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Penalty Shot: The European Union's Application of Competition Law to the *Bosman* Ruling

INTRODUCTION

In the fifteen countries comprising the European Union (EU), football¹ is more than a sport: it is a cultural institution.² Along with its cultural importance, European football is a multi-billion dollar industry.³ In Europe, national football associations and clubs receive billions of dollars yearly from the sale of television rights, advertising, endorsements, ticket sales, and merchandising contracts.⁴

On December 12, 1995, the European Court of Justice (ECJ) sent shock waves through the European football community with its ruling in *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*.⁵ The court's ruling effectively abolished the transfer fee system as well as rules limiting the number of foreign players a team may field.⁶ The ECJ held that the transfer fee system and the rules limiting the number of foreign players a team may field violated Article 48 of the Treaty of Rome, which regulates freedom of movement.⁷ However, the ECJ found no reason to address Bosman's claim that the transfer fee system and the foreign player limitations violated Articles 85 and 86 of the Treaty of Rome, which address competition.⁸

In violation of the court's order, the Union of European Football Associations⁹ (UEFA) neglected to abolish the transfer fee system or

¹ "Football," as used in this Note, refers to the sport known as soccer in the United States.

² See *Morning Edition: European Court Reverses Limit on Foreign Soccer Trades* (National Public Radio, May 21, 1996) [hereinafter *Morning Edition*].

³ See Peter Lansley, *TV Money Highlights Club Divide*, INDEPENDENT, June 8, 1996, at 31; *Morning Edition*, *supra* note 2.

⁴ See *Morning Edition*, *supra* note 2.

⁵ Case 415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1996 CEC (CCH) 38, 118 (1996) [hereinafter *Bosman*].

⁶ See *id.* at 136.

⁷ *Id.*; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 48, 298 U.N.T.S. 36 [hereinafter TREATY OF ROME].

⁸ *Bosman*, 1996 CEC(CCH) at 134.

⁹ Union of European Football Associations (UEFA) is the European governing body for football.

change its rules regarding foreign player limitations.¹⁰ In response, Karl Van Miert, EU Commissioner of Competition, threatened UEFA with fines for violation of EU competition laws, even though the ECJ neglected to rule on the impact of the competition laws.¹¹ Eventually, under pressure from the EU, UEFA reluctantly adopted the ECJ's ruling, by abolishing the transfer fee requirement and the foreign player restrictions.¹²

In the ECJ's opinion in *Bosman* the question of whether the practices of the national football associations and UEFA violated EU competition law was left unresolved.¹³ Instead, the ECJ relied solely on Article 48 to invalidate transfer fee systems and foreign player limitations.¹⁴ But, when enforcing the court's ruling, Van Miert applied the competition laws to force UEFA to abide by the ECJ's ruling.¹⁵

Section I of this Note provides a background of the EU's policy on competition. Section II examines the ECJ's ruling in *Bosman*. Section III analyzes the application of EU competition laws to *Bosman*. This Note concludes that while the ECJ did not rule on the applicability of EU competition law in *Bosman*, the practices of the national football association and UEFA violate Article 85. Furthermore, the events subsequent to the court's ruling in *Bosman* highlight the need for a court of finality, as well as the need to resolve all issues brought before it.

I. EUROPEAN UNION COMPETITION LAW

A. Policy: Free Market

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased sta-

¹⁰ See *Commission on Collision Course with UEFA Over Bosman Ruling*, EUR. REP., Jan. 20, 1996, available in 1996 WL 8661384; *UEFA Launches Attack on EU*, INDEPENDENT, Jan. 27, 1996, available in 1996 WL 4053221; *Van Miert and Flynn Lay Down the Law for UEFA*, EUR. REP., Feb. 3, 1996, available in 1996 WL 8661713. A study by an English firm of accountants states that the clubs of the English first division spent nearly £51,000,000 on transfer fees in the 1992/93 season. *Bosman*, 1996 CEC (CCH) at 53.

¹¹ Julie Wolf, *EC Threatens Ruling Bodies with Fines*, GUARDIAN, Jan. 20, 1996, at 18.

¹² Stephen Bates, *UEFA Finally Ties the Free-Agent Line*, GUARDIAN, Mar. 5, 1996, at 22.

¹³ Suzanne Perry, *Competition Aspects of Bosman Case Come to Fore*, Reuters, Jan. 18, 1996.

¹⁴ *Bosman*, 1996 CEC(CCH) at 134.

¹⁵ See Perry, *supra* note 13.

bility, an accelerated raising of the standard of living and closer relations between its Member States.¹⁶

To achieve the ends set out in Article 2 of the Treaty of Rome, the EU created a single internal market.¹⁷ In an ideal setting, vigorous competition among buyers and sellers forces prices to their lowest possible levels, with the increased responsiveness to buyers' demands.¹⁸

The EU's competition laws are intended to preserve open and free trade by protecting against anti-competitive tactics, ensuring the maintenance of an open market, preserving equal access to the market, and providing equal opportunity within the market.¹⁹ Practices including price fixing, collusion, or market sharing restrict trade by closing markets to competitors, controlling supply, or artificially inflating prices and are therefore prohibited based on the EU competition laws.²⁰

Beyond maintaining a free market, EU competition laws work to promote the integration of national markets.²¹ This goal is vitally important to the development of a single market in the EU.²² Therefore, the competition laws work to eliminate protectionist programs and encourage the creation of an open market.²³

B. *Law: Treaty of Rome Articles 85 and 86*

The Treaty of Rome serves as the primary source of EU competition law.²⁴ The underlying principle of EU competition law is articulated in Article 3(f), "[T]he activities of the Community shall include . . . the establishment of a system ensuring that competition shall not be distorted in the Common Market."²⁵ The substantive competition law is contained in Articles 85 through 94 of the Treaty of Rome.²⁶

¹⁶ TREATY OF ROME, *supra* note 7, at 15.

¹⁷ See DR. KLAUS-DIETER BORCHARDT, *EUROPEAN INTEGRATION THE ORIGINS AND GROWTH OF THE EUROPEAN UNION*, 23 (4th ed. 1995).

¹⁸ See RALPH FOLSOM, *EUROPEAN COMMUNITY LAW IN A NUTSHELL* 235 (1992); D.G. GOYDER, *EC COMPETITION LAW* 9 (2d ed. 1993); F. McGowan, *EC Competition Policy, in THE ECONOMICS OF THE EUROPEAN COMMUNITY* 173 (Ali M. El-Agraa ed. 1994); RITTER ET AL., *EEC COMPETITION LAW A PRACTITIONER'S GUIDE* 3 (1991).

¹⁹ See RITTER, *supra* note 18, at 3.

²⁰ See McGowan, *supra* note 18, at 174.

²¹ RITTER, *supra* note 18, at 3.

²² See *id.*

²³ See *id.*

²⁴ McGowan, *supra* note 18, at 179; see TREATY OF ROME, *supra* note 7, at 15, 36, 47-49.

²⁵ TREATY OF ROME, *supra* note 7, at 16.

²⁶ McGowan, *supra* note 18, at 179.

Article 85 is the core of the EU competition law.²⁷ It holds as incompatible with the common market “any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between Member States”²⁸ Therefore, to be held in violation of Article 85, three elements must be

²⁷ TREATY OF ROME, *supra* note 7, at 16.

Article 85

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

- (a) the direct or indirect fixing of purchase or selling prices or any other trading conditions;
- (b) the limitation or control of production, markets, technical development, or investment;
- (c) market-sharing or the sharing of sources of supply;
- (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

- any agreements or classes of agreements between enterprises,
- any decisions or classes of decisions by associations of enterprises, and
- any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:
 - (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
 - (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Article 86

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

- (a) the direct or indirect imposition of any inequitable purchase or selling prices or any other inequitable trading conditions;
- (b) the limitation of production, markets or technical development to the prejudice of consumers;
- (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- (d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

TREATY OF ROME, *supra* note 7, at 47–49.

²⁸ *Id.* at 47–48.

satisfied.²⁹ First, the violator must be an "enterprise" or an "association of enterprises."³⁰ An "enterprise" is defined as an entity which is engaged in business activities.³¹ Second, there must be an "agreement."³² An "agreement" is found where two or more parties reach a consensus between themselves, or through a third party, which dictates a pattern of commercial action.³³ Third, the agreement must have an appreciable impact on trade between Member States.³⁴

Article 86 of the Treaty of Rome prohibits an enterprise from abusing a dominant market position which affects trade between Member States.³⁵ A dominant position is created when a firm has the power to behave independently.³⁶ Independence is achieved when the firm does not need to take into account competitors, purchasers, or suppliers.³⁷ This independence must be viewed in light of the size of the market in which the business is involved.³⁸ A dominant position may be obtained on either the supply or demand side of the market.³⁹

C. Enforcement: Commission and European Court of Justice

The competition laws are enforced by two bodies: the Commission and the ECJ.⁴⁰ The Commission is composed of seventeen members, one of which, the Commissioner of Competition, is in charge of enforcing the competition laws.⁴¹ The Commission and the Commissioner's role is to apply regulations, directives, and decisions created by institutions of the Community, under the Treaty of Rome.⁴²

In 1962, the Council of Ministers adopted Regulation 17, giving the Commission and the Commissioner of Competition investigatory powers, as well as the authority to determine when violations of Articles 85 and 86 occur.⁴³

²⁹ *Id.*

³⁰ *Id.*

³¹ RITTER, *supra* note 18, at 31.

³² TREATY OF ROME, *supra* note 7, at 47-48.

³³ RITTER, *supra* note 18, at 60.

³⁴ See TREATY OF ROME, *supra* note 7, at 47-48.

³⁵ See *id.* at 48-49.

³⁶ FOLSOM, *supra* note 18, at 280-81.

³⁷ *Id.*

³⁸ See *id.* at 281-82.

³⁹ See *id.* at 279.

⁴⁰ See RITTER, *supra* note 18, at 5-6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Council Regulation 17, Feb 6, 1962, in ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW C4-014 (Sweet and Maxwell, vol. IV, 1975) [hereinafter Regulation 17].

The Commission and Commissioner also have the authority to render enforcement decisions, subject to judicial review by the ECJ.⁴⁴ The enforcement decisions of the Commission and Commissioner may require a firm found in violation of the competition laws to discontinue practices which violate the EU competition laws.⁴⁵ The Commission also has at its discretion the authority to levy substantial fines against firms for intentional or negligent infringement of competition law.⁴⁶

Along with the Commission, the ECJ also works to enforce competition laws, by serving as final arbiter of disputes arising under Community law.⁴⁷ In its role as final arbiter the ECJ performs three primary functions.⁴⁸ First, the court conducts judicial review of acts of the European Council, the European Parliament, and the Commission when challenged by private parties.⁴⁹ Second, it provides rulings on preliminary questions regarding interpretation of the Treaties.⁵⁰ Third, it determines whether a Member State has infringed on its obligations under the Treaty.⁵¹

The ECJ is assisted by six advocates-general who act as "the embodied conscience of the Court."⁵² The advocates-general provide an independent review and opinion of the cases before the court.⁵³ The Advocate-Generals' opinions are not binding on the court, but they are published with the ECJ's opinion in its final order.⁵⁴

⁴⁴ *See id.* at C4-046.

⁴⁵ *See id.* at C4-014, C4-015, C4-016.

⁴⁶ *See id.* at C4-040. The fines may be substantial but not to exceed 10 percent of the turnover in the preceding business year of each of the undertakings found so to have participated. In fixing the fine, regard is to be had to the duration of the infringement and its seriousness. *See id.*

⁴⁷ RITTER, *supra* note 18, at 6.

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² D. LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES*, 249 (4th ed. 1987).

⁵³ *Id.* at 250.

⁵⁴ *Id.*

II. THE *BOSMAN* CASE

A. *Facts*

Between 1988 and 1990, Jean-Marc Bosman played professional football for R.C. Liege (Liege), a Belgian first division club.⁵⁵ In 1990, Liege offered Bosman a new contract which reduced his salary by seventy-five percent.⁵⁶ Bosman refused to sign this new contract, and pursuant to the rules of the transfer fee system,⁵⁷ his name was placed on the "transfer list."⁵⁸ Bosman's transfer fee was set at BFr 11,743,000.⁵⁹

During the compulsory transfer period, no club showed an interest in Bosman.⁶⁰ After this period expired, Bosman arranged a contract with SA d'économie mixte sportive de l'Union Sportive du Littoral de Dunkerque (US Dunkerque), a French club.⁶¹ The conditions of this contract included payment of BFr 1,200,000 to Liege by US Dunkerque, in exchange for receipt by US Dunkerque of a transfer certificate from league officials at URBSFA.⁶² Liege doubted US Dunkerque's solvency, and declined to request that URBSFA send the transfer certificate to US Dunkerque, resulting in the termination of the contract between Bosman and US Dunkerque.⁶³ Liege then suspended Bosman, which prevented him from playing the entire season.⁶⁴

⁵⁵ *Bosman*, 1996 CEC(CCH) at 122.

⁵⁶ *Id.*

⁵⁷ A transfer occurs when a player moves from one club to another. These contracts may last between one and five years and run until June 30. Before April 26 of the last year of a player's contract the team must offer the player a new contract. The player is free to reject this offer, at which time he is placed on a list of players available for 'compulsory' transfers. Acquisition of players from this list requires that the acquiring club pay the selling club a transfer fee to compensate the selling club for the costs of training the player. The transfer fee is based on a formula which takes into account the player's age, experience and prior salary. The player remains in 'compulsory' status from May 1 to May 31. On June 1, the player moves into a period of 'free' transfer. During this period the acquiring club and the selling club may come to an agreement as to the transfer fee. If the player is unable to obtain a transfer, the original club must offer the player a contract with the same terms as the April 26 contract. If the player refuses, the club has until August 1 to suspend the player. The player, after sitting out two seasons, then acquires amateur status and may go to another club without payment of a transfer fee. *Id.* at 119-20.

⁵⁸ *Id.* at 122.

⁵⁹ *Id.*

⁶⁰ *Bosman*, 1996 CEC(CCH) at 122.

⁶¹ *Id.* at 50, 122.

⁶² *Id.* at 122.

⁶³ *Id.*

⁶⁴ *Id.*

B. *European Court of Justice Opinion*

On April 9, 1992, Bosman brought suit against R.C. Liege, URBSFA and UEFA seeking a declaration that the transfer rules and nationality clauses violated the Treaty of Rome.⁶⁵ The ECJ was asked by the Belgian Cour d'Appel to give a preliminary ruling on the interpretation of Articles 48, 85, and 86.⁶⁶ The Cour d'Appel asked the ECJ to determine whether Articles 48, 85, and 86, "prohibit[ed] 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."⁶⁷ The Cour d'Appel also asked the ECJ to determine whether Articles 48, 85, and 86, "prohibit[ed] 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 organized."⁶⁸

The ECJ held that the transfer system restricts the freedom of movement of players who wish to pursue their career in another Member State by preventing them from leaving the clubs to which they belong, even after their contracts have expired.⁶⁹ A player's present team is given an unfair advantage in resigning the player because they do not have to pay a transfer fee.⁷⁰ This type of practice was held to serve as a barrier to freedom of movement, and therefore a violation of Article 48.⁷¹

The court then addressed the applicability of Article 48 to rules limiting the number of foreign players a football team may have on the field at one time.⁷² Article 48 prohibits discrimination based on nationality, stating that 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."⁷³ The court held that though there was no restriction on the number of foreign players a team may employ, rules preventing

⁶⁵ See *Bosman*, 1996 CEC(CCH) at 123.

⁶⁶ *Id.* at 118.

⁶⁷ *Id.* at 124.

⁶⁸ *Id.*

⁶⁹ See *id.* at 130, 132.

⁷⁰ See *Bosman*, 1996 CEC(CCH) at 130-31.

⁷¹ See *id.*

⁷² See *id.* at 132.

⁷³ TREATY OF ROME, *supra* note 7, at 36.

a team from fielding more than three foreign players limits a player's employment opportunities.⁷⁴ The court held that this limitation constituted discrimination, and therefore is subject to Article 48 restrictions.⁷⁵

USFRBA and UEFA argued in opposition to this ruling, citing non-economic grounds for applying the foreign player limitations.⁷⁶ These arguments included the need to field teams which are representative of the local population, the need to develop a local pool of talent from which national teams can be selected, and the need to maintain a competitive balance between clubs.⁷⁷ The court countered, claiming that the exemption for the protection of nationality need only be applied to the fielding of national teams.⁷⁸ The court held that the protection of nationalism is not an applicable argument in regard to professional football in Europe.⁷⁹ Football clubs are already comprised partly of foreign players.⁸⁰ Furthermore, players playing abroad remain eligible to play for their national team.⁸¹ Finally, the court held that the elimination of the nationality restrictions will serve to increase the opportunity for employment by creating a larger employment market.⁸²

The ECJ chose not to rule on the application of Article 85 and 86 to the transfer fee system and the nationality restrictions.⁸³ The ECJ cited sufficient grounds under Article 48 to invalidate transfer fee systems and foreign player limitations without considering Articles 85 or 86.⁸⁴ The court did not dismiss these claims, but merely chose not to rule on them in the *Bosman* case.⁸⁵

C. *Aftermath of Bosman Ruling*

The ECJ's decision in *Bosman* did not end the conflict between UEFA and the EU, but rather sparked more debate as UEFA refused

⁷⁴ See *Bosman*, 1996 CEC(CCH) at 133.

⁷⁵ *Id.* at 132-33.

⁷⁶ *Id.* at 133.

⁷⁷ *Id.*

⁷⁸ See *id.*

⁷⁹ *Bosman*, 1996 CEC(CCH) at 133-34.

⁸⁰ *Id.*

⁸¹ *Id.* at 134.

⁸² See *id.*

⁸³ *Id.* at 134.

⁸⁴ *Bosman*, 1996 CEC(CCH) at 134.

⁸⁵ See *id.*

to abide by the court's ruling.⁸⁶ UEFA expressed its intention not to make any immediate changes to its European transfer rules and foreign player restrictions⁸⁷ despite the court's call for immediate implementation.⁸⁸ UEFA argued that athletics should be given a special exemption under the EEC Treaty.⁸⁹

UEFA cited two specific reasons for hesitating to abolish the transfer fee system.⁹⁰ First, UEFA feared that smaller clubs and the system of developing young talent would be destroyed.⁹¹ UEFA claimed that small clubs were kept afloat by the money which filtered down to them from the large clubs as compensation for training and developing younger players.⁹² John Reames, Chairman of Lincoln City (a small club), argues that "as many as 35 [small clubs] will go out of business."⁹³ Absent the transfer fee system, young players would be able to receive training from a smaller team and progress to a larger team with little compensation being paid to the smaller team.⁹⁴

UEFA's second reason for hesitating to abolish the transfer fee system was the fear that an artificial transfer system would be created.⁹⁵ Because the *Bosman* ruling does not apply to transfers wholly within a single EU country, UEFA was afraid of a system in which teams would make arrangements with foreign teams for the purpose of funneling trades through foreign teams to avoid paying transfer fees on player trades between local teams.⁹⁶ Therefore, third parties would become involved in local player trades for the sole purpose of avoiding domestic transfer fees.⁹⁷

⁸⁶ See *Commission on Collision Course With UEFA Over Bosman Ruling*, *supra* note 10.

⁸⁷ Philippe Naughton, *FIFA and UEFA Say No Rule Changes this Season*, Reuters Newswire Serv., Dec. 22, 1995.

⁸⁸ See *Bosman*, 1996 CEC(CCH) at 135.

⁸⁹ EUROPEAN INFORMATION SERVICE, *UEFA Accepts Bosman Ruling on Foreign Players*, EUR. REP., Feb. 21, 1996.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.* Smaller clubs obtain money in the transfer fee system through the sale of players to larger clubs. The smaller clubs serve as 'farm' clubs by providing training for young players. When a player is obtained by a larger club, the smaller club receives a transfer fee as compensation for the training. *Id.*

⁹³ Martin Thorpe, *The Bosman Verdict: The Club*, *GUARDIAN*, Dec. 16, 1995, at 19.

⁹⁴ See *id.*

⁹⁵ See Naughton, *supra* note 87.

⁹⁶ *Id.*

⁹⁷ See *id.*

UEFA also resisted the elimination of the foreign player limitations.⁹⁸ UEFA claimed that if it was forced to eliminate the foreign player limitation during its regional tournament, the integrity of the tournament would be jeopardized.⁹⁹ It claimed, "it is in the interests of continuity and fairness in every sporting competition that the regulations of the competition are not changed during the course of the competition."¹⁰⁰

On January 19, 1996, the European Commission sent a formal warning letter to UEFA which threatened that if it did not abide by the *Bosman* ruling within six weeks, serious fines would be imposed against it.¹⁰¹ Karl Van Miert, EU Commissioner of Competition, had rejected UEFA's arguments and was seeking to enforce the ruling.¹⁰² The commissioner cited the need to apply the EU competition law in a consistent and timely manner.¹⁰³ On March 4, 1996, UEFA agreed to follow the *Bosman* rulings.¹⁰⁴

Though UEFA publicly accepted the *Bosman* ruling, it continued to maintain a degree of animosity toward it.¹⁰⁵ The Secretary General of UEFA, Gerhard Aigner, spoke negatively of the effects the *Bosman* ruling will have on football.¹⁰⁶ Aigner asserted that two classes of society would be created in football, the "haves" and the "have-nots."¹⁰⁷ Aigner argued that football would be divided into teams who can afford to purchase top quality players and those who cannot.¹⁰⁸ He went on to argue that the ruling threatens the future of the national structures and national football associations as the need to develop local players will be lost.¹⁰⁹

Van Miert responded to Aigner's argument by stating that the need to uphold EU law is paramount.¹¹⁰ He then called for cooperation

⁹⁸ Richard Weekes, *Player Power; Domestic transfer system facing legal onslaught; Football*, TIMES (London), Jan. 21, 1996, available in 1996 WL 6469251.

⁹⁹ See Naughton, *supra* note 87.

¹⁰⁰ *Id.*

¹⁰¹ Wolf, *supra* note 11, at 18.

¹⁰² EUROPEAN INFORMATION SERVICE *Van Miert Scolds UEFA for Predicting Post-Bosman Chaos*, Eur. Rep., March 23, 1996.

¹⁰³ *Van Miert and Flynn Lay Down the Law for UEFA*, *supra* note 10.

¹⁰⁴ See Bates, *supra* note 12.

¹⁰⁵ See *Van Miert Scolds UEFA for Predicting Post-Bosman Chaos*, *supra* note 102.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ See *Van Miert Scolds UEFA for Predicting Post-Bosman Chaos*, *supra* note 102.

between the big and small football clubs.¹¹¹ In order to protect small clubs from destruction resulting from the loss of transfer fees, Van Miert suggested the creation of a program which would allow for the equal distribution of money from endorsements, television rights and merchandising to all clubs.¹¹² He claimed that this program would help "fill the void left by the transfer fee."¹¹³

III. ANALYSIS

The ECJ declined to answer the question of whether the transfer fee system or the foreign player limitations violated EU competition law.¹¹⁴ The court's action raises two questions that will be addressed in the remainder of this note: (1) does the Commission or the Commissioner of Competition have the authority to threaten a party regarding an issue the ECJ chose to avoid? and (2) do Articles 85 and 86 apply to the practices of UEFA and the various national associations?

A. *Commission's Authority*

Regulation 17 authorizes the Commission to bring an end to any infringement of Articles 85 or 86.¹¹⁵ The Commission's power is limited by possible judicial review by the ECJ.¹¹⁶ Along with its role in judicial review, the ECJ also rules on preliminary questions regarding interpretation of the treaties.¹¹⁷ In *Bosman*, the ECJ's ruling on the preliminary questions put before it relied solely on Article 48.¹¹⁸ The tragic flaw in *Bosman* was that Article 48 did not provide the Commission with the power to enforce the ruling because Article 48 vests no authority to fine transgressors.¹¹⁹ The Commission, in order to strengthen its threat against UEFA, applied competition law, enabling it to fine violators up to ten percent of their annual turnover and impose daily fines if the undertaking fails to comply with the Commission's order.¹²⁰ Therefore, though the court found that UEFA and the national football associa-

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Bosman*, 1996 CEC(CCH) at 134; Perry, *supra* note 13.

¹¹⁵ Regulation 17, *supra* note 43, at C4-014.

¹¹⁶ *Id.* at C4-046.

¹¹⁷ RITTER, *supra* note 18, at 5.

¹¹⁸ *Bosman*, 1996 CEC(CCH) at 136.

¹¹⁹ Perry, *supra* note 13.

¹²⁰ Regulation 17, *supra* note 43, at C4-040; *see* Perry, *supra* note 13.

tion's practices violated EU law under Article 48, the insufficiency of the enforcement mechanisms of the relevant articles reduced the court's narrow holding to a paper tiger.¹²¹

The ECJ's decision not to rule on the applicability and enforcement of Article 85 and 86 served as a *de facto* relegation of this authority to the Commission.¹²² It is the belief of this author that the ECJ's failure to address all the issues before it in *Bosman* created two major procedural shortcomings: inefficiency and legal instability.

The ECJ serves as the final arbiter of EU law.¹²³ By failing to rule on Articles 85 and 86, the ECJ undermined its role as a court of finality.¹²⁴ Rather than provide a clear interpretation of the Treaty of Rome, it passed the issue to the Commission.¹²⁵ Therefore, the Commission was put in the position of deciding if UEFA and the national football association's actions violated EU law.¹²⁶ Any dispute arising from the Commission's subsequent actions must be brought before the courts for a second time.¹²⁷

The court serves as the interpreter of treaties.¹²⁸ In *Bosman*, the court resisted this obligation.¹²⁹ While the Commission does have the authority to end violations of Articles 85 and 86,¹³⁰ it is the ECJ's role to determine the meaning of these Articles.¹³¹ The inability of the court to make a decision leaves the issue unresolved. The instability is further exacerbated by the fact that the advocate-general also provided an opinion on the issue.¹³² In the present case the advocate-general held that UEFA and the national football associations had violated Article 85, but not Article 86.¹³³ Therefore, by not ruling on an issue, the ECJ creates the opportunity for a split in opinions between the advocate-

¹²¹ Perry, *supra* note 13.

¹²² See Regulation 17, *supra* note 43, at C4-014. Regulation 17, Article 3 states, "[w]here the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end." *Id.*

¹²³ See RITTER, *supra* note 18, at 6.

¹²⁴ See *id.*

¹²⁵ See *Bosman*, 1996 CEC(CCH) at 134-36.

¹²⁶ See Regulation 17, *supra* note 43, at C4-014.

¹²⁷ See LASOK & BRIDGE, *supra* note 52, at 136.

¹²⁸ See TREATY OF ROME, *supra* note 7, at 76-77.

¹²⁹ See *Bosman*, 1996 CEC(CCH) at 134.

¹³⁰ See Regulation 17, *supra* note 43, at C4-014.

¹³¹ See TREATY OF ROME, *supra* note 7, at art. 76-77.

¹³² See *Bosman*, 1996 CEC(CCH) at 54.

¹³³ See *id.* at 118.

general and the Commission with no reasonable means to resolve the split other than a rehearing of the case.

B. *Article 85*

Article 85 is applicable to agreements between enterprises which may affect trade between Member States.¹³⁴ An "enterprise" is defined as any entity engaged in business activities.¹³⁵ The receipt of millions of dollars yearly through television contracts, marketing agreements, and ticket sales make UEFA and the national football associations a part of the multi-billion dollar sports entertainment business.¹³⁶ Therefore, to the extent that UEFA and the national football associations are engaged in business activities, they are considered enterprises as defined by the EU.¹³⁷

The second requirement for the application of Article 85 is the presence of an "agreement between undertakings."¹³⁸ An agreement exists if two or more parties reach a consensus between themselves, or through a third party, which dictates their actions.¹³⁹ The mere existence of an association demonstrates an agreement between its members to abide by common rules.¹⁴⁰

The third requirement for the application of Article 85 is that the agreement has an appreciable effect on trade between Member States.¹⁴¹ The transfer system affects trade by creating an artificial barrier to trade which encourages the preservation of the present market situation.¹⁴² The transfer system skews the market by giving the original club an unfair advantage over all other competitors.¹⁴³ This advantage results in unbalancing the natural market forces of supply and demand to favor the original club.¹⁴⁴ Therefore, the general trade in players is inhibited.¹⁴⁵

¹³⁴ See TREATY OF ROME, *supra* note 7, at 47-48.

¹³⁵ See RITTER, *supra* note 18, at 31.

¹³⁶ See *Morning Edition*, *supra* note 2; Lansley, *supra* note 3, at 31.

¹³⁷ See TREATY OF ROME, *supra* note 7, at 47-48; Lansley, *supra* note 3, at 31.

¹³⁸ TREATY OF ROME, *supra* note 7, at 47-48.

¹³⁹ See RITTER, *supra* note 18, at 60.

¹⁴⁰ See Alan Tomlinson, *North and South: the Rivalry of the Football League and the Football Association*, in BRITISH FOOTBALL AND SOCIAL CHANGE: GETTING INTO EUROPE, 25, 26 (John Williams and Stephen Wagg ed. 1991).

¹⁴¹ See TREATY OF ROME, *supra* note 7, at 47-48; RITTER, *supra* note 18, at 81.

¹⁴² See Perry, *supra* note 13.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

UEFA, as the governing body of European Football, oversees the rules and trades in all fifteen member states.¹⁴⁶ Because of the large numbers of teams and players and the fact that trading players is common, it is a common practice for players to move from clubs located in one country to teams located in another country.¹⁴⁷ Therefore, the trading of players between clubs affects trade between Member States.¹⁴⁸

In addition, foreign player restrictions limit the number of foreign players a team may field, which drastically reduces the demand for foreign players.¹⁴⁹ Thus, players who otherwise would satisfy the demands of a team are not able to take advantage of this need because the players do not have access to the market.¹⁵⁰ The limitations placed on foreign players forces them to remain in their native country.¹⁵¹ This inhibits the functioning of the market system by enabling domestic clubs to pay lower wages to native players because of the players' inability to compete for jobs in other Member States.¹⁵²

CONCLUSION

Application of Regulation 17 demonstrates that the Commission has the authority to bring an end to any violations of Article 85 or 86. The court's failure to address the competition law issue served only to muddle the adjudication of this issue. By not ruling on the competition issue, the court placed the burden of interpreting the competition law in the hands of the Commission. In order to create more unified laws, the ECJ should answer all questions placed before it regarding treaty interpretation. Adherence to this guideline would create more unified laws in the EU, which would in turn enhance the development of the common market.

In *Bosman*, strict application of Article 85 demonstrates that UEFA and the national football associations may be viewed to have violated this law. Through agreements codified in their rules, UEFA and the national football associations unnaturally influenced trade between Member States by controlling the flow of labor. The impact of these

¹⁴⁶ See *Bosman*, 1996 CEC(CCH) at 119.

¹⁴⁷ See *id.* at 53.

¹⁴⁸ See TREATY OF ROME, *supra* note 7, at 47; *Bosman*, 1996 CEC(CCH) at 111.

¹⁴⁹ See *Bosman*, 1996 CEC(CCH) at 133.

¹⁵⁰ See *id.*

¹⁵¹ See Perry, *supra* note 13.

¹⁵² See *Bosman*, 1996 CEC(CCH) at 133.

restrictions directly conflicts with the objectives of the Treaty of Rome and the EU competition law.

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