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The Legacy of *Bosman*

Revisiting the Relationship between EU Law and Sport

Antoine Duval
Ben Van Rompuy *Editors*

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ISSN 1874-6926 ISSN 2215-003X (electronic)
ASSER International Sports Law Series
ISBN 978-94-6265-119-7 ISBN 978-94-6265-120-3 (eBook)
DOI 10.1007/978-94-6265-120-3

Library of Congress Control Number: 2016935566

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer-Verlag GmbH Berlin Heidelberg

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Foreword

The first thing to do for the Court of Justice of the European Union with an incoming case is to choose the judge rapporteur and the Advocate General responsible for the opinion. The date of registration determines the President of the Court, responsible for the nomination of the judge rapporteur, and the First Advocate General, responsible for the nomination of the advocate general competent for the case. In the *Bosman* case the date of registration was 6 October 1993. The next day, a partial replacement of the Court took place. So the outgoing President took no decision on the *Bosman* case. The nomination of the judge rapporteur took place after that date. Ole Due was the Court's President, and Marc Darmon the First Advocate General. Together, they nominated the same persons originally nominated for the first *Bosman* case C-340/90, registered 15 November 1990. The President (already Ole Due) had then nominated as judge rapporteur Federico Mancini, and the then First Advocate General Francis Jacobs had nominated myself as competent Advocate General. In the second *Bosman* case C-269/92, registered on 15 June 1992, these nominations had been maintained. On proposition of the judge rapporteur and the Advocate General the full assembly of the Court decided to keep the case before the full court. Mancini was a football fan and reader of the 'Gazetta dello Sport'. His *référendaire* Vittorio Di Bucci[1] was in charge of the case. I had a *référendair*e named Gerhard Grill,[2] who was also very knowledgeable about football. He was charged with the preparation of the case.

The parties to the case, the European Commission and the French and Italian governments, handed in briefs and participated in the hearing on 20 June 1995. The Italian Prime Minister at that time was Silvio Berlusconi. The French minister for culture and justice, Jaques Toubon, even assisted at the hearing. For their part, the Danish and German governments participated only in the hearing. Originally, the German (Kohl) government had not intended to join the procedure. But at the

[1]Now director and principal legal advisor, legal service of the European Commission.

[2]Now director at the European Ombudsman.

demand of the State government of Baden-Württemberg it acted at the hearing on the side of the football associations, like France and Italy. Indeed, the finance minister of Baden-Württemberg at the time was Gerhard Mayer-Vorfelder, who was also presiding the VfB Stuttgart, a prominent German Bundesliga club. The only government that sided with Bosman was the Danish government. The best pleadings in my mind were made by the agent for the Commission, Ms. Wolfcarius who, different from the earlier written submissions of the Commission, pleaded in favour of Bosman. After the hearing there was a dinner of the Court in honour of the French minister. Returning home that evening I watched the late edition of the German first TV news programme, which gave a rather positive report of the hearing.

My opinion in this case was scheduled immediately after the summer recess of the Court. So it had to be prepared during the summer vacation. But before we could start, the opinion for another case (C-101/94) had to be finished. Its presentation was scheduled for July 13 1995. After that I had planned a trip to the 'Châteaux de la Loire'. Before leaving I discussed the line to be followed in the opinion with Gerhard Grill. He drafted the opinion and faxed chapter after chapter of the draft to the various 'châteaux' of the Loire Valley. I studied them and returned them to Mr. Grill with my comments. There were few comments.

Much attention was given to the question of admissibility of the preliminary questions raised by the national court. Both questions (on the transfer system and especially the nationality clause) were considered to be inadmissible by several governments and by the Commission in its written submissions. We considered the arguments against admissibility on more than 12 pages and refuted them. We saw no reason for the Court not to give the preliminary ruling and the Court followed us.

During the preparation of the opinion I received several phone calls from the German political world offering more information on the subject. I thanked them for the offer, but told them I could only use information that was also in the hand of the judges and that the occasion for sharing such information had been the hearing. So there was no use in giving me now such information. In no other case in my career of almost 14 years at the Court have I been exposed to such efforts to take influence on a case. The political influence and power of football cannot be overestimated. Another example illustrates this fact. After the judgement I was invited to participate in a broadcast of the second German TV channel (ZDF)—'Das aktuelle Sportstudio'—together with a representative of the football associations to talk about the consequences of the judgment. A few days before the event I got a fax from the moderator that the discussion would not take place because the representative of the football associations was unavailable. If you switched on the broadcast that Saturday you could however see the representative of the football associations criticizing the judgment and nobody contradicted him.

As you probably know, the opinion pleaded for the admissibility of the case and for the incompatibility of the football rules with the freedom of movement for workers seen as containing a general prohibition of restrictions on the freedom

of movements, a prohibition of discrimination on grounds of nationality, and a prohibition of agreements restricting competition. The echo of the opinion in the media was split in two camps. The general media and especially the UK media were favourable to my views. In fact, it is probably the only case in my career at the Court for which I have been stopped in the streets, clapped on my shoulders and commented: Well done! On the other side, the media close to sport in general and particularly to the national football associations and UEFA were very critical.

Not being satisfied with the opinion, UEFA requested the Court to order a measure of inquiry with a view to obtaining fuller information on the role played by transfer fees in the financing of small or medium-sized football clubs and the consequences of their possible disappearance. After hearing my views on the matter, the Court considered that the application should be dismissed. Indeed, it was made at a time when the oral procedure was closed. The Court held that such an application could be admitted only if it relates to facts which the party concerned could not put forward before the close of the oral procedure. This was not the case here. Moreover, the question was raised whether the aim of maintaining a balance in financial and competitive terms, and in particular that of ensuring the financing of smaller clubs, could be achieved by other means such as a redistribution of a portion of football income from television—in particular by Mr. Bosman in his written observations. Obviously the football associations had been confronted with that issue even before the hearing. The opinion treated this matter under the heading 'Maintenance of the financial and sporting equilibrium'.[3]

So the stage was set for the rendering of the judgement.

The judgement largely followed the opinion. Thanks to it, for the first time, millions of people learned that in 'Europe' they have individual rights and judges who protect them. This book celebrates the importance of the *Bosman* judgement as a fundamental case for the application of EU law to sport and for the dialogue that it fostered between sports governing bodies and the EU institutions. The book, which covers a wide range of subjects, demonstrates the living legacy of the *Bosman* ruling.

Prof. Dr. Carl Otto Lenz
Advocate General at the Court of Justice in *Bosman*

[3](para 218–234).

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Ben Van Rompuy is a senior researcher at the T.M.C. Asser Instituut, where he heads the ASSER International Sports Law Centre, and he is also a Visiting Professor of Competition Policy at the Free University of Brussels (VUB). His main research interests lie in the field of EU competition law and internal market law, with a specific focus on its application in the media and sports sectors. He has published widely in this area and frequently acts as a legal expert for media companies, sports associations, athletes, and public authorities. He holds a Ph.D. in law from the VUB (on the role of non-economic public policy considerations in EU antitrust law enforcement) and held visiting scholar positions at Georgetown University and New York University.

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Abbreviations

ACP	African, Caribbean and Pacific Group of States
AG	Advocate General
BER	Block Exemption Regulation
CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
DG	Directorate General
DRC	(FIFA) Dispute Resolution Chamber
ECA	European Club Association
ECB	England and Wales Cricket Board
EEA	European Economic Area
EEC Treaty	Treaty establishing the European Economic Community (Treaty of Rome)
ELPA	Elliniki Leskhi Aftokinitou kai Periigiseon (Greek Automobile and Touring Club)
EP	European Parliament
EPFL	European Professional Football Leagues
EUR	Euros
FFP	Financial Fair Play
FIA	Fédération Internationale de l'Automobile
FIFA	Fédération Internationale de Football Association
FIFPro	Fédération Internationale des Associations de Footballeurs Professionnels
FOA	Formula One Administration Ltd
G14	Group of 14 European football clubs
GBER	General Block Exemption Regulation
INEA	Institute for European Affairs
IOC	International Olympic Committee
ISC	International Sportsworld Communicators
ITC	International Transfer Certificate
MOTOE	Motosykletistiki Omospondia Ellados NPID (Greek Motorcycling Federation)

MRSPC	Minimum Requirements in Standard Player Contracts
NYC	New York Convention
PA	Principal-agent
PFA	Professional Footballers' Association
PFSC	(UEFA) Professional Football Strategy Council
PSC	Players Status Committee
RSTP	(FIFA) Regulations on the Status and Transfer of Players
SGB	Sports Governing Body
SME	Small and Medium-sized Enterprise
TFEU	Treaty on the Functioning of the European Union
UCI	Union Cycliste Internationale
UEFA	Union Européenne de Football Association

Chapter 1
Introduction

Antoine Duval and Ben Van Rompuy

Abstract In this introduction to the edited volume, The Legacy of Bosman. Revisiting the relationship between EU law and sport, we provide some background on the aim and methodology of the book. We start by outlining the reasons for exploring the legal and political transformations triggered by the Bosman judgment over the last 20 years and beyond. Most importantly, we argue for a shift in the way the ruling is commonly interpreted. The Bosman decision of the CJEU is widely perceived in the literature and in public opinion as a deregulatory intervention by the Court. This, in our view, is a misconception that necessitates a re-reading of the ruling. We suggest that the Bosman case is displaying a democratic ethos. The duty of justification it imposes on the transnational private regulations of sports governing bodies is of a genuine 'counter-democratic' nature. The last part of the introduction offers a short overview of the chapters included in the book.

Keywords Bosman · EU law · Lex sportiva · Sports law · Free movement · Competition law

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A. Duval and B. Van Rompuy (eds.), *The Legacy of* Bosman,
ASSER International Sports Law Series, DOI 10.1007/978-94-6265-120-3_1

Is the 20th anniversary of the *Bosman* ruling[1] a sufficient reason to revisit this old case on which so much has already been written? Is there still something interesting to say about *Bosman*?

We believe the answer is a resounding 'yes' and we count on this book to demonstrate it.

Unlike most judgments of the Court of Justice of the European Union (CJEU), which get lost in legal limbo over time, the relevance of the *Bosman* judgment has endured. It is a central case in the systematic structure of EU law, as demonstrated by the latest scholarship studying its position in the complex network of CJEU jurisprudence.[2] It is also a mythical case, one that gives flesh to the idea(l) of a European public sphere. *Bosman* is probably the only case decided by the CJEU that normal European citizens are susceptible to know. A simple google search will show its actuality and the permanence of its shadow in the public discourse on football and sport in general. It is fair to say that many people discovered the existence of the CJEU when it rendered this decision, as Advocate General (AG) Lenz vividly recalls in the preface to this book. This spotlight on the CJEU is the longest-lasting legacy of the *Bosman* ruling and probably its greatest service to the European cause.

Bosman taught generations of EU lawyers that EU free movement rights apply 'horizontally' to transnational private regulations of *inter alia* sports governing bodies (SGBs). In fact, this was already evident from the CJEU judgment in *Walrave and Koch*,[3] delivered twenty years earlier, but the popularity of football (in comparison to motor-paced cycling) helped drive this point home. Since *Bosman*, we also know that a simple non-discriminatory restriction of the free movement right of a worker needs to be justified and proportionate if it is to be compatible with EU law. In addition, we know that sporting regulators can invoke specific legitimate objectives (such as maintaining competitive balance or encouraging the recruitment and training of young players) to justify the restrictions they impose on the freedom to work of professional athletes. This general analytical framework for applying EU law to sport has not changed since 1995. Nonetheless, there are still academic lessons to be learned from *Bosman*. Law is a living object. The seemingly static structure of the legal framework developed in *Bosman* should not overshadow the unforeseen and dynamic nature of the transformative legal changes it has triggered. The hyper-activism of the European Commission after *Bosman*, primarily on the basis of the EU antitrust rules, compared to its passivity in the aftermath of *Walrave and Koch* and *Donà*,[4] illustrates the political and institutional choices at play. *Bosman* opened a Pandora's Box. The world of sport, and

[1]Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI:EU:C:1995:463.

[2]See the chapter by Derlén and Lindholm in this volume.

[3]Opinion of Advocate General Warner in Case 36/74 *Walrave and Koch v. Union Cycliste Internationale*, ECLI:EU:C:1974:111.

[4]Case C-13/76 *Gaetano Donà v Mario Mantero*, ECLI:EU:C:1976:115.

its *lex sportiva*, entered in legal communication with EU law, and has been dialectically engaged with it since then.[5] EU law was successfully used by a variety of actors to implicate the EU in the sporting world. This implication takes many different forms, e.g. the initiation of antitrust and State aid investigations,[6] the adoption of a White Paper and a Communication on sport,[7] and the introduction of a European social dialogue committee for professional football.[8]

This edited collection of contributions from leading scholars takes stock of this multifarious afterlife of the *Bosman* case. It explores how a set of legal formula and principles introduced in *Bosman* have on the long run triggered widespread social, legal, political, and institutional transformations that fundamentally affected the sporting world. In a way, this book demonstrates that one can understand the impact of a legal case only retroactively by analysing at a distance the practical changes it has provoked.[9] On that metric, *Bosman* deserves a special mention as a fundamental, symbolical milestone for the involvement of the EU in the sporting field.[10] Through various case studies, on specific aspects of the EU's involvement in sport, the chapters cover many of the domains in which spill-over effects of the *Bosman* ruling have been felt. Some of the authors also envisage the potential way forward, engaging partly in prophesising. By doing so, they demonstrate that *Bosman* has not run out of symbolic fuel yet, its spirit is still around. The case remains a beacon, a fundamental reference to which EU lawyers and administrators turn when they are confronted in one way or another with sporting matters.

20 years after *Bosman*, its legacy is well alive. The trajectory of EU sports law and policy can only be understood with reference to this case as a founding moment. The genealogy of its impacts presented in this book demonstrates both its currency and the depth and variety of its effects. The hundreds of commentaries published in the immediate aftermath of the case were sometimes, as legal commentaries often are, repetitive in their analysis and paraphrasing the decision.[11] For many of them, their added value in academic terms was relatively limited. However, the sheer mass of writings did probably contribute to the mythical status and symbolic force of the *Bosman* case. With the advantage of the temporal distance, this volume adds different (and less chartered) layers of analysis to the discussion.

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[5] In general on this legal relationship, see Duval 2015b.

[6] See the chapters by Pjetlovic and Van Rompuy and Van Maren in this volume.

[7] Commission White Paper of 11 July 2007, COM (2007) 391 final - White Paper on Sport.

[8] See the chapter by Parrish in this volume.

[9] A point made recently by Antoine Vauchez in a draft paper on file with the author.

[10] It has been duly recognized as a 'classic' of EU law by Azoulai and Maduro 2010.

[11] See for an incomplete overview of the existing commentaries the annotations collected by the CJEU at http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/notes_89-04.pdf. Accessed 1 December 2015.

1.1 Re-reading *Bosman*: From Deregulation to Democratization

1.1.1 The Deregulatory Myth

The *Bosman* case has been understood by many as a purely deregulatory ruling.[12] The chief narrative being that the CJEU, driven by an alleged neoliberal bias, engaged in a radical deregulation of football, as it was doing in other economic and social fields.

The ruling clearly fostered negative integration when it provided that nationality quotas are to be abandoned. This led to the Europeanization of the labour market for professional football players and, more broadly, sportspeople. On the one hand, it is fair to argue that the CJEU might have underestimated the destabilizing effects on sporting competitions which are, in football at least, still mainly structured on a national basis. There is some empirical evidence substantiating that the inflow of non-nationals in certain country might have discouraged the local training of young players in some countries.[13] On the other hand, we are not witnessing, as the CJEU predicted, a loss in interest in clubs featuring non-national or local football players. This was a key argument in favour of the nationality quotas in the *Bosman* case. UEFA, URBSFA and the French, German, and Italian Governments argued that *'those clauses serve to maintain the traditional link between each club and its country, a factor of great importance in enabling the public to identify with its favourite team and ensuring that clubs taking part in international competitions effectively represent their countries'*.[14] In fact, supporters' loyalty is a more complex phenomenon that is not chiefly dependent on the nationality (or local character) of the players fielded on the pitch.[15] A recent study has shown that *'without any ambiguity […] the influx of foreign players following the Bosman ruling has not fundamentally altered supporters' capacity to identify with their club'*.[16] The assumed xenophobic bias of supporters invoked to defend the maintenance of nationality quotas has not materialized in practice. This is good news for the EU, and a powerful rebuttal to those that perceive football fans as intrinsically prone to chauvinist behaviour.

Moreover, the European Commission and the CJEU have been willing - if corroborated by evidence - to acknowledge the collateral damages arising out of

[12]For a caricature of this point of view see Manzella 2002.

[13]CIES Football Observatory Monthly Report Issue no. 9 of November 2015, Record low of club-trained players in Europe. http://www.football-observatory.com/IMG/sites/mr/mr09/en/. Accessed 1 December 2015.

[14]Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI:EU:C:1995:463, para 123.

[15]For a detailed analysis of the fan behaviour to the internationalization/europeanization of squads see Ranc 2011.

[16]Ibid., p. 163.

the *Bosman* ruling and to tolerate regulatory mechanisms designed to tackle these externalities. For example, the Commission informally condoned the introduction by UEFA (and national federations) of a lighter version of nationality quotas: the homegrown player rule.[17] Similarly, the Commission indicated its political support for UEFA's Financial Fair Play Regulations.[18] And, most famously, it agreed to the introduction of a reformed FIFA transfer system in 2001.[19] The CJEU, for its part, has also been willing to accommodate the regulatory objectives of the SGBs. It has recognized the need for transfer windows in the *Lehtonen* case,[20] the proportionality of anti-doping rules in its *Meca-Medina* decision,[21] and the legitimacy of a training compensation system in the more recent *Bernard* ruling.[22] If there is a deregulatory ambition in the CJEU's sporting jurisprudence it is very well hidden. In fact, what the EU institutions are keen to preserve is the free movement of sportspeople in Europe. Directly discriminatory nationality quotas remain a no-go. However, the CJEU is well aware of the need for multilevel regulations (private and public) in sport, and very much ready to give the green light if they are properly justified.

This is the heart of the message one should derive from the *Bosman* ruling and its aftermath. The misleading deregulatory narrative of *Bosman* that prevailed until now has been a blessing for some SGBs willing to find a scapegoat to blame for their failure to regulate their own sport. Furthermore, this narrative also eclipsed a fundamental dimension of the *Bosman* ruling: its 'counter-democratic' function in a transnational space.

[17]Commission Press Release of 28 May 2008, IP/08/807 UEFA rule on 'home-grown players': compatibility with the principle of free movement of persons. http://europa.eu/rapid/press-release_IP-08-807_en.htm. Accessed 1 December 2015. Yet, the effectiveness of the measure remains controversial, see: University of Liverpool and Edge Hill University (2013) Study on the Assessment of UEFA's Home-Grown Player Rule. Study for the European Commission EAC/07/2012. http://ec.europa.eu/sport/library/studies/final-rpt-april2013-homegrownplayer.pdf. Accessed 1 December 2015.

[18]Commission Press Release of 21 March 2012, State aid: Vice President Almunia and UEFA President Platini confirm Financial Fair-Play rules in professional football are in line with EU state aid policy. http://europa.eu/rapid/press-release_IP-12-264_en.htm. Accessed 1 December 2015.

[19]Commission Press Release of 6 March 2001, IP/01/320 Commission President Prodi welcomes outcome of football transfers talks. http://europa.eu/rapid/press-release_IP-01-320_en.htm. Accessed 1 December 2015.

[20]Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, ECLI:EU:C:2000:201.

[21]Case C-519/04 P *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492.

[22]Case C-325/08, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, ECLI:EU:C:2010:143.

1.1.2 The 'Counter-Democratic' Function of Bosman

Bosman should in our view be interpreted as an instance in which the CJEU tried to impose a democratic check on the exercise of transnational authority by SGBs in football and beyond.[23] The control of the proportionality of the transfer system (and to a lesser extent of the nationality quotas) embodies the 'counter-democratic' function of the *Bosman* ruling.[24] In *Bosman*, the rules of the football federations were not considered per se contrary to the EU free movement rights. Rather, the justifications raised to defend their compatibility were deemed insufficient. In fact, as far as the transfer system is concerned, the less restrictive alternatives (i.e. the centralized redistribution of media rights revenues) proposed by AG Lenz, and indirectly endorsed by the CJEU in its ruling, were extremely restrictive of the economic freedom of clubs.[25] This framework of justification is the main legacy of the *Bosman* ruling.

Over time, it was transposed to the area of EU competition law. Because the CJEU had confined itself to the application of the free movement rules in *Bosman*, despite the guidance from AG Lenz in his opinion, the European Commission initiated the application of the EU competition rules to the sports sector. In the aftermath of *Bosman,* a growing number of notifications and complaints prompted the Commission to examine certain sports-related activities that were not considered contentious in the past. Regarding economic activities generated by sport, the growing commercialization of professional sport, closely related to developments in the European audiovisual sector, was the main catalyst for enforcement action. Regarding organizational sporting rules, however, *Bosman* had significantly cast a shadow on the idea that they, particularly given the commercial context in which they operate, could escape assessment under EU law. When the CJEU for the first time applied the EU antitrust provisions to a sporting rule in *Meca-Medina*,[26] it finally dismissed the notion of a 'purely sporting' exception in the context of EU competition law. It identified the *Wouters* proportionality test as the appropriate method to assess sporting rules under the antitrust provisions: as long as the rule is inherent and proportional to a legitimate objective in the interest of sport, the restrictions caused by that rule are not caught by the prohibition of anti-competitive practices.

[23]This claim is elaborated on in Duval 2015b.

[24]'By 'counter-democracy' I mean not the opposite of democracy but rather a form of democracy that reinforces the usual electoral democracy as a kind of buttress, a democracy of indirect powers disseminated throughout society–in other words, a durable democracy of distrust, which complements the episodic democracy of the usual electoral-representative system.' Rosanvallon 2008, p. 8.

[25]Opinion of Advocate General Lenz in Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others*, ECLI:EU:C:1995:293, paras 218–234.

[26]Case C-519/04 P *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492.

Hence, the most valuable heritage of the *Bosman* case is that the private regulators of sport have to justify and explain the proportionality of their rules. This undeniably endows the judiciary with an important political power, reminiscent of a much-dreaded *Gouvernement des juges*.[27] Yet, in a transnational context in which sport's private rulers are everything but democratically elected and inevitably escape the control of an absent global state, this turn towards a strong counter-democratic check on the SGBs is a (much) needed development.

In that regard *Bosman* has played, and still plays, a crucial function. The CJEU as an institution, and EU law as a legal system in general, are well placed to personify this counter-democratic ethos in the transnational sporting context. Indeed, SGBs, and FIFA in particular, have successfully secured an autonomous regulatory space by blackmailing national states. They are able to impose their conditions upon states willing to host international sporting competitions and use aggressive political tactic and threat to defend their autonomy and their authority.[28] Their power derives from their monopoly on the organization of mega-events, like the FIFA World Cup or the Olympic Games. SGBs are also able to play with one of the characteristic trumps of multinationals in a globalized world: they (ab)use the exit option.[29] In other words, by having the ability to leave a country or to choose one, these organizations can exercise a form of modern blackmail to shape the legal environment in which they operate and attract the favours of national politicians. This power asymmetry between international federations and national states, however, evaporates when the EU gets involved.[30] For example, the EU has no national team and does not compete for the organization of the Olympic Games. Moreover, for FIFA to threaten to ban all EU Member States would mean threatening to ban all the most successful (and wealthiest) national football federations. This explains why *Bosman* is of such importance (beyond the world of sport): it shelters the state from a direct confrontation with the SGBs and empowers national courts to stand up to them on the basis of EU law.

This power of EU law has been utilised in many different instances over the twenty years since *Bosman*. The FIFA regulations concerning the transfers of players, as well as those regulating the profession of agents,[31] were subjected to the critical review of the European Commission under its power to enforce EU competition law.[32] The same is true for the institutional structure and rules of the

[27]As pointed out by one of the legal advisers of UEFA, see Zylberstein 2008.

[28]On FIFA see García and Meier 2015. On the IOC see James and Osborn 2011.

[29]On the strength of the exit option of multinationals see Beck 2005.

[30]This asymmetry-breaking function of the EU has been emphasized by political philosophers and sociologists, see Habermas 2001 and Beck and Grande 2007. But also by EU scholars, see Menon and Weatherill 2008.

[31]Case T-193/02, *Laurent Piau v Commission*, ECLI:EU:T:2005:22.

[32]See the chapter of Duval in this volume.

Federation Internationale de l'Automobile (FIA) at the turn of the century.[33] In both cases, the SGBs were forced to change their rules in order for them to be deemed compatible with EU competition law. Similarly, the EU was instrumental in improving the privacy rights of athletes in the fight against doping. The intervention of the so-called *Article 29* Working Party was decisive in driving a reform of the Data Protection framework applying to the World Anti-Doping Code.[34] The mere threat of the use of EU law to challenge the transnational private regulations put in place by the SGBs forces them to think in terms of proportionality of their measures and to better balance the various interests of the affected actors when doing so. In this context, the rise of the Court of Arbitration for Sport (CAS) as a key institution in the regulation of global sport can only be understood with *Bosman* in mind.[35] It is because of the irritation of the *Bosman* ruling that CAS finally became the 'Supreme Court of World Sport'. CAS is far from perfect, its independence has been challenged recently by the Oberlandesgericht München in the *Pechstein* ruling,[36] but it offers a promising embryo of a separate judicial power to solve transnational sporting disputes. In the absence of an international sports court instituted by national states, it is a useful forum to approximate a judicial level playing field for the world's finest athletes and clubs. In short, *Bosman* is a 'reflexive'[37] judgment: it triggered changes to the normative and institutional structure of the so-called *lex sportiva*, but it did not aim at destroying it altogether.

EU law after *Bosman* (and already in *Bosman*) was not blind to the particular demands of the sporting world. On the contrary, as has been tirelessly reminded by lone but powerful voices, EU law was (and still is) extremely generous in its assessment of the compatibility of transnational sporting regulations.[38] Nevertheless, the rhetoric deployed by SGBs, namely that the EU disregards the peculiarities of sport, has been an extremely potent smokescreen.[39] It is a lobbying

[33]See Notice of 13 June 2001 published pursuant to Article 19 (3) of Council Regulation No 17), concerning Cases COMP/35.163—Notification of FIA Regulations, COMP/36.638—Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776—GTR/FIA & others [2001] OJ C 169/5.

[34]See the Opinion 3/2008 by Alex Türk of 1 August 2008, on the World Anti-Doping Code Draft International Standard for the Protection of Privacy. http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2008/wp156_en.pdf. Accessed 1 December 2015; See also Second Opinion 4/2009 by Alex Türk of 6 April 2009, on the World Anti-Doping Agency (WADA) International Standard for the Protection of Privacy and Personal Information, on related provisions of the WADA Code and on other privacy issues in the context of the fight against doping in sport by WADA and (national) anti-doping organizations. http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2009/wp162_en.pdf. Accessed 1 December 2015.

[35]Duval 2015a.

[36]On this case see Duval and Van Rompuy 2016.

[37]On the notion of reflexive law, see Teubner 1983.

[38]See in general the work of Stephen Weatherill on EU law and sport.

[39]Garcia and Weatherill 2012.

strategy gone right. So right that the idea of a neoliberal EU in sporting affairs has entirely occulted the fact that FIFA and UEFA themselves were actively driving the commercialization of football and cashing in substantial revenues which, apparently, ended up in the deep pockets of the administrators rather than trickle down to the bottom of the football pyramid. The public, misled by an offensive of charm picturing the traditional values of football under the ruthless attacks of an army of heartless European technocrats, has been wilfully fooled. The truth is very far from this. The EU (and the European Commission in particular) has left a wide scope of autonomy to SGBs. Instead, EU law provides a few (much-needed) legal weapons to weaker stakeholders in sport (mainly the athletes, but also the clubs) to challenge the regulatory status quo. However, like a constitutional review in a national context, this instrument has inherent limitations. SGBs 'only' face a duty to justify their decisions and this duty is tamed through the omnipresent reference to the notion of the specificity of sport. One would be at pain to identify a recent case in which FIFA or UEFA were unable to justify their rules.

Bosman is a Pandora's box that cannot (and should not) be locked ever again. It provides for a permanent right for athletes, clubs, and supporters to have the right to contest, criticize, and challenge the regulations put in place by the SGBs. The European and national courts (and competition authorities) are a new forum to debate the necessity (and *in fine* the legitimacy) of the regulations adopted. *Bosman* offers a legal and political response in a world undergoing an uncertain transnationalization process. It is a check on the emerging transnational powers and authorities, be they SGBs or multinationals, standard setting bodies, or non-governmental organizations. By imposing a proportionality test onto FIFA and UEFA, the CJEU recognized their capacity to pursuit legitimate objectives and to work for a transnational common good, but also the need to bind their power as Ulysses to his mast.[40]

1.2 The Structure of This Book

Each chapter in this book tackles a different aspect of the legacy (and origin) of the *Bosman* ruling. The case is used as a starting point by the authors to reflect from a variety of theoretical perspectives and methodologies on its influence over time on EU law and policy in the field of sport.

The book starts with Borja Garcia's chapter looking back at the social roots of the *Bosman* ruling. The chapter aims at showing that the ruling did not come out of the blue, but was the result of a complex evolution inside and outside the football world. *Bosman* is identified as an accelerator of a process that led to what is known as 'modern football'. From a macro perspective, Garcia reconstructs the broader historical (in particular economic) context surrounding the ruling. He then

[40]The metaphor is borrowed from Teubner 2012.

focuses on the micro context of the *Bosman* case through an in-depth study of the actors of the case and the complex interactions between their interests. Garcia concludes that the *Bosman* ruling is only a piece of a broader transformation of European football and cannot be understood in isolation from this transformation.

The Chap. 3 by Mattias Derlén and Johan Lindholm provides a fascinating study, based on the cutting-edge use of network theory, of the position of the *Bosman* judgment in the network of CJEU judgments. They demonstrate that the *Bosman* ruling is exceptional due to its profound and long-lasting influence on the CJEU's case law. This influence goes way beyond the realm of sports and extends primarily to four areas: the jurisdiction of the CJEU in matters of preliminary rulings, the use of the fundamental freedoms against private entities, non-discriminatory obstacles to the internal market, and the temporal effects of CJEU judgments. They conclude that the case's legacy is due to the fact that the ruling is well written, well reasoned, well known, and well connected. The chapter concludes that the ruling has had a transformative impact on the reasoning used by the CJEU outside of the relatively narrow sporting field. It anchors, in tangible facts, the widespread belief of a remarkable legacy of the *Bosman* ruling.

The Chap. 4 by Simon Gardiner and Roger Welch tackles the narrower question of the fate of nationality quotas and more broadly the transfer system in football following the *Bosman* ruling. They analyse closely both FIFA's proposal for the introduction of a 6 + 5 rule and UEFA's imposition of a homegrown player rule, and argue that both are likely to infringe EU law. To replace it, the authors support a comprehensive social dialogue agreement between FIFA, UEFA, and FIFPro as a reflexive legal strategy to create a reformed international transfer system, which would enhance player mobility and secure a true competitive balance between the clubs.

Chapter 5 by Antoine Duval offers a fresh look at the evolution of the FIFA Regulations on the Status and Transfers of Players (RSTP) after the *Bosman* ruling. The author retraces, through a study of the European Commission's investigation into the FIFA transfer system, the complex multi-level law-making process that led to the adoption of the FIFA RSTP. Thereafter, he assesses the autonomous institutional underpinnings and normative power of the FIFA RSTP, highlighting the emergence of a peculiar form of transnational regulation, enforced with the help of FIFA's internal tribunals and the CAS. This autonomous, highly institutionalized system is revealed as the direct legacy of the *Bosman* case, and of the Commission's attempt at nudging the regulation of the transfer system by FIFA. Hence, the chapter emphasizes the reflexive nature of the intervention of the EU Institutions into the realm of *lex sportiva*.

Chapter 6 by Katarina Pijetlovic addresses the application of EU competition law to organisational rules in the sports sector. Pijetlovic retraces in detail the case law of the CJEU and the decisional practice of the European Commission in their application of the EU antitrust provisions to sport cases. In doing so, she highlights the evolution of the tests applied from *Bosman* onwards to determine the compatibility of organisational rules with EU competition law. Thus, she points

out the centrality of the objective justification test and its progressive transplantation from internal market law into EU competition law. In her words, it becomes the 'ultimate test' for the regulations of SGBs after the *Meca-Medina* ruling of the CJEU in 2006.

Chapter 7 by Ben Van Rompuy and Oskar van Maren turns attention to the application of the EU state aid rules to public support measures for professional sport. Until very recently, this pillar of EU competition law remained an anomaly in the story of EU sports law. The authors explain why the financing of sports infrastructure and professional sports clubs only now, 20 years after *Bosman*, are on the radar of State aid control. Considering the general policy dynamics of EU State aid law and policy, they argue that the late appearance of enforcement efforts is not as remarkable as it may appear. The extension of the reach of State aid control to new sectors or new forms of aid has typically been the result of external constraints on the European Commission's independent agenda-setting abilities. In the case of sport, it was primarily the case law of the EU courts that triggered the recent surge in formal investigations and decisional practice.

Chapter 8 by Richard Parrish offers a critical look at the introduction of the European social dialogue committee in professional football. He traces back the emergence of the social dialogue to the liberalizing effects of the *Bosman* ruling on the transfer system. The author reviews the work of the committee since its inception in 2008 and provides a sobering account of its achievements to date. As pointed out by Parrish, the first agreement signed in 2012 has faced important difficulties at the implementation phase and since then the committee has been incapable of agreeing to other arrangements. Yet, the author remains hopeful that on the long term the European social dialogue will prove a necessary mechanism for a better governance of football.

Chapter 9 by Arnout Geeraert looks at the *Bosman* ruling from a political science perspective and builds on insights derived from the classical principal-agent framework. Highlighting the influence of *Bosman*, the chapter explores the limitations and opportunities of the EU's power in relation to SGBs. His fundamental claim is that EU law can offer a powerful shadow to force institutional and governance reforms of the SGBs. This power, however, is not unlimited as SGBs have been able to limit the capacity of the EU to intervene through various strategies. Geeraert concludes his chapter by offering some concrete policy advice for a more ambitious EU sports policy, oriented at improving the governance of the SGBs.

The closing chapter by Stephen Weatherill is an evolutionary study of the transformative effect of the *Bosman* ruling on the academic field. The author shows that EU sports law and policy as an academic discipline was almost non-existent before the *Bosman* ruling, in short it was a 'lonely world'. However, after the decision, a small but active community of scholars interested in the interaction between the EU and sport flourished. Or, as he so eloquently puts it, *'Bosman changed the pace of EU sports law–from backwater to fast flowing current'*.

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