of the Community. To use the apt definition developed by Alberta Sbragia, one could say that the EC as a whole has acted as a “coxswain” i.e. has engaged in the governance of football by “steering” football actors in the desired direction. The ECJ first and the Commission then have, in other words, facilitated but in the process also structured the role and action of social actors (in this case football actors).³⁵ Indeed, reading the letter of FIFA President Joseph Blatter to Competition Commissioner Mario Monti of 5 March 2001, one gets the impression that the Commission has simply acted as a consultant for FIFA to improve its rules. The March 2001 agreement, much like the ‘3+2’ rule, is a compromise. Albeit in substance it might be seen as another small step toward liberalisation, it is much more complex than the previous one and likely to prove contentious in its application (hence the need for an international autonomous arbitration body).

Conclusions

At the most general level EC involvement in football represents an example of the Community ‘rescue of European nation states’, or more precisely, of the rescue on the part of Community law of an area that national jurisdictions were obliged to leave to private sport organizations. A national judge or another national political authority would

³⁴ J.F. Pons, *loc. cit.*, p. 6.

³⁵ Alberta Sbragia, “The European Union as coxswain: governance by steering” in J. Pierre (ed.), *op. cit.*, pp. 219-240. Member states governments can be said to have engaged in the same type of mediating activity at the national level. According to an Italian sociologist the dynamics of the Italian government intervention in the domain of sports can be explained as follows: the increase in earnings generated by television has led some football super-clubs to claim for themselves and football in general a bigger share of the pie. Such “aggressively *profit*-oriented philosophy”, however, “has difficulty in coexisting with the principle of public support of the sporting movement.” Or, put in simpler words, in Italy by means of legal betting, football provides “public” financial support to many other sports. If football claims more for itself inevitably other sports will receive less. Hence, the intervention of the state aims primarily at curbing the “strong powers”, that is “checking the separatist tendencies of spectator football in relation to the wider system of performance sport.” The state, in other words, is called upon “to execute a complex role of both management and mediation.” Sport, and football in particular, constitute “a political arena” in which very concrete interests are at stake and the management of which “demands powers of arbitration.” The state can legitimise its “regulatory” intervention through “the very scope and the social dimension of the football phenomenon.” Nicola Porro, “Politics and consumption: the four revolutions of spectator football” in Roberto D’Alimonte and David Nelken (eds.), *Italian Politics: The Center-Left in Power*, Boulder: Westview Press, 1997, pp. 183-197, at pp. 191-192. For a review of state intervention in English football, see Jonathan Michie, “The governance and regulation of professional football” *The Political Quarterly*, 71, 2 (April-June 2000): 184-191.

not have been capable of taking on FIFA or UEFA given the means of reprisal available to the latter.³⁶ Whether Community involvement represents increased or diminished democratisation of sport is the object of a debate as contentious as the one on the relationship between governance and democracy. Community involvement is likely to continue although in a non-systematic way but on a case-by-case basis. As the Commission's paper on sport and competition of 24 February 1999 makes clear, Community sport policy is not yet sufficiently developed to answer all the issues that remain on the agenda, particularly the principle of organizing sports on a national territorial basis, the creation of new sporting organisations, club relocation, the ban on organizing competitions outside a given territory, the regulatory role of sporting event organizers, nationality clauses, selection criteria for athletes, sponsorship and the ban on clubs belonging to the same owner taking part in the same competitions, etc. The governance process through which changes will be wrought is likely to remain the same, namely it will begin with actions by football actors themselves. The most likely next step will be the removal of all nationality clauses in the wake of the recent passport scandal.³⁷

³⁶ P. Demaret, *loc. cit.*, p. 15. Demaret considers this rescue positive and calls it « récupération par l'ordre juridique communautaire de l'espace de liberté que les ordres juridiques nationaux étatiques avaient laissé au bénéfice des réglementations sportives privées. »

³⁷ The passport scandal is in fact another example of football actors and authorities taking actions that would eventually lead them to comply with the preferences of the Commission. The Bosman ruling established two categories of players, the EU nationals and the extra-communitarians. The latter and the clubs employing them obviously could not use article 48 to circumvent the nationality clause or the transfer rule although they could have used other parts of Community law to try to obtain the same result (see, for instance, L. Nyssen and X. Denoël, "La situation des ressortissants de pays tiers à la suite de l'arrêt Bosman" *Revue du Marché Unique Européen* 1, 1996, pp. 119-133). But this would have been a long and difficult route to follow. Hence, players and clubs used a more effective and direct method: they cheated by finding unlikely grandmothers in all corners of Europe or arranging marriages of convenience for extra-communitarian players. The situation eventually became so untenable following also the involvement of ordinary justice, that some national federations have decided to scrap the nationality rule altogether. This decision itself, however, is being contested by some clubs.