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Playing ball: EU regulation of professional football since the *Bosman* ruling

By Borja García

Background

As World Cup fever grips the continent, most football fans are probably totally unaware of the impact the European Union has had on the 'beautiful game'.

In a landmark ruling in 1974, the European Court of Justice (ECJ) declared, in the *Walrave and Koch* case, that sport was subject to EU law "in so far as it constitutes an economic activity within the meaning of Art.2 of the EC Treaty".

Since then, the EU institutions have become increasingly involved in sports-related issues and debates, especially about football, even though the Treaties do not give them any explicit powers in this area. This culminated in a specific article on sport (Article III-282) being included in the EU's ill-fated Constitutional Treaty.

However, it was the 1995 ruling by the ECJ on the *Bosman* case that really catapulted football to the top of the European agenda.

Jean-Marc Bosman, a Belgian player whose failed transfer from RC Liège to French Second Division side Dunkerque kick-started the whole process, asked the courts to rule on whether the international transfer system and the nationality quotas in club competitions imposed by FIFA and UEFA were lawful. In a preliminary ruling, the ECJ declared that these regulations breached the Treaty's provisions on freedom of movement for workers and against discrimination on grounds of nationality.

Despite several clear precedents at both European and national level, the far-reaching implications of the Court's ruling came as a shock to the football authorities, which had never imagined that the EU's regulatory powers could have an impact on their sport.

The subsequent liberalisation of the players' market changed the balance of power between employers (the clubs) and employees (the players), whose salaries shot up partly as an indirect consequence of the Court's verdict.

In parallel to the ECJ's interventions, football in Europe has been transformed by an enormous influx of money from the television industry, as the deregulation of the broadcasting market and the development of digital and pay-per-view television encouraged new operators to penetrate the sector by investing large amounts of money in football and other major sporting competitions.

The importance of football to television was underlined when Barcelona's Brazilian right-back Juliano Belletti scored the winning goal in May's UEFA Champions League final against Arsenal, watched by 13,715,000 Spanish viewers – almost one-third of the country's entire population.

Money matters

Over the last ten years, television income has displaced gate receipts as the top source of income for professional football.

In 1992, broadcasters paid 434 million euros for the television rights to English Premier League games for five seasons. Recently, the Premier League sold its live-to-air broadcasting rights for three seasons (starting in 2007-2008) for a massive 2.5 billion euros, with the final figure likely to be as high as 3.6 billion euros once the rest of the rights, such as highlights or the right to broadcast delayed games, are sold.

This suggests that predictions of a decline in the amount of money going into the sport from television, made a few years ago in the wake of the collapse of the ITV Digital venture in the UK and the Kirch empire in Germany, may have been wide of the mark. However, the auction for the broadcasting rights to UEFA's Champions League matches, which is now under way, will give a clearer picture of the trend.

Arguably, European football's governance structures have not been able to keep pace with the rapid commercial development of the professional game, and this has created numerous internal tensions between those involved in the sport.

Whereas clubs and federations formed a common front against Jean-Marc Bosman during his battle in the courts, the increasing amount of money available to the sport has prompted numerous requests for changes to a governance structure which used to be dominated, from the top down, by international (FIFA), European (UEFA) and national bodies.

At EU Member State level, top clubs have managed to increase their power, organising their own top-flight national competitions, for example, through the Premier League in England, Lega Calcio in Italy or Liga de Fútbol Profesional in Spain. However, this has been less successful at European level, where there have been two failed attempts to create a breakaway tournament to compete with UEFA's own Champions League and other club competitions.

Football's 'excesses' in recent years have intensified the internal debate about the way the sport is run, amid concerns over the origin of money invested in football, rumours of illegal betting and money-laundering, an increasing gap between the richer and poorer clubs, and even match-fixing practices which have, in some cases (for example, Germany) led to referees being sent to jail.

The debate about the (re)distribution of power within football's system of governance now overlaps with discussions on how its structures should be updated both to comply fully with European law and to combat such 'excesses'.

State of play

The EU takes a predominantly regulatory approach towards football, with its influence on the game shaped mainly by the application of EU law – especially provisions linked to the internal market and to the economic activities of the professional game.

However, regulatory policies tend to become politicised over time and football is no exception. As a result, the EU now has two distinct approaches towards the game: a legal and a political one.

Regulating football

First and foremost has been the drive to liberalise football as an economic activity because of its potentially significant impact on the European economy and markets. This has involved: a) ensuring freedom of movement for players, who are now considered workers as defined by the Treaty; and b) regulating the economic aspects of the game (such as the sale of broadcasting rights and ticketing arrangements for major tournaments) to ensure that they comply fully with EU competition law.

Despite opposition from the sport's governing bodies, this has been enforced through a series of ECJ rulings and investigations by the European Commission's Directorate-General for Competition. These have normally resulted in negotiated settlements rather than official decisions.

In the immediate aftermath of the *Bosman* ruling, Commission competition officials received at least 60 sports-related complaints, with most of them linked to the application of competition policy to the sector. This prompted the Commission to examine how far football and other sports complied with EU competition rules, starting with an investigation into FIFA's international transfer system.

The Commission decided that the changes introduced post-*Bosman* fell short of the EU Treaties' provisions on free movement, and entered into protracted negotiations with the sport's governing bodies to try to settle the issue.

The eventual agreement between the two sides included measures

to support the training of players; the establishment of a transfer period per season; clearly-defined rules on the contractual arrangements between players and clubs; the setting up of an arbitration body; and clarification that the latter did not prevent players taking their cases to national courts.

Despite initial complaints from the sport's governing bodies that the Commission was exceeding its powers and interfering with football's right to self-government, both sides have since heralded the negotiations which led to the deal as constructive, and agree that they helped improve mutual understanding of each other's concerns.

The second important case was the Commission's investigation into the joint sale of television rights for the UEFA Champions League, coupled with investigations into similar practices at national level by the German Bundesliga and the English Premier League.

The Commission argued that UEFA was hindering competition in the television market by selling broadcasting rights in a single package to just one broadcaster in each Member State. However, it accepted the principle of joint selling – allowing UEFA to sell rights on behalf of all the participating clubs – even though this also had a negative impact on competition. It justified this decision on the grounds that it would increase the appeal of the UEFA Champions League as a brand and maximise the income to be redistributed at the grass-roots level of the game.

Once again, UEFA entered into negotiations with Commission competition officials and the case was settled informally, with UEFA agreeing to amend its selling arrangements.

In essence, the current position is that leagues, federations or other organisations can sell the rights to their competitions jointly as long as they create several rights' packages which can then be bought by more than one broadcaster, thereby boosting competition within the television market. In short, there can be only one seller, as this is better for football, but there must be several buyers.

Three years after the case was closed, both sides now acknowledge that the agreement has been a success. It is seen by many as a turning point, with UEFA recognising the benefits of bringing its procedures into line with EU law and the Commission acknowledging that the sport has some specific characteristics which make it different from other economic activities.

Politicising football

Alongside the regulatory drive by EU policy-makers, there has been a growing debate on sport's socio-cultural values, bringing politics into play as a counterweight to the market-oriented approach which dominated in the aftermath of the *Bosman* ruling.

This approach regards sport as something more than an economic activity and as a sector which deserves special protection because, notwithstanding its economic element, it also performs five important social functions: educational, public health, social, cultural and recreational.

This argument has won support from the European Parliament, football's governing bodies (especially UEFA) and national governments. However, in the absence of an EU competence for sport, policy-makers have had to rely on *soft law* measures, such as parliamentary reports in 1994 and 1997; political declarations on the specific nature of sport and its social values attached to the Treaties of Amsterdam in 1997 and Nice in 2000; and the Commission's 1999 Helsinki report on sport (which was drafted by the Directorate-General for Education and Culture).

This politicisation of sport reflects concerns that football's 'excessive' economic development, facilitated (although by no means caused) by the liberalising zeal of the EU's policy-makers, is putting the football's social functions, and even the future of the sport itself, at risk. Recent scandals – over match-fixing in Belgium, the jailing of referees in Germany and the judicial investigations into Juventus and other teams in Italy – demonstrate just how real this risk is.

This politicisation has had two consequences. First, it has had an impact on the approach to liberalising the sport taken by EU policy-makers, who now tailor the way they apply European law to the specific nature of football in order to protect its social function. Second, it has opened up a debate on the changes needed in the way European football is run to ensure the survival of the professional game.

It is argued that one important way to redress the situation is to strengthen football's 'pyramid' governance structure. In this scenario, UEFA and national federations could play a central role in giving the game a secure future, provided that they update their structures to ensure democracy, transparency and representation in decision-making for all stakeholders and to comply with the legal requirements.

The latest development in this area was the launch of an Independent European Football Review by British Sports Minister Richard Caborn during the British Presidency of the EU in 2005.

Prospects

Ten years after the *Bosman* case, professional football has been transformed beyond recognition. It is now somewhere between sport and entertainment, but it remains as popular as ever – and still "more important than life and death", as former Liverpool manager Bill Shankly famously put it.

The EU institutions' interventions have undoubtedly had an impact on this transformation, but they are not responsible for the worrying trends in professional football.

The politicisation of the game in the post-*Bosman* era has led to a debate on the wisdom of giving the Union competences in sport. Football's governing bodies initially requested a protocol exempting sport from the application of European law, but they were eventually forced to recognise that this was a non-starter.

Other stakeholders in the governance of sport, such as clubs and players, as well as the Commission and, ultimately, the Member States, were all adamantly opposed to any such exemption.

The European Convention on the Future of Europe which drafted the EU's Constitutional Treaty in 2002-03 suggested – and national leaders agreed – that sport should be made one of the Union's "coordinating and supporting" competences, as this would allow it to help Member States develop a European dimension to sport, mainly at amateur level. It is, however, unlikely that this would have major consequences for football if the beleaguered Constitution eventually comes into force.

Three key elements are likely to shape the game's future at the European level:

1. *The report of the Independent European Football Review launched by the British Presidency last year*. The Review's chairman, former Portuguese Minister José Luís Arnaut, wants to establish a framework for forging a partnership between football and public authorities. The aim would be to provide political support and legal certainty to the dialogue between stakeholders in the professional game to ensure its future. This would entail a central role for governing bodies such as UEFA, but could also give clubs – and possibly even supporters – better representation. The report expresses serious concern about the health of European football and calls for quick action by governing bodies, EU institutions and national governments.

2. *The outcome of the so-called Charleroi or Oulmers case*. In this case, which is tipped to be a new *Bosman* for European football, the Belgian club Charleroi and the association of 18 of the richest football clubs in Europe, known as the G-14, are arguing that FIFA and UEFA rules on the release of players for national team games amount to an abuse of a dominant position under Articles 81 and 82 of the EU Treaties. The question has been referred to the ECJ for a preliminary ruling, which is not expected before late 2007. If the Court accepts the clubs' argument, this is bound to increase their power and representation in football's governing structures at the European level.

3. *The Commission's recently-announced White Paper on sport*. Consultations between different Commission departments have just begun, and a public dialogue is about to be launched with civil society and the sports movement. Commission President José Manuel Barroso also wants the College of Commissioners to discuss the EU's future role in sport-related issues at the highest political level. This could result in sport being mainstreamed in other European policies.

As a general principle, the EU institutions would prefer to reduce their role in the regulation of professional football, limiting themselves to supervising the way the game is run and its compliance with EU law.

Instead, they want to concentrate on using sport as a tool to achieve their goals in other policy areas, such as health (for example, the fight against obesity), social cohesion (for example, the fight against racism) and bringing citizens closer to the Union.

With political and legal support from public authorities, it would then be up to the football community – clubs, federations, players, supporters and maybe even broadcasters – to settle their internal arguments in a way that ensures fair competition (both on and off the pitch) and better-managed professional football clubs.

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