

# THE BOSMAN RULING: EUROPEAN SOCCER – ABOVE THE LAW?

Blair Downey\*

---

## I. INTRODUCTION

THE AVERAGE SPORTS FAN, when thinking about sports, does not usually think about how it applies to international law. Most European soccer fans didn't either until Christmas of 1995. On 12 December 1995, a ruling was laid down by the European Court of Justice (ECJ) that drastically changed the face of Europe's game and passion.

This paper will discuss the following. First, there will be a brief explanation of the general objectives of the European Union (EU). Second, it will provide an overview of the operation of European soccer prior to and following the decision. Third, the facts of the ruling and the court's decision will be provided. The decision will then be analyzed with respect to its effect on Articles 48, 85, and 86 of the Treaty of Rome. Next, the fears and concerns of this decision (as voiced by the soccer world) will be addressed. This will be followed by an analysis of possible solutions to the problems soccer has experienced since the ruling, and a special focus will be given to the latest solution. Finally, this paper will analyze the ruling with respect to the British Premiership League.

## II. EU'S OBJECTIVES

TO UNDERSTAND WHY THE ECJ RULED as it did, the overall objectives of the EU must first be understood. The Treaty of Rome, which created the EU, was signed in 1957.<sup>1</sup> Although it was originally signed by only six states, it now has fifteen members. They include the United Kingdom, Ireland, France, Belgium, Holland, Luxembourg, Spain, Portugal, Germany, Denmark, Greece, Sweden, Italy, Austria, and Finland. Its principal focus was:

the removal of border impediments to trade, especially tariffs and quotas, but over time it has committed itself to a much more substantial level of economic and political integration,

---

\* William J. Parsons Law Office, Barrister, Solicitor & Notary.

<sup>1</sup> M. J. Trebilcock & R. Howse, *The Regulation of International Trade*, (London: Routledge, 1995) at 23.

which would provide for the free movement of goods, services, capital, and people within the Community.<sup>2</sup>

(It should be noted that the EU is the only trading bloc that has enshrined the freedom of movement principle as guaranteed under Article 48.<sup>3</sup>) The EU contends that it is essential to a comprehensive free trade regime in that its intent is to eliminate any discrimination between workers with respect to their nation of employment.<sup>4</sup>

The objective of achieving such mass integration is highlighted in Article 2 of the Treaty of Rome, which states:

[t]he aim of the European Union, by instituting a Common Market and bringing together the economic policies of the Members, [is] to promote a development of economic activities, continuous and balanced expansion, increased stability, increased standard of living, and closer relations between Members.<sup>5</sup>

This integration arose because of many factors, including the fact that Europe was ravaged after World War II, and with its economy in dire straits it did not want the possibility of European nations developing a great animosity between one another again, as was the case throughout history with France and Germany.

Clearly, to obtain this substantial integration, the members must adopt the same policies and abide by them. One such policy is that competition must not be hindered whatsoever within the EU. Competition is a vital ingredient to economic prosperity and capitalism. Without it, monopolies or cartels would emerge. This would increase prices for consumers and give people a lower standard of living. Article 3(F) of the treaty articulates the importance of competition: “[t]he activities of the Community shall include... the establishment of a system ensuring that competition will not be distorted in the common market.”<sup>6</sup> The EU’s competition laws are highlighted in Articles 85 and 86.

---

<sup>2</sup> *Ibid.*

<sup>3</sup> R. Atherton, “Fraser v. Major League Soccer (MLS): The Future of the Single-Entity League and the International Transfer System” 66 *UMKC L. Rev.* 887.

<sup>4</sup> P. Closson, “Penalty Shot: The EU’s Application of Competition Law to the Bosman Ruling” (1998) 21 *Boston College and Int’l Comparative L. Rev.* 167.

<sup>5</sup> *Treaty Establishing the European Economic Community*, 25 March 1957 298 U.N.T.S. 36, Article 48.

<sup>6</sup> Closson, *supra* note 4.

### III. HOW SOCCER WORKS

THE WORLD GOVERNING BODY OF SOCCER is the Federation Internationale de Football Association (FIFA). It has five regional divisions which govern their respective continents. The European division is the Union des Associations Europeennes de Football (UEFA). UEFA then has various associations which govern soccer in that particular member state. FIFA, UEFA, the Belgian Association, and Jean-Marc Bosman are the relevant actors in this case.<sup>7</sup>

Traditionally soccer was organized in the following way. Each club had a developmental system. They would find young prospects and then spend time and energy developing their skills and talents so that one day they would play on the organization's first division club. (A first division club is equal to a National Hockey League franchise.) Usually these prospects were domestic boys, frequently being local boys. The majority of the club's players were domestic due to a UEFA rule that no team could field more than three non-nationals at one time.<sup>8</sup> The rationale: local talent increases local interest.

When a player's contract was up and he wanted to leave the club, he would apply for a transfer. That is, he could advertise his talents to other clubs – but there was a catch. Even if he found an interested club he would not automatically go to this team. There had to be an agreement reached between the new and old clubs. This was not an agreement on trade of players, but one of money. In order for the player to move, the new club had to agree to pay a transfer fee to the old club. This was to compensate for the club's time and energy spent on developing the player. If an agreement was met, the player would change clubs. If not, the player would either resign with the original club, or if he did not want to do that, he could be suspended by his club. This changed with the Bosman ruling.

### IV. AND THE WALLS CAME DOWN

#### A. The Bosman Ruling

Jean-Marc Bosman was, at best, an average player for the RC Liege, a first division club in Belgium's Association. Bosman's contract expired in 1990, leading RC to offer a one year extension with a salary decrease of 75 percent.<sup>9</sup> He refused, and was put on the transfer list. Bosman

---

<sup>7</sup> R. B. Arnedt, "European Union Law and Football Nationality Restrictions: The Economics and Politics of the Bosman Decision" (1998) 12 *Emory Int'l L. Rev.* 1091.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

negotiated a deal with a French club in a lower division. The transfer was to be temporary and the fee was to increase if it became permanent.<sup>10</sup>

RC, fearing the solvency of this club, denied the transfer. Bosman refused to resign with RC and at the start of the 1990-1991 season he was suspended. Bosman then sued the Belgium Association and RC, claiming that the transfer system and the nationality clause violated Articles 48, 85, and 86 of the Treaty.<sup>11</sup>

On 12 December 1995, the ECJ laid down its ruling. The court held that the transfer system and the nationality rule did violate Article 48 and that the system and rule, therefore, had to be banished. The court did not make a decision regarding arguments that concerned Articles 85 and 86.<sup>12</sup>

Essentially the ruling created a free agency situation in Europe for soccer players. This effect was similar to that experienced in major league baseball 25 years ago when Peter Seitz, an arbitrator, made a ruling on the Dave McNally-Peter Messersmith case which struck down the reserve clause in baseball contracts and created free agency. In addition, every club in Europe could now field as many non-nationals as they pleased. This ruling, however, did not apply to players still under contract, to the makeup of national teams, or to players who come to play from outside of Europe.

## B. Article 48

Article 48 of the treaty states:

freedom of movement shall involve the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other working conditions.<sup>13</sup>

How did the transfer system violate Article 48? It acted as an artificial barrier to movement.<sup>14</sup> If a team wanted a player, and in turn the player wanted to play for that team, provided his contract had expired, he still could not move without an agreement on a fee. Therefore the only thing that was preventing him from exercising his right to move to a club where there was an employment opportunity was money. The obligation of having to agree on a fee inhibited a player's ability to move freely.

The non-national rule also violated Article 48. By limiting the number of foreigners a club could field at one time, the rule was actually

---

<sup>10</sup> Closson, *supra* note 4.

<sup>11</sup> Atherton, *supra* note 3.

<sup>12</sup> Closson, *supra* note 4.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

discriminating against foreign players. This discrimination affected a player's employment opportunities. Because there were limits, the opportunity to play elsewhere was decreased. While these opportunities should be decreased for lack of talent or experience, it should not be due to being born in a different member state. These rationales were used by the ECJ in making its decision.

### **C. Articles 85 and 86**

Although the ECJ did not make a decision on this issue, the EU Commissioner of Competition, Karl Van Miert, implemented the Bosman ruling in soccer by holding that it was anti-competitive. While the commissioner has the authority to do so, there could be action brought against his decision through the courts. However, in all likelihood, the court would agree with the commissioner. While UEFA refused to implement the ruling initially, they conceded after receiving threats of heavy fines by the commissioner for failing to comply.<sup>15</sup>

In order for a practice to be anti-competitive it must meet a three-stage test that is outlined in Article 85. First, there must be an agreement between enterprises. (An enterprise is an entity that does business.) Because UEFA and the various associations conduct business with each other with respect to TV contracts, marketing, and ticket sales, the first element was satisfied. Second, there has to be a decision by an association which is made up of enterprises. The individual member associations were members of UEFA, and therefore followed UEFA's decision not to implement the ruling. Third, any decision or concerted practice must affect trade between member states. As stated before, the transfer system was held to be an artificial barrier to trade. Because a club could turn down any transfer fee offer, the club had an unfair advantage, for they could keep the player for as long as they wished, or they could prevent him from playing through suspension. This advantage skewed the market and encouraged the preservation of the present market situation. Also, because clubs frequently traded players in other states, UEFA's decision to uphold the transfer system and the non-national rule affected trade between member states.<sup>16</sup>

Van Miert was satisfied that this three-stage test was met. Therefore, the Bosman ruling entered European soccer with great criticism and concern from the soccer community.

## **V. SOCCER'S GREATEST FEARS**

### **A. Wages**

---

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

Club owners were concerned that the ruling would drastically increase wages. They argued that because teams were no longer required to pay the transfer fee players would demand a higher salary. Also, the establishment of free agency led to a great increase in the use of player agents who expected to be paid, and paid well. Therefore, players would be forced to ask for higher salaries to offset the expense of agents.

The fear of increasing wages has become a reality. For example, Lionel Pickering, the Chairman of Derby, a first division club in the Premiership League, stated his club's average salary increased from two million pounds in 1995 to three million pounds in 1999.<sup>17</sup> Also, the aggregate income of the clubs in the premiership was 246 million pounds (\$476.50) in 1998-1999. This is three and a half times the amount of 1992-1993.<sup>18</sup>

This increase in wages is driving up operating costs. William Davies, a soccer financial expert of the stockbroker firm Capel-Cure Sharp, believes that not all premiership clubs will be able to cope, particularly smaller clubs.<sup>19</sup> Smaller clubs will need to increase wages to remain competitive and in doing so they will greatly decrease profit margins – that is, if they profit at all. With fewer and fewer dollars it will become increasingly difficult to attract skilled players as bigger clubs are able to pay the salaries sought by top foreign players. Subsequently, less talent will result in a decrease in performance quality. If this continues over a period of time the club may lose fan interest and may ultimately have to fold. Canadians are all too familiar with this situation as they experienced it with the franchise relocations of the Winnipeg Jets and the Quebec Nordiques.

## **B. Clubs Folding Economically**

What would be the effect if teams do start to fold? First, it would have a negative effect on the local economy because the club plays a major economic role in many of these communities. If teams left, unemployment would increase. The vendors, janitors, security guards, parking attendants, administrative staff, and even some of the players themselves would be out of work. This would create a vacuum in the economy. If these newly unemployed people cannot find work in their town, they may have to move and take their families with them. With the population declining and employment opportunities at a minimum, this in turn may deter other people from moving to the community to settle permanently. Although these effects are merely hypothetical, they are greatly feared in the communities of smaller clubs.

---

<sup>17</sup> D. Anderson, "Premiership clubs facing doubtful financial future" *Yorkshire Post* (18 November 1999) (pagination unavailable).

<sup>18</sup> "Soccer: Premiership Attendance and Profits Up, Wages Soaring" *Associated Press* (30 April 1999) (pagination unavailable).

<sup>19</sup> Anderson, *supra* note 17.

Furthermore, if a number of teams were to fold, the aggregate effect on the economy would be troublesome. With fewer teams in the league, fan interest would continue to decrease, leading to decreases in attendance, TV revenues, and merchandising. The soccer industry would thus be contributing a lot less to the economy – a direct conflict with the EU's objective of enhancing the economy. Should the effects outlined above occur in a number of communities, the overall unemployment rate would rise. Certainly, a high unemployment rate is not the trademark of a prosperous economy.

### **C. Clubs Folding – Psychologically**

The possible economic implications are certainly great, but the possible psychological implications cannot be dismissed. Clubs in the majority of these communities are like olive trees, as the club often serving to identify people. For example, Peter is not just from Liverpool, but he is Peter from Liverpool, home of the most successful club of the twentieth century. (I will use Liverpool to illustrate this point, although Liverpool is a big club and is in no danger of folding.) If the team were to leave, the community's sense of belonging and pride would be shattered, as they have always been known by their club throughout the UK and Europe. Without their club, members would merely be people from a northern town. In addition, the club creates a common bond between the people of Liverpool. The rich and poor can all get together in the local pub to watch, cheer, and even jeer their team. Take the club away and they have nothing to discuss as they no longer have a common rallying point. Therefore, the effect of these teams folding could be damaging to the community's psyche.

### **D. National Players**

Many critics argue that the ruling is a setback for national talent. The fear is that big clubs will devote less time to their developmental system, as they can rely on snatching up talent from smaller clubs. As less time is spent on this system, the opportunity for recruiting local boys decreases. Previously the development system was the means by which players rose to the top. If big clubs put an end to this system, players must then compete for a placement in smaller clubs' systems. And because it is only smaller clubs that will continue with such systems, the availability will be greatly reduced as compared to all clubs having adequate systems. Furthermore, if larger clubs were to spend less time on these systems, it may become economically unfeasible for smaller clubs to continue with their devotion to such systems. The development of players costs money and if they are not being compensated for this development, why should they continue the system? As a result, the

opportunity for national talent will decrease drastically.

The concern about national talent stems largely from the banishment of the non-national rule. Critics fear, and it has happened, that teams will sign foreign players of equal talent for less money. (This practice of signing for less money only applies to non-star players.) If this were to continue, the number of domestic job opportunities for national players would decrease. This concern is highlighted by the fact that in 1995 there were 102 non-nationals playing in the premiership, while in the 1998-1999 season there were 185.<sup>20</sup> Although this is only an average increase of twenty non-nationals a year, such small, continuous, incremental changes have a massive effect when taken as a whole.

## **E. Fan Interest**

Ultimately, the underlying concern is that the ruling is going to cause fan interest to decline, and that it could lead to the end of the game. Fan interest may decline as teams fold and the fans of those teams stop watching because there is not enough local talent on the field. As valid as these concerns may be, the reality of the situation, at present, is the contrary. The attendance figures have been rising since the ruling. In fact, in 1994-1995, the premiership match day income for the league was 26 million pounds (\$41.90). In 1998-1999, however, that figure was 203 million pounds (\$326.8).<sup>21</sup> Although this figure includes TV revenues, merchandising, and other factors, two important components of these figures are attendance and ticket sales, both of which have been on the rise since 1995.

## **VI. HOW TO SAVE THE GAME?**

### **A. Longer Contracts**

Philippe Piat, chief of the players' union, proposes that "[c]lubs ought to have the right to hold apprentices to five-year contracts."<sup>22</sup> (Currently the average length of a contract is three or four years.) If this were to happen clubs would receive longer use of the players whom they develop. They may even be able to build a contender. Additionally, if a player were to become unhappy with his present club he could go to a new club, provided an agreement for transfer was made. The old club would then receive a fee for the time and money spent on developing his skills.

Unfortunately, there is one roadblock to this suggestion – the players

---

<sup>20</sup> N. Spencer, "Soccer: FA join the call to reduce foreign aid" *The Daily Telegraph [London]* (3 February 2000) (pagination unavailable).

<sup>21</sup> *Supra* note 18.

<sup>22</sup> R. Hughes, "But Where Should the Princes Play? World Soccer" *International Herald Tribune [London]* (22 January 1997) (pagination unavailable).



will probably not endorse it. Take, for instance, star players. If these players are playing for a small club, they may feel they are not being paid what they deserve because the club cannot afford it. The player may, however, not be able to go to a large club (which can afford the salary) due to an inability to work out a transfer agreement. Furthermore, even if a player did move to a larger club, he may still not receive the salary he wants due to the fact the club will have to pay a transfer fee. And finally, by the time the contract expires, the player may not be worthy of the salary initially granted, and therefore would not receive an increase. Basically, this proposal is not favoured by the players and will probably not work.

## **B. Equal Distribution**

An attractive, but unlikely solution was put forth by Karl Van Miert. He suggested that the National Associations, UEFA, and FIFA institute "...a program which would allow for the equal distribution of money from endorsements, television rights and merchandising to all clubs."<sup>23</sup> This program, a single-entity system by which the Major League of Soccer in the United States operates, would help offset the problem of rising costs. Essentially, under this program, owners share revenues and expenses thereby preventing the driving up of salaries and expenses. In its purest form this system is controlled by one entity, which again, is owned by teams equally. The players do not contract with particular teams but with the single entity. If players have grievances, they are resolved by the entity. Owners are unable to drive up salaries as less wealthy owners will not permit them. Under this system, teams are matched rather evenly and there is an emphasis on local players playing for the local team so as to increase fan interest.<sup>24</sup>

The problem with this solution is greed. Soccer in Europe is a multibillion dollar industry. Most club owners are wealthy. The idea of having to share profits with unsuccessful clubs is inconceivable. Take, for instance, Manchester United, the richest sports team in the world. The owner pockets millions of dollars from this club. To have to hand over some of these profits to a club that is in last place and fills half its seats would not seem reasonable to this millionaire. This system is a great idea for start-up leagues. However, the Premiership and other large leagues in Europe have been around for years now and despite the outcome of this ruling they are still bringing in billions of dollars. Therefore, unless the game is on the verge of collapse, this single-entity system will not be given much consideration.

---

<sup>23</sup> Closson, *supra* note 4.

<sup>24</sup> Atherton, *supra* note 3.

### C. A Light At the End of the Tunnel?

Sepp Blatter, the president of FIFA, made a proposal to the EU on behalf of the soccer community in Europe that would create a quota for national players. That is, each team would have to field at least six nationals at one time.<sup>25</sup> This proposal is not too onerous considering most teams only field four or five non-nationals at once anyway. The basis for this proposal is obvious – to protect national talent and decrease rising costs. This will be achieved, theoretically, because teams will not be spending millions on foreign players. The amount of money spent on foreigners will be decreased as teams will be limited in playing foreigners. Unfortunately, late last year this proposal was rejected. Vivianne Reding, the EU commissioner for education and culture stated: “[i]t’s crystal clear that we can’t accept any rules that limit the number of EU foreigners on a team.... The commission will not act against the Bosman ruling.”<sup>26</sup>

The rejection did not halt the soccer community’s efforts. In late March 2000, Blatter made the same proposal, essentially asking for soccer to be exempted from the EU’s common labour laws. In response, Gerhard Aigner, UEFA’s chief executive stated: “[...]these treaties (the Treaty of Rome) were made for economic life, not for sporting life.”<sup>27</sup>

Some politicians agree that soccer should be exempted from the EU’s labour laws. Portuguese Internal Affairs Minister, Fernando Gomes, made these recent comments:

[o]bviously there’s a clear conflict of interests... between what EU treaties say on the free movement of goods and people, which cannot be jeopardized, and on the other hand the need to safeguard in sport, especially in soccer, against some perverse aspects. A protocol recognizing the specific needs of sport, especially soccer, will be annexed to existing EU treaties.<sup>28</sup>

But not all politicians agree. Andrew Fielding, spokesperson for the Employment Commissioner, Anna Diamartopoulou, made these comments on the proposal:

[t]his seems to fly in the face of everything the EU stands for.

---

<sup>25</sup> *Ibid.*

<sup>26</sup> J. Traynor, “The Final Say: EU are right about our foreign imports” *Scottish Daily Record* (22 March 2000) 20.

<sup>27</sup> “EU Denies FIFA and UEFA hopes for limit on foreigners” *Deutsche Presse-Agentur* (2 December 1999) (pagination unavailable).

<sup>28</sup> *Supra* note 36.

If they are proposing quotas which oppose EU law, they should approach it with the carrot instead of the stick and introduce incentives to help with the nursery education of footballers.<sup>29</sup>

Essentially, Fielding does not blame the enforcement of the freedom of movement principle for the problems that have arisen, but rather blames the inadequacy of the development of these players.

Despite such harsh criticism, the proposal was discussed by the EU ministers on May 10. Unfortunately for the European soccer community, the EU ministers refused to support the proposal to exempt soccer from the EU's labour laws on the belief that any change would undermine the freedom of movement principle,<sup>30</sup> a result that is not acceptable to the EU, or compatible with their overall objectives. Christopher Forax, spokesman for Commissioner Reding, stated: "[o]n Wednesday an informal meeting of European sports ministers gave no signal that professional sport could exclude the free circulation of players within the European Union."<sup>31</sup> This decision seems to end the dream of giving soccer special status under the law, as the EU stands firm on protecting the freedom of movement principle.

Aigner, the loudest voice for demanding change, has begun to explore alternative methods that could alleviate the negative effects of the Bosman decision. Despite the presence of many who believe soccer should be given special status (including the Education and Employment select committee in Britain which is urging the British government to support such changes at the intergovernmental conference later this year<sup>32</sup>), this proposal is futile. As it now stands, the European soccer community must independently find a solution for the effects of the Bosman decision under the "present" EU law, as it applies to all individuals and industries equally.

## VII. CONCLUSION

**T**O DENY GLOBALIZATION IS TO FAIL; to resist is futile. Everyone and every company must learn to adapt to the new world order, but to what extent? Do we have to lose our sense of identity or belonging to succeed in this era? As walls have fallen and borders have increasingly

---

<sup>29</sup> B. Hatton, "EU Prepares Changes on Foreigners in Soccer, Anti-Doping Measures" *Associated Press* (17 March 2000) (pagination unavailable).

<sup>30</sup> M. Mann, "EU: Soccer-EU Commission resolute against changing Bosman ruling" *Reuters* (8 May 2000) (pagination unavailable).

<sup>31</sup> "EU ministers fail to back FIFA plan to limit free circulation of footballers" *AFX News* (11 May 2000) (pagination unavailable).

<sup>32</sup> "UK MPs call for limit on foreign footballers" *AFX News (UK)* (18 May 2000) (pagination unavailable).

become mere lines on maps, people are exposed to various customs, ways of thought, music, sports, and beliefs. Although this certainly does have its benefits, people still need something with which to identify. People of a particular area long for a common rallying point. It gives them a sense of belonging to something great.

Sports are that common bond for many people. Take, for instance, Canadians when the Paul Henderson or Mario Lemieux goal is mentioned. Complete strangers have a conversation over a simple goal. The same may be said for soccer in Europe. It is more than a game on this continent; it is a deep-rooted passion. To many Europeans it is a religion, similar to the way hockey was a religion in Quebec during the eras of Rocket Richaud, Jean Beliveau, and Guy Lafleur. Although globalization is in full swing, each nation (including Europe) protects its religious rights. Because many people feel just as passionate about their game as they do for their religion (and because this passion is so deep and held by so many), I agree with the critics of the Bosman ruling, and I agree with the proposal to exempt soccer from the EU's labour laws. It cannot be acceptable for the Lexus to destroy every olive tree, because some things are worth saving.