

# The Role Of The European Court Of Justice As A Political Actor In The Integration Process: The Case Of Sport Regulation After The Bosman Ruling

Luca Barani

## 1. Introduction

The article aims to explore the development of sport-related competences at the European Union (later-EU) level by focusing on the interdependent relationship between the political and legal spheres of the EU system<sup>1</sup>. Such an analysis stems from the historical development of the European integration process. The European Court of Justice (later-ECJ) has often acted on behalf of the so-called “institutional triangle” (Commission, Council, Parliament) and reached its most important decisions by mixing legal and political considerations<sup>2</sup>. Moreover, the process of “*juridicisation*”<sup>3</sup> of politics has considerably blurred the distinction between political and judicial spheres in Western polities. Thus, the objective of this article is to put into perspective judicial activism of the ECJ in the sport field and to assess its impact on the supranational integration process, even if at times it went against general political preferences.

The regulation of sport was chosen as a case study firstly and mostly because of its capacity to illustrate the potential tension between political and legal spheres. This capacity is due to the specific status that sport has acquired in the current stage of the European integration process. Although not included in the legal reach of EU Treaties, sport issues are handled by the ECJ and the Commission, which seek to achieve a greater level of integration in this field. This legal/technocratic drive to complete the Common market has been blocked by the Council, which repeatedly refused to integrate sport into the EU competencies and declined to define a clear sport exemption in the first pillar. Notwithstanding strong external political pressures on the EU institutions and a great amount of attention that some of them are devoting to this subject, we are currently witnessing a *status quo* deadlock in the sport regulation field.

In similar situations in the earlier stages of the European integration, political instances gave way to the ECJ, both in taking the initiative to shape the supranational system as well as in setting the agenda of the integration dynamics<sup>4</sup>. On a general level, structural conditions for such judicial leadership have remained in place up to the present day. This is due to several factors. Firstly, it is due to inertia of the integration process, driven by a legalistic mode, which transforms political problems in legal terms. Secondly, it is due to divergent efficiency of EU governance practices. The streamlined judicial proceedings of the ECJ, even if time-consuming, are more efficient than the legislative practices of other EU institutions. Thirdly, it is due to the legitimacy capital, which was accumulated by the ECJ during its history, either by producing authoritative interpretations of the Treaties or by taking important decisions on sensitive questions.

Thus, the current deadlock in the sport regulation case is not related to the change of structural

conditions. On the contrary, it is due to the self-containment of ECJ activism, which is adapting itself to the changed circumstances of the mature integration process in Europe. Taking stock of this evolution, the role of the ECJ is evaluated, in order to assess its overarching influence in the current EU system. This brings into discussion the issue of the clear-cut separation between political and legal spheres of the EU enterprise<sup>5</sup>. Dehousse categorises political functions performed by the ECJ as follows<sup>6</sup>:

- overall normative shaping of the EU *polity*, due to its interpretative powers upon Treaties;
- pervasive influence on the behaviour of institutional and individual actors within EU *politics*, due to its structural position;
- specific impact on *policies* during the decision-making process, due to either its interaction with other EU institutions or its proper internal functioning.

This article focuses on the third aspect by introducing a theoretical framework built on two different sources of literature: neo-functionalism and neo-institutionalism. In addition to that, the article employs the distinction between judicial and political spheres as a useful analytical tool to investigate the interplay between the ECJ and the so-called “inter-institutional triangle” in the case study of the sport regulation. The analytical presentation of the empirical case under analysis comprises the last 10 years: from the date of delivery by the ECJ of *Bosman* ruling in 1995 until the conclusion of the Convention on the Future of the European Union in 2004. At the end of this presentation, the potentialities and limits of the theoretical framework are evaluated, conducing to the general conclusions.

## 2. Theoretical framework

In order to analyse the development of sport regulation at the EU level the article is relying on two sources of theoretical literature. There are two main questions to be answered. The first is to explain *why* the sport issue was included in the EU agenda. The second is to explain *how* the EU institutions dealt with this matter.

On the one hand, *Neo-functionalism*<sup>7</sup> provides a model, which helps to explain the origin of sport regulation at the EU level. Firstly, it is the most commonly used theoretical framework to deal with matters related to the Common Market and legal integration<sup>8</sup>. Secondly, the EU involvement in the sport field seems to have followed quite closely the neo-functionalist theory, both in its insights as well as in its theoretical shortcomings.

According to this model, the intervention of the ECJ and Commission into sport issues was motivated by functional purposes, even though these matters were not included in their legal reach. The formal transfer of relative competencies failed to materialize, however. This highlights the shortcomings of the neo-functionalist model, which this article will address<sup>9</sup>:

- the missing nexus between structural factors and actors’ political will;
- the disproportionate importance given to technocratic dynamics to the detriment of symbolic politics;
- the neglect of external factors affecting internal integration.

On the other hand, *Neo-institutionalism*<sup>10</sup> provides a possible model to understand the ongoing development of sport regulation. This theoretical framework mainly focuses on the role acquired by the institutions in the elaboration of the political process but, at the same time, neglects the origins of the dynamics. Nevertheless, this framework provides interesting insights for understanding internal mechanisms of the EU institutional system. According to *Neo-institutionalism* theories, institutional design affects political actors’ action, even in unforeseen ways, which are not taken into account in their assumed rational strategies. According to this view, institutions are a collection of elements that couple interdependently, and so give birth to peculiar governance mechanisms.

The main characteristics of the EU system are its *co-operative nature*, due to intertwined competencies throughout institutions, and its even *balance* between supra-national (ECJ and Commission) and intergovernmental (Council) instances. This institutional *imbroglio* explains the interlacement on the decision-making system in the EU. The “*neo-institutionalist*” literature traditionally pays particular attention to the so-called “*inter-institutional triangle*” (European Parliament, Commission, and Council)<sup>11</sup>. This triangular relationship is viewed as the focus of the political decision-making process<sup>12</sup>. In respect of the complexity of this ‘Bermuda triangle’, the ECJ appears to be a monolithic organism, endowed with well-specified powers and competencies, exogenous to

the decision-making process.

This article challenges this particular view, by analysing this case study, according to a neo-institutional framework, which takes into account the role and functions of the ECJ. However, some of the shortcomings of this theoretical approach are going to be outlined<sup>13</sup>:

- the missing nexus between highlighted structural factors and actors' effective behaviour;
- tendency towards reductionism and circular arguments.

### 2.1. Neo-functionalism

*Neo-functionalism* constitutes probably the most elaborate, ambitious, as well as criticized, theory of regional integration and, more particularly, of European integration. According to its original formulation, during the 1960s, the neo-functionalist dynamics is composed of two sorts of *spill-overs*: a functional one and a political one. The functional spill-over<sup>14</sup> is a process arising from the functional tasks themselves. It reflects the enmeshed and interdependent nature of economic activities in modern societies. Consequently, the enactment of a supranational level, which deals with sectoral economic integration, sets in motion a teleological self-reinforcing process encouraging further integration. The success of existing policies creates pressure for deepening and widening the Community competencies. In this perspective, it is the Community's own progressive activity that provokes the need for new measures. In other words, supranational organizations, despite their intergovernmental origins, are living a life on their own<sup>15</sup>.

The political spill-over involves the build-up of political pressures inside the member states in favour of further integration and transfer of competencies and means towards the supranational level. This second spill-over has two dimensions. The first aspect is the assumed pluralistic nature of democratic societies, which determines conflicts of interest between different groups. The crucial assumption is that these groups focus on the functional level, which they consider as better serving their interests. This struggle follows the logic of utilitarian rationality. The perceptions of group interests, as well as expectations concerning the activities of different levels, determine shifts of group loyalty. The second aspect is the assumed elitist nature of politics, which determines the importance of political *elite*, national and extra-national<sup>16</sup>. The inter-play between and inside these two *elites* is essential in deciding which is the most appropriate way to conduct policies. If the functional spill-over is creating the working conditions for further integration, the political spill over, composed of two previously mentioned aspects, is crucial in provoking an overall snow-ball effect: the transfer of competencies from the national to the supranational level.

### 2.2. Neo-institutionalism

*Neo-institutionalist* theories constitute the tool-box on which this article is relying to explain the "how" of sport regulation development. The main assumption is that the institutional setting, made up of a complex of interdependent norms, rules and organizations, influences heavily the political process and its generated outcomes. This influence is mainly exerted in two ways: through the definition of path dependency and the production of unintended consequences. The first element refers to the restriction of options, which are conceivable and effectively available to actors, due to the re-enforcement of the institutional inertia, although this constraint is not of deterministic nature, it exerts significant influence on the political process. The second element refers to the institutional interdependence and issue linkage, which affect the rational strategies of actors involved in institutional networks or structures. This aspect generates a certain amount of uncertainty about the link between envisaged actions, individual or collective, and expected outcomes. In fact, the link is by no means linear or direct.

In order to study the ECJ role, this article considers the EU to be a political system characterized by sharing rather than clear-cut division of powers. In such a system, the entanglement between the institutions is of extreme intensity. The case study of sport regulation development at the EU level aims at analysing in depth this enmeshment. It demonstrates the interaction as well as the intertwining of institutional links and actors' strategies, in chronological and simultaneous manner.

The article accounts for ways in which the legal structure, taken as a whole, intervenes into the decision-making and influences the behaviour of other actors. In this conceptual setting, the ECJ is considered to be an important player, which has the capacity to affect other institutions of the

system as well as to receive feedback from them. This capacity could be defined as four-folded, following the analysis of Dehousse<sup>17</sup>:

- political innovation
- political pressure
- judicialization of the political process
- juridical legitimization

This article regards the ECJ as an institutional actor, acting consistently in the EU political system, endowed with its own proper agenda concerning the integration process. The ECJ preferences and priorities are assumed to be the outcome of internal (between judges and Advocates Generals) and external bargaining (within the Community legal epistemic community<sup>18</sup> composed of lawyers, experts and academics). Nonetheless, given the methodological difficulties involved in studying the ECJ preference building, the article assumes that this process is happening in a “black box” context. Thus, this article treats the ECJ as a unitary, though complex, actor.

The following section puts this analytical framework at test, from an empirical point of view, by using the specific case of sport regulation. An assessment of the proposed theoretical framework will be proposed at the end of the presentation of the case study.

### 3. Analytical presentation

The following section analyses the development of EU competences in the sport field, while focusing on the causes and consequences of the ECJ’s *Bosman* ruling. The timeline under consideration stretches between 1995 and 2004 and includes two IGC(s) and the Convention on the Future of Europe. In comparison with the initial years of European integration, this was a period marked by hectic EU interventions in the sport field. Presentation proceeds in chronological manner and is divided into three sub-sections.

In the first sub-section, the article looks at the entrance of the sport question in the EU agenda, which happened mainly thanks to the initiative of the ECJ and its (in)famous *Bosman* ruling. This ruling stimulated the reaction of other EU bodies, which is explained in depth later by explaining the political (a) and legal (b) intricacies of the situation of sport in Community Law.

In the second sub-section, the article discusses issues which were at the centre of political (a) and judicial (b) debates mounted inside the EU machinery in order to find a solution to the problems generated by the *Bosman* ruling.

In the third sub-section, the article presents the current status of the compromise concerning sport at the EU level, which is a fragile combination of alternative and/or divergent institutional strategies.

For analytical reasons mentioned before, the presentation is structured around the duality between the ECJ and the “*triangle institutionnel*”, in order to point out the tension between juridical and political dimensions of the ongoing saga of sport regulation. Such a division helps to highlight different perspectives on the institutional interests at stake. The ECJ sought to re-affirm a fundamental principle, the supremacy and primacy of Community Law, faced with the challenge represented by sport self-affirmed autonomy. Meanwhile, the other EU institutions backed a less ambitious stance on the politically delicate field of sport autonomy, which in their view was not of strategic importance to the EU integration.

#### 3.1. Sport in the EU agenda

According to several rulings of the ECJ, given the absence of any reference to sport in the EC Treaty, the European institutions have no direct competencies in the area<sup>19</sup>. In spite of subsequent Treaty revisions, the EU and its bodies have not yet acquired direct competencies in the field of sport. Sport matters, however, entered into the sphere of EU activities thanks to their economic relevance. Nonetheless, the EU bodies have not been unanimous in their approach towards sport-related questions. Sport is a divisive issue inside the EU and it is possible to observe stark internal rift concerning *if* and *how* to regulate, even indirectly, a politically sensitive field when there is no legal basis in the EC Treaty for intervention at the supranational level.

### 3.1.1. Political aspects

Sporting activities entered in the EU sphere of influence in the 1970s because of their newly acquired economic importance. The increase in commercial turnover and sponsoring of the professional branches of football, basketball and other disciplines across Europe necessitated some sort of regulatory interventions on the part of the Community institutions.

However, from a regulatory point of view, sport enjoyed an exceptional position in respect to other sectors for what concerns obligations stemming from the creation of the Common Market. This “above the law” attitude was based on a self-proclaimed autonomy *vis-à-vis* Community Law. To a certain extent, this arrangement reflected member states’ susceptibility to impingements on their cultural and social structures. In fact, this situation was in line with the full autonomy and self-regulation of sport organizations, which are almost universally enshrined in the national legal orders of Western Europe<sup>20</sup>.

Given the absence of a clear legal competence at the European level, however, encounters between sport and European integration produced varying attitudes in the EU. The interaction between self-governance structures and EU regulation was both cooperative and confrontational.

The Commission and the Council preferred to adopt a softer stance towards sport issues, opting for a benevolent neglect, subsidizing minor sport events and adapting to major sport requests. In fact, the European Council viewed sport mainly as a possible instrument for promoting European identity, by means of a publicity and communication campaign. This was part of the ‘People’s Europe’ strategy to raise awareness about the European Communities and their impact on daily lives of European citizens. This approach was outlined in the 1985 Adonnino report, approved by the European Council in Milan<sup>21</sup>.

In relation to the Commission approach, it is safe to state that the issue of sport and its compliance with Community Law has always been more or less marginal on its agenda, well after the Common Market Project was launched during Delors’ presidency of the Commission. In respect to the implementation of Community Law, the Commission adopted a soft approach, seeking to persuade sport authorities, and particularly football bodies, to comply with Community Law, where appropriate<sup>22</sup>.

The ECJ judges and elected European parliamentarians, however, were not as tolerant. The European Parliament vocally requested the Commission to take the necessary steps to ensure that professional sport complied with Community Law<sup>23</sup>. Its requests, however, were downplayed by the Commission, under the pretext of its lack of competencies on the matter. In addition to that, the ECJ had already put in doubt the self-affirmed independence of sport bodies, in its jurisprudence concerning their obligation to comply with the principles of Community Law. The Court was surely not prepared to treat professional sport branches in the same way as the Commission. During 1990s the issue became more explosive than ever, because football organizations were clearly infringing upon more than one area of the EC Treaties. That was particularly true of obstructive practices directed against the free movement of professional athletes<sup>24</sup>.

### 3.2.1. Legal aspects

Divergences between the Court and the Commission were exposed by the *Bosman* ruling, which centered on labor restrictions as a matter of contention between a football player and club. In fact, the ECJ was called to clarify compliance of professional football restrictive labor practices with the provisions of Community law

#### The State of the Law before Bosman ruling

Before entering the reconstruction of the *Bosman* ruling and its aftermath, it is necessary to dwell slightly on the legal intricacies of the sport governance regulation at the EU level, with special emphasis on labor restrictions of professional sportspersons. The problem is two-fold. On the one hand, restrictive and discriminatory labor practices in the private sector are subject to artt. 39, 81 and 82 of the EC Treaties. Application of Community law to sport requires different legal considerations to be taken into account and results in several points of divergence, which in turn



creates a problem of coherence at the very heart of the Treaty<sup>25</sup>. Secondly, there can be different means of enforcement. In fact, these labor restrictions are susceptible to a dual enforcement: either by the Commission, in its capacity as the “guardian of the Treaties”, or by private parties before national courts, relying upon the direct horizontal effect of artt. 39, 81 and 82 EC.

Concerning the first problem, the overlap and discrepancies between Art 39 EC and artt. 81-82 EC, make this issue complex<sup>26</sup>. In fact, concerning professional sport, the legal treatment of discrimination on national grounds and obstruction to freedom of movement for workers appear more lenient under competition law than under Art 39 and its related secondary legislation. In respect of free movement, such practices of discrimination and obstruction are prohibited without exception in professional sport, as it was declared in the *Dona* case. Vice versa, under competition law, Commission can grant an exemption for private labor restrictions under 81(3), in consideration of the specific conditions of the economic activity.

Regarding the problem of legal complexities originating from the EC Treaty itself, they have been magnified by the presence of different means of enforcement available to the Commission and the ECJ when they seek to address the potential tension between these provisions. In fact, concerning enforcement of artt. 39, 81 and 82, there is a remarkable difference from the standpoint of the ECJ, in the exercise of its preliminary-ruling jurisdiction (under Art 234 EC), and that of the Commission, in its administrative capacity as ‘guardian of the Treaties’ (under Art 226 EC).

On the Commission’s side, there are no legal means by which it is possible to enforce Art 39 directly against private parties. An indirect way is to use infringement proceedings against member states, based on Art 226 EC, demanding them to legislate against sporting bodies which breach the Treaty. By adopting this approach, the Commission would target private sport organizations indirectly. In such a scenario, a member state could be made liable for activities carried out within its territory by private parties, with its more or less tacit assent, which have adopted measures in conflict with Community Law. Such an eventuality is theoretically possible, but it is not very feasible. In practical terms, it is cumbersome and time-consuming, with uncertain results at the end of the process.

From the Commission’s point of view, however, direct proceedings against sport organizations are possible in relation to competition law, which confers to its DG Competition powers of investigation and discretionary decision while disposing of such cases. If this DG takes the view that football bodies are acting in breach of the EU competition rules, the Commission has power to issue a decision requiring termination of the anti-competitive practices and, in addition to this, it may decide to impose a fine. Under the current rules, however, the use of these powers of investigation and enforcement under competition law is not transparent for private parties, which have a vested interest in these proceedings. Once the Commission is informed of possible infringements concerning artt. 81 and/or 82, by “natural or legal persons who claim a legitimate interest”<sup>27</sup>, the complainant is not entitled to a final decision. This means that if the Commission decides not to pursue the infringement for reasons of political considerations or shortage of resources the complainant has no other means for redress, except to pursue the matter before a national court. In such an eventuality, private parties may invoke all directly effective provisions of the Treaty in order to challenge sport regulations, which they consider infringe Community Law. In fact, artt. 81 and 82 are directly effective, both vertically and horizontally. Thus, although this procedure is subject to national courts’ filter, it provides access to the ECJ for individuals seeking to challenge Community Law infringements. Whereas the DG Competition can have a much more expedient use of complaints under competition law, the ECJ, because of its role in preliminary references, is called to answer to all claims about *justiciables’* rights and is less inclined to neglect national court’s questions.

In sum, from the point of view of the *justiciable*, the Commission is the more effective avenue to deal with restrictive labor practices, while the most relevant DG is that in charge of Competition. This is true, however, only as long as the Commission is willing to process his or her claims. The judicial route, at the contrary, is easier to take but more time- and energy-consuming. Moreover, the pressure exerted on the ECJ by individuals or groups is more effective only if carried consistently in line with its jurisprudential principles and doctrine.

## The Bosman ruling

To take a specific case in point, Mr. Bosman, a professional football player unsatisfied with the treatment he received in his club, went on to challenge the UEFA regulations concerning the transfer of football players upon expiry of their contract under Community Law. A preliminary reference to the ECJ, via a national court, was coupled with the procedure according to EC Competition rules. However, because of the already explained overlap between art. 39 and artt. 81 and 82, his action raised irksome questions about legal implications stemming from previously mentioned Treaty intricacies.

Mr. Bosman submitted to the Commission his complaint concerning sport transfer rules invoking artt. 81/82, but it was dismissed as not having substantial importance. Moreover, the case, which was started before a Belgian court in August 1990 and initially involved only the player and his club, eventually assumed a broader political dimension with time. The UEFA and the Belgian football federation quickly entered in the case, siding with the club, whereas the trans-national professional players' trade union supported Mr. Bosman.

A preliminary reference, concerning also discriminatory rules on the ground of nationality in professional club recruitment and invoking artt. 39, 81 and 82, was filed to the Court of Luxembourg. The questions raised by the *Cour d'Appel de Liège* were the following:

"Are Articles 39, 81 and 82 of the Treaty of Rome of 27 March 1957 to be interpreted as:

a. prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club?

b. prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organize?"<sup>28</sup>

Focusing on these questions, the principal aspects of the ruling were both procedural and substantive. The ECJ dealt with both these aspects consistently, taking into account its previous rulings on the subject<sup>29</sup> and in line with its mainstream jurisprudence<sup>30</sup>.

Concerning procedural objections raised during the process, the ECJ confirmed that sport regulations were partially subject to Community Law. Firstly, the ECJ recognized that organizational rules of sport could be exempted from a rigid application of Community principles, due to their social dimension which is not within the reach of the EC Treaty. However, even recognizing the basically non-economic nature of sport activities<sup>31</sup>, the Court re-affirmed its competency to rule on conformity of professional and semi-professional sporting activities with the Community Law, if they are mainly economic in nature. In conclusion, sport was inscribed within the scope of application of Community Law insofar as it constitutes an economic activity, especially when it provides a gainful employment or a remunerated service, as is the case of professional or semi-professional athletes. Secondly, the private parties involved in sport disputes were allowed to invoke Community Law principles, having direct horizontal effect, which is the case of art. 39, dealing with freedom of movement for workers, and artt. 81 and 82, dealing with fair competition.

Considering substantial aspects of the ruling, the ECJ decided to apply only art. 39, without taking into account competition law, as asked by the national court and advised by the Advocate General in his opinion. The Court gave priority to art. 39, dropping the question on competition rules and ignoring overlaps with artt. 81 and 82<sup>32</sup>. This can be explained both by the practical difficulties of entering in such a conundrum without the assistance of previous pronouncements of the DG competition<sup>33</sup> and by the inclination of the Court to apply the rules of free movement in similar cases<sup>34</sup>.

The underlying reasoning of the ECJ judgment, styled by judge-rapporteur Mancini in two steps, was the same for both issues under consideration: the principle of national quotas and the transfer rules<sup>35</sup>. Firstly, infringements of the principles of the EC Treaty by private bodies without legitimate objectives, which can be justified by the general interest, are prohibited. Secondly, even if the measures are sufficient to attain their objectives, they must pass a proportionality test (that is, they are not more restrictive than necessary).

In respect of the first point, the Court acquiesced in the legitimacy of objectives pursued by the sport rules, justified on non-economic grounds: “maintaining a financial and competitive balance between clubs and supporting the search for talent and training of young players”<sup>36</sup>. Regarding the second point, however, the Court stated that the mechanisms adopted by the football governing bodies in order to pursue these legitimate aims were not proportionate, because the same results could be achieved by adopting measures which had a lesser impact upon the free movement of workers<sup>37</sup>.

The Court determined that the rule laid down by sport associations, according to which football clubs may field only a limited number of professional players, who are nationals of another member state (namely the ‘3+2’ rule), was an obstacle to free access to the labor market and was not justified by “pressing reasons of public interest”<sup>38</sup>. Even if these rules were not directly relevant to the *Bosman* case, the Court decided to make a pronouncement on the question of their legitimacy, considering prospective difficulties to have them raised again<sup>39</sup>.

Concerning the issue of transfer fees (not a discriminatory measure in itself) the Court recognized that reasons behind sport associations’ transfer rules were legitimate. However, it also stated that transfer rules were disproportionate measures in comparison with expressed objectives.

Considered as a whole, the *Bosman* ruling did not ignore unilaterally the social significance of sport or condemn irrevocably its organizational arrangements<sup>40</sup>. Nonetheless, it undermined the self-assurance and privileges of the football establishment and cast more than a shade of doubt about the legal autonomy of sport with regard to European integration<sup>41</sup>. In fact, the Court stated that Art 39 EC, which guarantees freedom of movement for workers inside the EU, precludes the use of transfer rules and national quotas laid down by sporting associations for professional footballers, who are nationals of one member state, on the expiry of their contract. According to the ECJ, such rules are likely to restrict the post-contractual freedom of movement of players who wish to pursue their activities<sup>42</sup>.

It has to be said that the main issue of legal complexity at stake (overlap of freedom of movement and of fair competition) was not resolved by the ECJ. In the *Bosman* ruling, Art. 39 was invoked as the only basis for the judgment and the ECJ did not pronounce itself on the possible application of artt. 81 and/or 82. As a consequence, the Commission was left to pronounce itself on the competition field, but this case was a clear rebuff to its prior conciliatory attitude towards sport organizations.

### 3.2. The Debate(s)

The threat of judicial proceedings against transfer regulation pressed the football authorities to negotiate a compromise on this matter with the Commission, in order to void the issue of contention arising before the Court. In 1991, the Vice-President of the Commission, Mr. Martin Bangemann, declared that an agreement had been reached with football governing bodies<sup>43</sup>. The so-called ‘3+2’ rule<sup>44</sup>, also known as “gentlemen’s agreement”, was meant to confirm the practice of national discrimination in the field composition of professional clubs. In such a way UEFA slightly modified its rules, in order to avoid the pronouncement of the sentence before the Court. The ECJ, however, went out of its way during the proceedings of the *Bosman* case and pronounced itself on this issue. Seizing the opportunity offered by the ruling, the Competition commissioner, Mr. Karel Van Miert, forced the football authorities to comply with the ECJ ruling and disavowed the “gentlemen’s agreement” negotiated by his colleague Mr. Bangemann.

#### 3.2.1. The political debate

The intervention of the Commission in the sport field was partially triggered by the mass media mobilization around the ECJ judgment. In fact, this ruling stimulated debates and responses on the part of other EU bodies, which were under pressure from different interest groups. The European Parliament and Council proved to be more receptive to public concerns than the Commission or the ECJ.

The European Parliament (EP) had a clearly more supra-nationalist stance than that of the Council. The Doris Pack report, issued on the 13<sup>th</sup> of June 1997, represented a first reaction to the consequences of *Bosman* ruling. The report concentrated its requests on the Commission and the Council. In fact, the EP asked for the creation of a Task force inside the Commission, convening



a formal sport Council, and adding an article dedicated to sport in the Treaties, in prevision of the 1997 IGC<sup>45</sup>.

The European Council was called by the Belgian Prime Minister<sup>46</sup> to take a position on the *Bosman* case, but it adopted a low profile. This attitude resulted in an annexed declaration to the conclusions of the Amsterdam ICG. Even if only by a symbolic gesture, the governments felt the need to intervene in this field, stressing the social importance of sport and inviting the Commission to associate sport governing bodies to the activities concerning sport governance.

It is worthy to note that the Commission and its application of Community Law to sport issues was the principal target of EP and the Council, there was no explicit reference to the ECJ. Following the Amsterdam declaration, the sport Unit inside the DG Culture of the Commission, under the double impulsion of the Council and the European Parliament, was charged with coordination of EU policies affecting sport as well as definition of the main principles of EU politics on this topic. In response to the EP request for a Green Paper on sport, a working paper was produced in 1998, which constituted the first attempt to make a sketch of the Commission's activities in this field, involving 20 DG, and the first step to coordinate them<sup>47</sup>.

Moreover, under a precise mandate of the Wien European Council, the sport Unit was charged to submit a report on the state of sport in the Union, with the stated objective to preserve the structure of existing governing bodies and to maintain the social function of sport<sup>48</sup>. The background behind this initiative was provided by the multiple scandals to which the European sport was subjected in the summer of 1998. The doping scandal of the Tour de France, the threat to the UEFA monopoly of European football competitions, and the debates about intertwining of propriety between football clubs and television companies, were the main topics on which the attention of the Commission focused<sup>49</sup>. Governments hinted at the opportunity to use the European level in order to curb the destabilization of national and European sport organizations. This attitude was confirmed by the so-called Helsinki Report, presented to the European Council in December 1999<sup>50</sup>. Because of the lack of direct EU competencies in the sport field, partnership between national and sport governing bodies was viewed as essential to provide a comprehensive solution to the problems of sport activities. In this way, the instances the EU intervened regularly in sport problems increased and the EU became incrementally involved in a status-quo maintenance of the sport system.

### 3.2.2. The judicial debate

Alongside visible steps taken by the political side to support sports external autonomy, the legal dynamic proceeded to altering the relations inside sport organizations. Whereas, traditionally, grievances and disputes between different components of the sport world were resolved internally, the resort to external instances, especially the judiciary and administrative bodies, escalated after the *Bosman* ruling. Other sport disciplines were involved in judicial cases regarding Community Law before national courts<sup>51</sup>, without demanding an intervention of the Luxembourg Court. Following the same logic, since 1997, the Commission Competition DG received several claims by individuals and groups, demanding to investigate alleged infringements by clubs and federations.

Subsequently, the ECJ engaged itself in improving its jurisprudential doctrine on sport issues. The occasion came when three other cases followed the *Bosman* ruling, although with a much lower profile. All three cases came from Belgian courts, which demonstrated the willingness of the judges of this country to involve the ECJ in sport issues<sup>52</sup>. All these cases were intended to attack other sport regulations under the cover of Community Law.

The case *Deliège*, the most ambitious of the three, tried to enlarge, in depth as well as in scope, the effects of the *Bosman* ruling to judo, extending to semi-professional sports the enforcement of fundamental freedom guaranteed by the Treaties to European citizens.

The case *Lehtonen* tried to transplant more or less the same reasoning as in the *Bosman* ruling to the regulations concerning recruitment of basketball players.

The case *Balog*, the least problematic from a legal point of view, tried to extend the rights accorded to the football professional players in the EU to their colleagues from countries which signed partnership agreements with EU.

Because of the complex and time-consuming mechanisms of the legal process<sup>53</sup>, the judicial action on sport issues gradually lost the momentum which was created by the *Bosman* ruling, and

disappeared from the forefront of public interest. Under the surface, however, tough judicial battles took place in the Luxembourg Court. Aware of the possible consequences of a “*Bosman bis*”, a majority of governments entered in the judicial debate as *amici curiae*<sup>54</sup>, to argue against the point of view of plaintiffs and to support the point of view of the sport federation. Nonetheless, in view of the preparation of the 2000 Nice IGC, the interplay between legal and political considerations in the sport regulation re-emerged. In April 2000, two ECJ rulings were delivered<sup>55</sup>, while the Commission launched a probe against the transfer rules of sport bodies.

With these almost simultaneous rulings, whose motivations are complementary if read in combination, the ECJ operated a complex realignment of its doctrine on sport regulation, according to the signals of the political environment<sup>56</sup>. The principles of Community Law were reaffirmed but the results of the cases followed a different course. *Deliège* ruling embodied the shift from a confrontational to a more compromising stance of the ECJ towards sport authorities. The conclusions confirmed all powers and competencies for the EU to intervene in sport issues, as long as they possess an economic dimension<sup>57</sup>, and to enforce Community Law, if necessary. The ECJ, nonetheless, recognized explicitly the functions and role of sport federations and governing bodies concerning the concrete organization of different sport disciplines. The *Lehtonen* ruling pointed out to the sport governing bodies that their actions related to organizing professional competitions are subject to control in respect of Community Law principles and thus cannot infringe the legal “*acquis communautaire*”. It was a signal to sport authorities that their autonomy is not absolute but has some tight limits, which are under surveillance by the ECJ. Moreover, the issue of the *Balog* case was still looming large on the horizon of football federations.

In fact, crisis was precipitating. In reaction to the inflated transfer market following the ending of 2000 European Championship, the Commission notified the UEFA and FIFA of the necessity to change the rules of this market in order to curb the anti-competitive nature of transfer regulations<sup>58</sup>. This ultimatum was reinforced by the threat of financial fines by the Competition DG. The overall responsibility of this course of action lied with the Competition DG, which indicted the Football governing bodies. They were forced to devise a new transfer system, taking into account the interests of professional players and clubs. The negotiations lasted from September 2000 until the beginning of March 2001 and influenced remarkably the preparation of a sport declaration for the 2000 IGC<sup>59</sup>. However, the thrust of the Competition DG was harnessed by the creation of an inter-service coordination inside the Commission, which was unfavourable to a rapid conclusion.

Equally frightening for the football authorities was the perspective of an additional ruling of the ECJ. In fact, its judgement in the *Balog* case was threatening to extend abruptly to all professional players from associated countries with EU (i.e. Morocco, CEECs, Turkey) the same rights accorded by the *Bosman* ruling to EU football players. The general conclusions, usually signalling the lines of subsequent ruling, were expected for the end of March 2001.

### 3.3. Reaching a compromise

The preparation of the Nice IGC was on the top of the agenda of the French presidency, but it also included sport<sup>60</sup>. In fact, the Nice IGC found the time to call for a compromise between the strict application of Community Law and the requests of sport federations. After the spring rulings, as outlined by the Commission’s European sport Forum<sup>61</sup>, it was no longer possible to include a sport exception in the Treaty, as demanded by national and international sport federations during their *tournée* to the European Parliament and the Commission in April 2000<sup>62</sup>. A compromise, in favour of a special position of sport at the European level, was inscribed in the 4<sup>th</sup> Annex to the Nice Summit and aimed at softening the stance of the ECJ and the Commission Competition DG stance toward football. This was made possible by the political intervention of senior politicians in national governments seeking to maintain sport autonomy and its traditional privileges. The FIFA and the UEFA consciously invoked and obtained the support of German and English governments<sup>63</sup>, as well as that of the French and Swedish EU presidencies.

In fact, it was important for football governing bodies to find a remedy assisting in overcoming the Commission and ECJ attempts to apply the Community Law to sport.

Concerning the Commission, the sport declaration of Nice and informal pressures of the pro-sport lobbying pushed this institution to soften the negotiating demands *vis-à-vis* football governing

bodies. The Commission, in fact, had half-heartedly assumed the function of an external 'regulator' of sport business, given its shortage of resources and a long list of priorities. Its most recent decisions outlined its lack of willingness to monitor in depth the activities of sport bodies. On the one hand, the Competition DG was eager to discharge its docket of accumulated cases and avoid additional responsibilities<sup>64</sup>. On the other hand, the Culture DG enhanced its role of privileged interlocutor with sport authorities, launching the idea of "2004 Year of sport". As a result, with a single press release, the Commission summarized its position on the remaining proceedings on sport. This clearing of its 2001-2002 docket of complaints was done following the scheme highlighted in the Helsinki report, which suited the autonomy of sport federations<sup>65</sup>.

Regarding the activities of the European Court of Justice, the football authorities escaped the continuation of the *Balog* case before this forum. The results of the Commission negotiations and the pressures of his club were crucial in inducing Mr. Balog to find a compromise, negotiated at the highest level of the FIFA in Switzerland, days before the presentation of the Opinion of Advocate-General on the case<sup>66</sup>. This outcome prevented the preliminary ruling of the ECJ, which probably should have followed the lines of the *Bosman* ruling<sup>67</sup>. Regarding the Court and national courts, the combined effect of the transfer deal with FIFA and the lack of enthusiasm of the part of Commission to pursue further investigations concerning sport breaches of EU law have discouraged prospective litigants.

Currently, the most likely scenario for the future is a retrenchment of monitoring and enforcement activities at the European level as well as a return to the internal dispute-solving machinery of the sport federations, more inclined to conciliatory mediation and informal settlements<sup>68</sup>. The notion of "*spécificité sportive*", introduced in the annex of the Nice Treaty to qualify the multiple functions performed by sport organizations<sup>69</sup>, is translated in a loose supervision of sport activities exerted by EU bodies. In other words, a lip service to the respect of the legal principles of European integration is paid in exchange of a loose control of effective practices. The possible ratification of the Draft Constitutional Treaty, is likely to reinforce this scenario. Art. 182 allows EU bodies to support social, educational and cultural aspects of sport, as part of EU competencies. If a reference sport is finally going to make its appearance in the EU treaties, consecrating a closer cooperation between the EU and sport bodies.

#### 4. Assessment of the Theoretical Framework

As explained earlier, sport regulation in the EU has developed in a discontinuous manner, and primarily as a response to sudden crises: the *Bosman* affaire, the Doping scandal, the transfer boom. The reactive nature of sport regulation at the EU level was the result of the lack of political will to intervene unless in case of punctual events that could no longer be ignored. This article, however, contends that, due to the functional nature and institutional configuration of the EU integration process, the apparently erratic regulation of sport has a coherent underlying structural logic.

In fact, neo-functionalism explains rather satisfactorily the origin and evolution of the sport regulation at the EU level. The ECJ and the Commission could act because of the shift of loyalty of interest groups. Confronted with unfavourable national legal orders, which ruled out any challenge to the established sport regulation, professional players increasingly opted out for action at the existing supranational level, to achieve their objectives. The invocation by professional football players of the principles of free-market regulation of the Community law is easily explainable in terms of Neo-functionalist utilitarianism.

If the integration *engrenage* is pertinent in explaining the decision of supranational institutions, ECJ and Commission, to intervene in sport issues, it is less helpful in providing explanation for the timing of their intervention. Sport regulation in the EU has developed in a discontinuous manner, following the irregular rhythm of emergencies which pushed EU institutions to act. The ECJ, and not the Commission, was best disposed to grasp such opportunities. The eagerness of the ECJ to intervene extensively in sport matters is explainable in terms of centrality of the sport issue on its agenda and its most stringent procedures, than those of the Commission, applicable for dealing with individual or collective claims concerning the enforcement of Community Law.

Concerning the importance of sport questions, the sport exemption from the Treaty dispositions is and remains a peripheral issue in the Commission agenda, as proved by the 1991 agreement of the Delors Commission with football governing bodies. This question, on the contrary, is a much

more central issue for the ECJ, because of its concern for the principle of the supremacy of Community Law. In fact, this principle is the very fundament of the authority that the ECJ possesses. Consequently, its defence of the "*acquis communautaire*" has a strong element of self-interest, both in maintaining its institutional position and defending the process of legal integration. Regarding the role of procedures, the art. 234 procedure, which is implemented by the ECJ, allows for individuals willing to signal Community Law infringements a surer, even if time consuming access to judicial instances, than the analogue procedure provided by the DG Competition at the Commission. Whereas the Commission bureaucracy has an expedient use of such complaints, the ECJ, because of its self-proclaimed mission to champion the *justiciables*, is more attentive to the enforcement of Community rights. Consequently, the pressure exerted on the ECJ by specific interest groups can be effective, if carried in line with the jurisprudential principles and doctrine of the ECJ<sup>70</sup>.

Nevertheless, in the case of sport regulation not all factors, which pushed for "Europeanisation" of this issue, are linked to the functional spill-over.

#### 4.1. Weaknesses of Neo-functionalism

As mentioned earlier, some important shortcomings are inherent to the neo-functionalist framework.

- The understudied nexus between structural configuration of interests and political strategies of actors;
- Over-reliance on technocratic considerations to the detriment of symbolic politics;
- Neglect of the influence of external factors in the process of integration.

Regarding the first factor, it is quite apparent that in the case study under analysis, the connection between functional logic and political strategy did not happen, as it would be expected by neo-functionalist theory. The sport regulation, as defined by the ECJ, was perceived by national governments as an unintended and undesirable consequence of the building of the Common market, and thus had to be opposed.

Regarding the second factor, the neo-functional model overlooks completely the symbolic importance of sport as an important factor for the politicians involved. This shortcoming is well illustrated by the success of the demagogic arguments of sport federations, which are inclined to present sport as a major element of national identity, and have repeatedly managed to oppose the activities of the Commission and the ECJ.

Concerning the third factor, the neo-functional theory does not take into account exogenous influences that favored EU intervention in sport matters. The pressure for further extension of formal EU competencies in the sport field arises directly from the general modernization of sporting activities. Since the 1970s, sport in Western Europe has become increasingly involved in commercialized activities linked to broadcasting industry. The worldwide commercial growth of sporting activities, connected to tele-communication sector deregulation, has determined the relevance of sport for the Common Market. The increase in commercial sponsoring of the professional branches of certain sports, in particular football and basketball, added a strong economic dimension to sport, which pushed it within the reach of Community economic regulation. Moreover, several national inquiries about the doping scandal revealed the transnational dimension of the phenomenon.

Even with these adjustments, however, the sport case cannot be completely understood in the light of *neo-functionalist* theory. The expected political spill-over did not take place at Amsterdam or Nice IGC(s), and is still waiting the ratification of the Constitutional Treaty. Confronted with the resort of professional athletes to the instances of the supranational level, against their opponents, major professional leagues and football self-governing bodies intervened in order to stop the shift at the EU level, as it was detrimental to their interests. National and international football organizations lobbied assiduously national governments and EU institutions in order to reverse the *spill-over* and to get a political exemption. Confronted with the consequences of the functional *spill-over*, however, these organizations adopted a more pragmatic attitude, aimed at shaping incrementally the political *spill-over*. As a consequence, the entry of a formal reference to sport in the Treaties was delayed until the 2004 Convention, and so until the day the European Constitution comes in power, the halfway solution of the "*specificité sportive*" will be in place. The reasons of such an outcome are complex, but in order to stick to the neo-functionalist frame,

they are fundamentally two.

Firstly, the functional logic was over-stretched in the sport case, because of the lack of a full-fledged political *spill-over*. Community Law was applied to professional sport without taking into consideration the structural link between professional and amateur worlds. Because of this structural linkage, the extension of EU competencies to sport meant that the EU reached out to social and non-economic issues, previously untouched by European integration. Due to differences between economic and cultural spheres of sporting activities, direct application of Community Law to the latter can create so many problems, that any attempt to solve the matter quickly are destined to fail.

Secondly, an unfavourable balance of power, in terms of interest mobilization and coalition building, prevented such a move. The shift of loyalties from the national level proved to be insufficient to legitimate the action at the supranational level and thus compelling the political *elites* to delay the transfer of competencies until a sufficient consensus among sport federations was found. The ECJ and the Commission, aware of the possible backlash, were hesitant in their attempt to enforce Community Law at the expenses of sport autonomy.

In conclusion, however, the neo-functional theory does not explain the permanence of an intermediate compromise between national and supranational solutions. The development of sport competences at the EU level clearly contradicts the linearity of the integrative process advocated by neo-functionalism. This *impasse*, however, can be explained by combining of the neo-functional insights with neo-institutionalist arguments.

#### 4.2. The contribution of Neo-Institutionalism

In spite of strong pressures on the part of football governing bodies, requests to reverse the functional *spill-over* were rejected, forcing the former instances to perform a half-hearted adjustment to the Community Law<sup>71</sup>. This apparent irreversibility of the integration logic is explainable in terms of the burden of institutionalised deference to the decisions of the ECJ as well as by the fear of the weakening of the Common Market integration, which might have followed sport exemption from Community competences. According to the neo-institutionalist framework, in fact, the institutional setting is affecting the decision-making in two ways: by defining a path dependency of institutional inertia and by producing unintended consequences related to the strategies of actors.

The first aspect relates essentially to the restriction of choices available to decision makers. Because of institutional inertia, not all possible options are equally conceivable or attainable. This factor, even if not sufficient in itself to prevent determined actors from obtaining their objectives, has an impact on the final decision. In the case of sport, the explicit reversal of a decision taken by the ECJ is simply not an easy option for any governments, as it is a very remote possibility, to say the least.

The second aspect relates to the institutional interdependence and issue linkage that affect the rational strategies of actors implied in institutional networks or structures. A sectoral exemption for sport matters could have had considerable effects on the overall dynamics of integration, opening the door to similar cases and weakening the benefits of the Common market, to which most governments are committed.

More generally, the deadlock on *status quo* was determined by the complexity of the decision-making on the EU institutional system, given the absence of larger consensus. This phenomenon is defined by Fritz Scharpf as the *joint decision trap*<sup>72</sup>. Each actor has several breaks at his disposal and by manipulating them he can block either the progress or the regression of the integration process.

The weight of these factors is running against the neo-functionalist dynamics, which was conceived without consideration to institutional variables. On the one hand, the sport case is consistent with the *neo-functionalist* dynamics, as it is an example of a new sector drawn into the supranational sphere of influence, without national explicit assent and by virtue of functional *spill-over*. Specifically, in spite of the fact that sport was out of the EU reach of competencies, it is handled by the ECJ and the Commission in order to assure the effectiveness of the Common Market. On the other hand, it is worthy to note that the political *spill-over* did not completely take place, especially considering the outcomes of Amsterdam and Nice IGCs. Apparently several member states blocked any extension of the EU formal competencies in this field (by means of



invoking either art. 308 or art. 48 of the EC Treaties) in opposition to the activism of the ECJ and the Commission. In fact, the reference to sport found its way into the Treaties only thanks to the European Convention, which was characterized by a much more fluid setting of coalition networks, capable of bypassing intergovernmental blockages and cross-vetoes<sup>73</sup>.

Even if the EU sport regulation was more reactive rather than pro-active, it was closely entangled in the logic of the decisional architecture. Due to the absence of a well-defined strategy behind the progressive Europeanization of sport matters, the contribution of neo-institutionalist theory is therefore crucial to understand the erratic dynamics of sport competencies at the EU level.

## 5. General Conclusions

From a theoretical point of view, the aftermath of the *Bosman* ruling of December 1995 demonstrates the interaction and the interdependence between juridical and political spheres inside the current EU decision-making system. The initial move of the ECJ, which came in the form of a legally-binding ruling, forced other institutions to react and enact sport re-regulation. The ECJ, however, did not retain the monopoly of action and the aftermath of the *Bosman* ruling clearly did not develop according to the ECJ's own preferences, because of the complex interaction between divergent strategies in the EU political system.

The underlying tension between legal/technocratic and political spheres was put in evidence by the impasse between functional and political *spill-over*. This fundamental conflict has proved to be a durable feature of European integration since its first years, and it is still in place, even if with different features.

The neo-institutionalist perspective stresses the ECJ's capacity for opening, nurturing and closing the EU decision-making process in a more consistent and coherent way than it is possible for any other EU institutions. By using categories proposed by Dehousse about the ECJ role in the EU decision-making<sup>74</sup>, it is possible to highlight the different dimensions of this capacity, as it manifested itself in the sport case.

Firstly, its capacity of political pressure in respect of the inter-institutional triangle, showed by the consequences of *Bosman* ruling. Secondly, its action of judicialization of the political process, where the interest groups enter in the judicial play to obtain results. Thirdly, its power of delegitimization of political bargains, just as in the case of the "gentlemen's agreement". Fourthly, its influence in shaping the content of the decision making, proposing some options instead of others, illustrated by the effects of *Deliège* and *Lehtonen* rulings.

Taken together, all the different dimensions of the ECJ's relevance for the EU decision-making system have to be put in the perspective of the so-called "judicialization of politics", a phenomenon broadly defined as "the expansion of the province of the courts and judges at the expenses of the politicians and/or the administrators."<sup>75</sup> This expansion has occurred in well-established democracies all around the world and has interested also the European integration process, reinforcing the already exceptional structural role of the ECJ in the Treaties.

If at the earlier stages of the European integration the ECJ experienced a comfortable room of manoeuvre, currently its freedom is reduced by three main factors, associated with the overstretching of its authoritative interpretation of Community Law<sup>76</sup>: the visibility of the ECJ caused by its acquired central role in the EU system, the growing judicial burden due to the workload, the increasingly critical environment surrounding its activity.

In addition to that, it is interesting to stress the evolving capacity of other institutions to impede the ECJ to intervene, by using indirect means. According to observation, the actors involved in the sport saga operated an off-of-record regulation of the issue combining different elements, to avoid the juridical feeding of the ECJ and escape its intervention in a very delicate political compromise:

- declaratory, not legally binding, statement;
- informal political agreement, so-called "gentleman's agreements";
- interference in legal procedures.

These specific forms of intervention in the legal field were adopted both by the Commission, defining its regulation, as well as by the European Council and member states during the IGCs. Without having a clear legal status, these declarations were sending political signals that made a difference in the political environment and influenced the activities of the Court. These manoeuvres were especially important in reason of the unclear status of sport in European integration,

but they are significant beyond this case. The interesting lesson to draw from this experience is that the influence of the ECJ on the EU decision-making system is not one-way. Even if the Court is assumed to be a monolithic organism, largely independent by other institutions, the ECJ is receiving and is sensitive to the political feedback from other EU institutions in response to its interventions. This illustrates the politicisation of Community law, as a consequence of the ECJ-induced “judicialization” of the EU political game<sup>77</sup>.

## Notes

<sup>1</sup> According to Joseph H. H. Weiler : “...the interaction of the legal and the political, and the consequent equilibrium, constitute the very fundamental feature of the Community legal structure and political process.” in Idem (1999), *The Constitution of Europe*, Cambridge, Cambridge University Press, p. 13.

<sup>2</sup> Joseph H. H. Weiler (1999), *The transformation of Europe* in op. cit., pp. 10-101.

<sup>3</sup> Jacques Commaille, Laurence Dumoulin, Cécile Robert (2000), *La juridicisation du politique*, Leçons scientifiques, Paris, LGDJ.

<sup>4</sup> Pierre Pescatore (1981), “Les travaux du « groupe juridique » dans la négociation des traités de Rome”, *Studia Diplomatica* XXXIV, pp. 159-178.

<sup>5</sup> Koen Lenaerts (1992), “Some Thoughts about the Interaction between Judges and Politicians in the European Community”, *Yearbook of European Law* 12, pp. 1-34.

Renaud Dehousse (2000), “L’Europe par le droit: pladoyer pour une approche contextuelle”, *Politique européenne* 1, pp. 63-83

<sup>6</sup> Renaud Dehousse (1997), *La Cour de Justice des Communautés européenne*, Montchrestien 2<sup>ème</sup> éd., cfr. Chapter 3.

<sup>7</sup> Ben Rosamond (2000), *Theories of European Integration*, London, MacMillan Press, pp. 50-73.

<sup>8</sup> Anne-Marie Burley, Walter Mattli (1993), “Europe before the Court: A Political Theory of Legal Integration”, *International Integration* 47:1, pp. 41-76.

Alec Stone Sweet, Thomas L. Brunell (1998), *The European Court and the national courts: a statistical analysis of preliminary references, 1961-1995*, *Journal of European Public Policy* 5:1, pp. 66-97

<sup>9</sup> Malcolm Anderson, Monica Den Boer, Peter Cullen (1995), *Policing the European Union*, New York, Oxford University Press.

<sup>10</sup> Ben Rosamond, op. cit., pp. 113-122.

<sup>11</sup> Clive Church (2002), “Teaching about EU Institutions”, *Journal of European Public Policy* 9:2, pp. 666-675

<sup>12</sup> Giandomenico Majone (2002), “Delegation of Power in a Mixed Polity”, *European Law Journal* 8:3, pp. 319-339.

Helen Wallace, William Wallace (1996), *Policy-making in the European Union*, New York, Oxford University Press, Third Edition.

<sup>13</sup> B. Guy Peters (1996), *Political Institutions, Old and New*, in Goodwin and Klingemann (eds.), *A New Handbook of Political Sciences*, New York, Oxford University Press

<sup>14</sup> According to Leon Lindberg, this specific spill-over “refers to a situation in which a given action, related to a specific goal, creates a situation in which the original goal can be assumed only by taking further actions, which in turn create a need for more action and so forth”, quoted by Ben Rosamond (2000).

<sup>15</sup> Jeppe Tranholm-Mikkelsen (1991), “Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC”, *Millennium* 20:1, pp. 4-6.

<sup>16</sup> The concept of extra-national is borrowed by General De Gaulle characterization of Commission personnel during the ‘empty chair’ crisis.

<sup>17</sup> Renaud Dehousse (1997), op. cit., Ch. 3.

<sup>18</sup> Concerning this concept, see Peter M. Haas (1992), “Epistemic Communities and International Policy Cooperation”, *International Organization* 46:1, pp. 1-35.

<sup>19</sup> Case C-36/74 Walrave v Association UCI [1974] ECR 1405

Case C-13/76 Dona v Montero [1976] ECR 1333.

Case C-222/86 Heykes v Unectef [1987] ECR 4097.

<sup>20</sup> Luca Di Nella (1998), “Il rapporto tra fenomeno sportivo e diritto : osservazioni di teoria generale e di diritto civile, comunitario e comparato”, *Rivista di diritto sportivo* 1-2, pp. 243-265.

Jean-Pierre Karaquillo (1996), *Le droit du sport*, 2<sup>nd</sup> Ed. Paris, Dalloz

Colin Miège (1996), *Le sport européen*, Paris, Presses Universitaires de France.

<sup>21</sup> Bulletin European Communities, “A People’s Europe. Reports from ad hoc Committee”, Supplement 7/1985.

<sup>22</sup> Commission, *La communauté européenne et le sport*, SEC (91) 1438 final, 31/7/1991

During the 70s and 80s, several meetings were arranged between the Commission and Football authorities to discuss the problem of national quotas in recruitment rules concerning professional clubs.

<sup>23</sup> European Parliament, Larive Report, PE Doc. A2-282/88, 17/2/1988

Parlement européen, *Résolution sur la libre circulation des joueurs de football professionnels dans la*

Communauté, Doc. A2-415/88, 11/4/1989

Parlement européen, Résolution sur la Communauté européenne et le sport, JOC C 205/1994/06/06 p. 487.

<sup>24</sup> For a perspective on the clash between EC Law and Sport regulations, in spite of political arrangements, see Nicolas Parisi (1996), "L'affaire Bosman : chronique d'une confrontation annoncée", *Revue de jurisprudence de Liège, Mons et Bruxelles*, p. 156.

<sup>25</sup> Julio Baquero Cruz (2002), *Between Competition and Free Movement*, Oxford, Hart Publishing, pp. 86-88.

<sup>26</sup> Stephen Weatherill (1989), "Discrimination on grounds of nationality in sport", *Yearbook of European Law* 9, pp. 55-92.

<sup>27</sup> Commission, Regulation 17/62 art. 3(2).

<sup>28</sup> C-415/93, *Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921.

<sup>29</sup> In the case C-36/74 *Walrave v Association UCI*, [1974] ECR 1405, the Court recognized the incommensurability between economic and sport logics. In the case C-13/76 *Dona v Montero*, [1976] ECR 1333, the ECJ discriminated on this basis between the competition of national representatives, motivated only by sport-related considerations, and the competition of professional teams, having a predominantly economic dimension.

<sup>30</sup> For a review of this jurisprudence see Marco Silvestro, Alessandro Silvestro (1996), "Le sport dans l'Union européenne et l'arrêt Bosman", *Revue du Marché Commun et de l'Union européenne* 400, pp. 489-493.

<sup>31</sup> C-415/93, *Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921, § 76.

<sup>32</sup> Some observers, however, argued that, in reference to this issue, this decision revealed a certain judicial self-restraint on behalf of the Court, which consciously avoided the application of Competition rules to football transfer rules. This dispensed the Court from ruling on domestic transfers. See Stephen Weatherill (1996), "Annotation on Bosman", *Common Market Law Review* 33, pp. 1024-1026.

<sup>33</sup> According to Judge Mancini, who was the judge-rapporteur in Bosman, it is sound judicial technique in the ECJ collegiate working, to limit the legal basis in order to avoid shaky compromises in the text of judgements. Giuseppe Federico Mancini (2000), "Practice, Procedure, and Forms of Action at the European Court of Justice", in *Idem, Democracy and Constitutionalism*, Oxford, Hart Publishing, p. 217.

<sup>34</sup> Louis Baquero Cruz (2002), *op. cit.*, pp. 103.

<sup>35</sup> David O'Keeffe, Paul Osborne (1996), "L'affaire Bosman", *Revue du marché unique européen* 1, pp. 17-44.

<sup>36</sup> C-415/93, *Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921, § 105.

<sup>37</sup> *Ibidem*, § 110.

<sup>38</sup> *Ibidem*, §§ 85-86.

By using only art. 39 the Court was led to apply to private bodies rules the exceptions included in the article aimed to exempt public bodies, in order not to deprive them of an adequate level of protection

<sup>39</sup> *Ibidem*, § 136 the remark shows the intention of the Court to strike down the agreement of the Commission.

<sup>40</sup> Stephen Weatherill (2000), "Resisting the Pressures of Americanization: the Influence of European Community Law on the European Sport Model", in S. Greenfield and G. Osborn (eds.), *Law and Sport in Contemporary Society*, London, Frank Cass Publishers, p. 164.

<sup>41</sup> Mario Clarich (1996), "La sentenza Bosman : verso il tramonto degli ordinamenti giuridici sportivi ?", *Rivista Italiana di Diritto Pubblico Comunitario* 3-4, pp. 613-628.

For a argument in favour of Sport self-affirmed autonomy, based on conceptions of legal pluralism, see L. Silance (1998), *Les sports et le droit*, Bruxelles, De Boeck.

<sup>42</sup> C-415/93, *Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921, § 101.

<sup>43</sup> The "gentlemen's agreement" was viewed by football federations as dismissing preventively the threat represented by the Bosman case, by altering the status quo without fundamental changes. Interview with Mr. Misson, Sports Law Lawyer, Liege, 10/7/2003.

<sup>44</sup> According to this compromise, clubs may recruit 3 'foreign' players plus 2 'assimilated' players, meaning those who have played for a certain number of years in the domestic competitions.

<sup>45</sup> Parlement européen, Résolution sur le rôle de l'Union dans le domaine du sport, J.O. n°200 du 30/6/97.

<sup>46</sup> Who was reacting to national public opinion: "Selon le premier ministre, le sport devrait bénéficier, tout comme la culture, d'un statut particulier dans les normes communautaires. Il estime que si l'application des lois par les juges n'est pas conforme à la réalité sociétale, c'est au législateur qu'il appartient de réagir" *De Standaard*, 22 december 1995, quoted by Roger Blanpain (1996), *L'affaire Bosman*, Leuven, Peeters, p. 27.

<sup>47</sup> Coopers&Lybrand, *L'impact des activités communautaires dans le sport*, study realized in 1993 and updated in 1995.

<sup>48</sup> See § 95, European Council Conclusions, Wien, 11-12 December 1998.

<sup>49</sup> Commission, *Evolution et perspectives de l'action communautaire dans le sport*, document de travail des services de la Commission, 29/9/1998.

<sup>50</sup> Commission, COM (1999) 644 et /2).

<sup>51</sup> L'Humanité, "Affaire Malaja: pas de super arrêt Bosman dans le basket", 28 janvier 1999.

Le Monde, "Football: l'affaire Ekong bouleverse le marché italien des transferts", 8 Novembre 2000.

<sup>52</sup> In respect of other national courts, the Belgian judicial instances seem to be more receptive to the possible European dimension of the cases in from of them. This sensitivity is also a result of the pressure of the parties and lawyers involved in these cases.

<sup>53</sup> See Antoine Garapon (1997), *Bien juger, essai sur le rituel judiciaire*, Paris, Odile Jacob.

<sup>54</sup> Without being contemplated in the rules of the procedures of the European Court of Justice, this institution present in common law system is the most apt to capture the function of the observations made by governments and Commission at the address of the Court during a preliminary reference procedure.

- <sup>55</sup> Joined case C-51/96 and C-191/97 *Christelle Delière v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, Judgment of the Court of 11 april 2000
- C-176/96 *Jury Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball ASBL (FRBSB)* [2000] ECR I-2681, Judgment of the Court of 13 April 2000.
- <sup>56</sup> The Amsterdam Declaration on Sport was quoted to justify the ECJ conclusions in both motivations: C-176/96 *Jury Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball ASBL (FRBSB)* [2000] ECR I-2681 § 33
- C-51/96 and C-191/97 *Christelle Delière v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, Judgment of the Court of 11 april 2000 § 42.
- <sup>57</sup> Conclusions générales de l'avocat général Cosmas of 18 May 1999, § 41 in C-51/96 and C-191/97 *Christelle Delière v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, Judgment of the Court of 11 april 2000.
- <sup>58</sup> Financial Times, "Fifa to shake up football transfer fee system", Friday September 1, 2000.
- <sup>59</sup> Interview with Ms. Caballero, French Permanent Representation to the EU, Brussels, 10/6/2001.
- <sup>60</sup> Sénat de la République française, Audition de M. Pierre Moscovici sur les conclusions du Conseil européen de Lisbonne, 29 Mars 2000.
- <sup>61</sup> IXème Forum Européen du sport, Document cadre pour les discussions du groupe de travail portant sur la spécificité du sport, Lille 26-27 octobre 2000.
- <sup>62</sup> Conclusions de la réunion de dialogue Commission / mouvement sportif, 17 Mars 2000
- Commission, Discours de Mme Reding au Congrès de l'UEFA, 30 juin 2000.
- <sup>63</sup> Deutsche Bundesregierung (2000), Declaration commune du Chancelier fédéral Gerhard Schröder et du Premier ministre Tony Blair, Communiqué n°425/00.
- <sup>64</sup> Upon multiple requests for an interview with responsible officials, the author was addressed to the DG website to consult the official position of the Commission.
- <sup>65</sup> Commission MEMO/02/127.
- <sup>66</sup> The author tried to have a look at these conclusions, which were ready at the moment of the disclosure of the deal between Mr. Balog and FIFA, but he was prevented by the rules of confidentiality of the ECJ. However, a unofficial version of the conclusions were already circulating among Sport officials in Brussels. Confidential Interview Brussels, 12 June 2000.
- <sup>67</sup> On football transfer concerning nationals of other countries in the EU, which probably would have followed the guidelines of Bosman ruling. Even if this speculation is a counter-factual hypothesis, by definition uncertain, it is circumstantially confirmed by the legal doctrine and by the consistent jurisprudence of the Court in enforcement of art. 39.
- See L. Nyssen, X. Denöel, "La situation des ressortissants de pays tiers à la suite de l'arrêt « Bosman »", *Revue du marché unique européen*, 1 (1996), p. 119-133.
- <sup>68</sup> Interview with the lawyers defending Mr. Balog, Brussels 12 June 2000.
- <sup>69</sup> The speculative nature of this justification is matched only by the invention of a European Sport Model, built in opposition to a supposedly unified American Sport model, functioning as a dystopic model.
- <sup>70</sup> Obviously, this does not prevent the ECJ from avoiding sensitive questions and issues in its judgments.
- <sup>71</sup> Le Soir, "Réponse hésitante de la Fifa", jeudi 12 juillet 2001.
- <sup>72</sup> Fritz W. Scharpf (1988), "The Joint Decision Trap: Lessons from German Federalism and European Integration", *Public Administration* 66, pp. 239-278.
- <sup>73</sup> Lars Hoofmann, Anna Verges Bausili (2003), "The Reform of Treaty Revision Procedures: The European Convention on the Future of Europe" in Tanja Bortzel, Chicowski (eds.), *The State of the European Union* 6, Oxford, Oxford University Press, pp. 124-154.
- <sup>74</sup> Renaud Dehousse (1997), op. cit., Ch. 3.
- <sup>75</sup> Torbjorn Vallinder (1995), "When the Courts Go Marching In", in Torbjorn Vallinder, Neal C. Tate (eds.), *The Global expansion of Judicial Power*, New York, New York University Press, p. 13.
- <sup>76</sup> Joseph H. H. Weiler, "The least-dangerous branch: a retrospective and prospective of the European Court of Justice in the arena of political integration", p. 212 in op. cit., pp. 188-218.
- <sup>77</sup> John Ferejohn (2002), "Judicializing Politics, Politicizing Law", *Law&Contemporary Problems* 65, pp. 41-68.