

Dionyssis G. Dimitrakopoulos

More Than a Market? The Regulation of Sport in the European Union¹

EXISTING ANALYSES OF THE ROLE OF IDEAS – DEFINED HERE AS ‘principled beliefs’ that ‘specify criteria for distinguishing right from wrong and just from unjust’ and ‘translate fundamental doctrines into guidance for contemporary human action’² – in the policy process portray them as significant factors that affect political outcomes. Ideas do so (1) by providing ‘road maps’ that guide political action; (2) by establishing focal points that resolve problems in cases of multiple equilibria; and (3) through the institutions that embody them.³ This is unsurprising given that ‘politics finds its sources not only in power but also in uncertainty—men collectively wondering what to do . . . Governments not only “power” . . . they also puzzle. Policy making is a form of collective puzzlement on society’s behalf; it entails both deciding and knowing’, as Hugh Heclo put it.⁴ If this is so in the embedded context of the nation-state, demand for guidance is likely to be stronger in the evolving system of the European Union (EU) where policy traditions, national and transnational interests and institutional logics often clash. This demand is unsurprising because integration often proceeds by means of the implementation of broad principles (such as the free movement of goods, services, capital and people) in specific areas of activity, even when the latter are not explicitly mentioned in the relevant EU legislation. This is

¹ The author is grateful to Philippe Marlière, Argyris G. Passas and the referees of this journal for stimulating comments. The usual disclaimer applies. The research reported here has been funded by the European Commission through a Marie Curie Post-Doctoral Fellowship held at the University of Oxford.

² J. Goldstein and R. Keohane, ‘Ideas and Foreign Policy: An Analytical Framework’, in J. Goldstein and R. Keohane (eds), *Ideas and Foreign Policy*, Ithaca, NY, Cornell University Press, 1993, p. 9.

³ *Ibid.*

⁴ H. Heclo, *Modern Social Politics in Britain and Sweden*, New Haven, CT, Yale University Press, 1974, p. 305.

when a comparatively high degree of uncertainty as to how far change ought to go increases demand for guidance that can stem from ideas and the broader, historically defined normative order.

This article seeks to explore this process and draws empirical material from the regulation of professional sport in the EU. This is not a core area of concern for the EU but one in which the EU became intensively involved in the 1990s. The article focuses specifically on the regulation of the system of international transfers in football because the involvement of the EU in this area exemplifies its activity in other areas of sport-related regulation⁵ namely, the reliance on Treaty-based provisions regarding competition policy⁶ for the regulation of a sector that, as key actors see it, is a 'special case' – sport, they argue, is much more than an industry, or a market.

The article advances two claims. First, the notion that sport is much more than a mere economic activity has guided and limited the EU's involvement in the regulation of this activity. Second, this happened not only because this idea is deeply embedded in the traditional regulation of sport in Europe, but also because it had powerful 'carriers' who, despite their unwillingness to see the EU become involved in this area, were forced to forge an uneasy compromise with the promoters of change. In that sense, this article seeks to add to a growing body of literature that highlights the political relevance of ideas in general, and (1) their role as 'weapons'⁷ as well as (2) the relative importance of their 'carriers'.⁸

The importance of this case study for our understanding of the broader policy process is twofold. On the one hand, the development of the EU has created a new opportunity structure that has generated new constraints and opportunities both for public and private actors. On the other hand, far from being the 'runaway Eurocracy' often depicted in both the academic literature and the media, the EU's institutions (in this case the Commission) often have to contend with immaterial forces that guide and constrain political activity. As a result, institution- or power-based analyses of the politics of integration ought to take into account ideational factors. In more general

⁵ S. Weatherill, '“Fair Play Please!”: Recent Developments in the Application of EC Law to Sport', *Common Market Law Review*, 40 (2003), pp. 51–93.

⁶ For an overview see R. Parrish, *Sports Law and Policy in the European Union*, Manchester, Manchester University Press, 2003, ch. 5.

⁷ M. Blyth, *Great Transformations*, Cambridge, Cambridge University Press, 2002.

⁸ K. Sikkink, *Ideas and Institutions*, Ithaca, NY, Cornell University Press, 1991.

terms, this article seeks to contribute to a growing body of literature that highlights the importance of ideational factors for the explanation of political phenomena by putting forward the argument that these factors do not eliminate political agency; rather, they channel it.

IDEAS AND THE POLICY PROCESS

The growing interest in the impact of ideational factors on the policy process is an important development in the study of politics in advanced industrialized societies. Ideational factors have been conceptualized in a number of ways⁹ varying from cognitive frames and norms to expertise and beliefs, but existing analyses typically stress the importance of the normative and the cognitive aspects of these factors. Thus, ideational factors have been shown to affect the definition of actors' interests and strategies as well as the outcomes of political battles.¹⁰ Although the autonomous impact of these factors has been contested by those who claim that it is, at best, epiphenomenal (i.e. it covers more consequential factors such as interests), the real challenge for the exponents of ideational analyses is to reconcile their arguments with the notion of agency. For that purpose, ideas-based arguments must be tested in a variety of settings in addition to (and beyond) the crystallized structures of the nation-state.

The EU provides an interesting testing ground. A product of purposeful actors (nation-states), it has become a new opportunity structure that affects both its creators and other, non-state, actors. Given that integration has hitherto privileged the removal of barriers to economic activity, the issue arises as to the way in which sectoral peculiarities are taken into account (if at all). From the perspective of the national governments this is an important issue because they are often held to account for EU policies that they control only imperfectly. They are often faced with competing demands that call for

⁹ R. Hansen and D. King, 'Eugenic Ideas, Political Interests and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.', *World Politics*, 53 (January 2001), p. 238; and John L. Campbell, 'Ideas, Politics, and Public Policy', *Annual Review of Sociology*, 28 (2002), pp. 21–38.

¹⁰ See, for example, M. Finnemore, *National Interests in International Society*, Ithaca, NY, Cornell University Press, 1996; S. Berman, *The Social Democratic Moment*, Cambridge, MA, Harvard University Press, 1998.

value judgements. These judgements must, however, be made in a specific context underpinned by material (e.g. institutional) and ideational factors.

The EU, like all organizations facing a novel decision situation, typically uses its existing standard operating procedures and institutional repertoires.¹¹ These are adjusted only marginally when that is deemed to be required. This is often the case in the European Commission's use of its powers in the field of competition, which often leads public and private actors to realize that a given practice is simply untenable and must be changed. However, deciding *how* the EU ought to deal with such cases once they appear on the agenda and, in particular, *how far* it can (or even ought to) go is much less straightforward. Its activity is shaped by wider social, political, economic, and other considerations. This is especially so in cases where the market has evolved and developed new practices that are not regulated, when there is no regulatory framework at all – national or European – to build on or when there is conflict between existing national regulation and EU legal provisions. The role of ideas can be important in cases of this kind.

In that context, the European Commission is mandated by the Treaty to assess the unique characteristics of the economic activity in question and act accordingly. Hence, it must identify and interpret the requirements of a given economic activity and reconcile them with the principles enunciated by the Treaty. The Treaty allows the Commission to choose an appropriate method of action, but how far can it go in implementing a provision of the Treaty in a specific case? This is the cardinal difficulty that the Commission faces in implementing broad Treaty provisions in previously untested areas.

Ideas affect this process through their *operational* and *political* characteristics. Some ideas are easier to put into effect than others, because (1) they resonate more with the cardinal characteristics of a given decision situation and (2) they are embedded in the standard operating procedures of given political actors. On the other hand, the political appeal of ideas relates primarily to their capacity to (1) legitimize some forms of political action (but not others) and (2) facilitate the creation of coalitions of political actors.

The next section focuses on the reform of the system of transfer regulations in European professional football. The now famous

¹¹ J. March and J. Olsen, *Rediscovering Institutions*, New York, Free Press, 1989.

Bosman ruling of the European Court of Justice (ECJ) highlighted the incompatibility of the previous regime with key provisions of the Treaty and rendered change unavoidable, but it did not resolve a key issue. How far should change go and how should the Commission – the ‘guardian of the Treaty’, apply the principles of the free movement of workers and the free provision of services to the area of professional sport where there was no sport-specific Treaty provision and no secondary EU legislation (directive, regulation, decision)? The analysis that follows is an attempt to demonstrate that the socially constructed and institutionalized idea that sport is both a professional/economic activity *as well as* an educative, social and recreational one has guided, legitimized and constrained the role of the Commission and has also affected the new system of transfer regulations.

THE REFORM OF EUROPEAN TRANSFER REGULATIONS

The Pre-Bosman Era

Until 2001, European professional footballers did not have the right to ‘resign’ from one ‘job’ with one club and find another while their contract was in force. Indeed, unlike most professionals working in the EU, they either had to wait until the end of their contract¹² or a freely agreed transfer fee had to be consented to between the two clubs. This system contravened the free movement of workers and the provision of services, i.e. two fundamental principles of the single European market. However, the European Commission did not utilize its powers of guardian of the Treaty (Article 226/169) against this practice because doing so would imply that professional football was merely an *economic* activity like any other that is regulated by EU law. The idea that sport in Europe is much more than a mere economic activity was at the heart of the Commission’s action during the 1990s. Indeed, it was this idea that both guided and limited the executive role of the Commission in its attempt to resolve a conflict between broad provisions of the Treaty and historically defined practices.

¹² Prior to the *Bosman* ruling they were not allowed to switch clubs freely even after the end of their contract.

The free movement of workers and the free provision of services were at the heart of the process of economic integration that was re-launched in the mid-1980s. These principles were to be implemented in a gradual, incremental manner.¹³ Indeed, Article 63 of the Treaty of Rome stipulated that the abolition of restrictions to the free provision of services should follow a programme setting out the general *conditions* under which and the *stages* by which each type of service was to be liberalized. This reflected the need to take into account service/sector-specific peculiarities and requirements.

Nevertheless, professional football remained outside the remit of this legislative programme, for three reasons. First, Article 63 of the Treaty gave priority 'to those services which directly affect production costs or the liberalization of which helps to promote trade in *goods*'.¹⁴ Second, the economic dimension of professional football had not yet acquired a high profile. Finally, the very idea of the involvement of the EC/EU in this area of activity was problematic because the Treaty contained no corresponding specific provision. This view was also supported by the jurisprudence of the ECJ.

Indeed, when a Dutch court asked the ECJ to decide in 1974 whether the Treaty applied to sport, the ECJ ruled that 'the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Art. 2 of the Treaty'.¹⁵ The ECJ subsequently reaffirmed this view¹⁶ and specified that Treaty provisions 'do not prevent the adoption of regulations or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the *particular nature* and context of such matches and are thus of sporting interest only'.¹⁷

This jurisprudence of the ECJ is of cardinal importance for two reasons. First, the ECJ accepted that sporting activities have more than a mere economic dimension, but it did not define their

¹³ Articles 48, 49 and 59 of the Treaty.

¹⁴ Added emphasis.

¹⁵ Case 36/74, Judgment of 12 December 1974, Walrave and Koch/Association Union Cycliste Internationale and others, *European Court Reports* (1974). See also Parrish, *Sports Law*, pp. 85–7.

¹⁶ Case 13/76, Judgment of 14 July 1976, Dona/Mantero, *European Court Reports* (1976); Case 222/86, Judgment of 15 October 1987, Unectef/Heylens, *European Court Reports* (1987), 4097.

¹⁷ Case 13/76, paras. 12, 14, added emphasis.

characteristics. Second, the ECJ accepted that when the Treaty applies to the economic dimension of sport, exemptions are acceptable to the extent that they are based on the 'particular nature and context' of the relevant activities. For example, competitions between national teams that, by definition, exclude foreign players are acceptable under EC/EU law. These two aspects of the jurisprudence of the ECJ are causally linked. Exemptions enunciated by the Treaty are acceptable precisely because of the *specificity* of sporting activities that have both an economic and other dimensions.

At the same time, central aspects of the organization of sporting activities clearly violated Treaty provisions. In the past, professional football clubs were not allowed to employ more than two foreign players, even if these players were citizens of a member state. This regulation breached the free movement of workers and the free provision of services enunciated by the Treaty. The possibility of further legal action under the Treaty did not change the attitude of the Union of European Football Associations (UEFA, the body that governs European football), which consistently tried to divert pressure emanating from the Commission.

Already in 1978 UEFA had given an undertaking to Etienne Davignon, then Commissioner in charge of industrial affairs and the single market, that it would abolish the limitations on the number of EC footballers who were employed by football clubs in the member states but concrete action did not follow. The re-launch of the single market project in the mid-1980s could have produced a 'bandwagon effect' against such restrictive practices. However, this did not happen. The officials of the European Commission had to overcome not only the lack of a sport-specific Treaty provision but also the opposition of Jacques Delors, then president of the Commission.

Delors, a keen football fan with links to a number of top clubs and league officials,¹⁸ believed that the EC had no powers to deal with this issue. When in 1986 he realized that, in the course of an otherwise routine investigation regarding compliance with the free movement of workers, Commission officials were considering the possibility of taking legal action against clubs under the Commission's powers as guardian of the Treaties, Delors confronted Manuel Marín, then commissioner in charge of social affairs, who was supporting the stance of the officials of his department. When Delors realized that

¹⁸ K. Van Miert, *Le Marché et le Pouvoir*, Brussels, Racine, 2000, p. 131.

Marín was unwilling to give in, he reassigned responsibility for this dossier to Peter Sutherland, then commissioner in charge of competition policy, so as to 'bury' the issue altogether.¹⁹ Arguably, the same logic permeated the gentlemen's agreement concluded in 1992 by UEFA and Martin Bangemann, then vice-president of the European Commission. This agreement introduced the so-called 'three plus two rule' that allowed football clubs to have up to three foreign footballers.

This small change clearly fell short of a radical overhaul of the regulations governing the transfer of footballers within the EU. Throughout the 1990s, the Commission received a significant number of complaints regarding the transfer system while, as Parrish notes, a body of opinion was gradually emerging at the level of the EU 'seeking to give the socio-cultural and integrationist qualities of sport a higher priority'.²⁰ This was also exemplified by the Declaration attached to the Treaty of Amsterdam in 1997. The Declaration highlighted the 'social significance of sport' and although it was not legally binding it was a political message that EU institutions were expected to take into account when they dealt with issues affecting sport.²¹

The now famous Bosman case²² put the issue of the radical overhaul of the transfer system back on the agenda. Jean-Marc Bosman, a determined Belgian professional football player, took legal action that brought about a sea change in European football.

The Bosman Case as a Critical Juncture

Bosman was a professional player of RC Liégeois. When his contract expired, the French club US du Littoral de Dunkerque offered to

¹⁹ Interview with European Commission official, 19 September 2001. This was part of a broader 'policy of tolerance' according to (former) Commissioner Karel Van Miert, *Le Marché et le Pouvoir*, p. 130.

²⁰ R. Parrish, 'The Politics of Sports Regulation in the European Union', *Journal of European Public Policy*, 10 (2003), p. 250.

²¹ See Parrish, *Sports Law*, p. 176. A similar Declaration has also been appended to the Treaty of Nice.

²² Case C-415/93, Judgment of 15 December 1995, Union Royale Belge des Sociétés de Football association and others/Bosman and others, *European Court Reports* (1995).

employ him and concluded an agreement with him and a separate agreement with his former employer, RC Liégeois. RC Liégeois, doubtful about the French club's solvency, did not ask the Belgian League to issue the certificate that was required for the successful completion of the transfer. As a result, the contracts did not enter into force. In addition, the Belgian club suspended Bosman, thereby preventing him from playing for the entire season. Bosman took the Belgian club to the Belgian courts, which subsequently asked the ECJ to interpret Article 48 of the Treaty of Rome (free movement of workers) in relation to the regulations governing the transfer of professional footballers. More specifically, the Belgian court sought to ascertain whether this provision precluded the application of UEFA-sponsored national regulations under which a professional player could not, upon the expiry of his contract, be employed by a club based in another member state unless the latter paid a fee to his former employer. After reaffirming its views regarding the specificity of sport, the ECJ ruled that the aforementioned regulations violated the free movement of workers that directly affected players' access to the employment market in another member state.²³ Furthermore, the ECJ condemned the aforementioned gentlemen's agreement between the Commission and UEFA regarding the 'three plus two rule'.

This was a landmark ruling for two reasons. First, the ECJ reaffirmed the view that sporting activities were multifaceted and that EU law applied to the economic facet of those activities. Second, it dealt a heavy blow to a key component of the regulations governing the transfer of professional footballers, the edifice that had hitherto exemplified the 'specificity' of sport. It obliged UEFA and the International Federation of Football Associations (FIFA) – the game's governing bodies that were previously immune to external pressures – to reconsider this edifice in its entirety.²⁴ In that sense, the ruling opened a path that the Commission (in its capacity as guardian of the Treaties) and the game's governing bodies had to follow.

²³ Thus, the ECJ vindicated the Commission officials who had attempted to raise the issue on the same legal basis during Jacques Delors' first term as Commission president.

²⁴ The first indication of change was the letter of warning issued to UEFA and FIFA in January 1996 on Commissioner Van Miert's instructions with regard to the compatibility of the 'three plus two rule' and the provisions of the Treaty.

Nevertheless, the cardinal question remained unanswered: *how far* should the Commission go in promoting the implementation of the free movement of workers and the free provision of services in this particular area? What guided and limited its action in an area where (1) the powers of the EU remained hard to define and (2) the Commission's past activity had been criticized by the ECJ? In other words, what are the characteristics of the *specificity* of sport? How far and in what way should they be taken into account in the implementation of the aforementioned legally binding freedoms in this area?

The Specificity of Sport as Political Weapon

The continuing opposition of UEFA and FIFA, and the active involvement of government leaders (especially those of Britain, Germany, France, Italy and Spain) who overtly supported a 'cautious' and 'balanced' approach²⁵ while covertly and fiercely opposing substantive change, further complicated the task of the European Commission²⁶ and highlighted the eminently political nature of this issue. This was unsurprising given that – unlike FIFA, which has little direct

²⁵ The British Prime Minister Tony Blair and the German Chancellor Gerhard Schröder openly supported this approach. Bundesregierung der BRD (2000) Der Bundeskanzler teilt mit: Gemeinsame Erklärung von Bundeskanzler Schröder und Premierminister Blair zum Transfersystem im Profi-Fußball. Pressemitteilung Nr. 425/00, 10 September 2000. Also, the Swedish Prime Minister Göran Persson made a number of telephone calls to European Commission President Romano Prodi supporting the same view (interview with European Commission official, 19 September 2001). These calls reflected a rather demagogic attitude that was based on the football fans' ignorance of (1) the fact that the Commission simply followed the ECJ's Bosman ruling and (2) important legal developments at the national level. Indeed, a senior Commission official highlighted the fact that Gerhard Schröder's public discourse, interestingly, did not allude to the fact that the Federal Employment Court had ruled that the previous system of transfer regulations was unconstitutional. Interview with European Commission official, 12 September 2001. Further, these public statements were presented as an attempt to protect football from the unnecessary and unwelcome intervention of the Commission (a vague argument that was received sympathetically by the uninformed and misinformed football fans) but, in essence, were overt pressures on the Commission to be more sympathetic to the views of powerful football clubs. Ministers representing smaller member states were supportive to the Commission. Interviews, European Commission, 18 September 2001.

²⁶ The French presidency of the EU also promoted the idea of the 'exemption sportive européenne', *Le Monde*, 4 June 1999.

contact with clubs – UEFA maintains direct links with football clubs, in particular the so-called ‘G14’, a Brussels-based organization that represents now 18 wealthy and powerful European football clubs²⁷ that vehemently opposed change.²⁸ Given that these arguments were used by ‘an industry of considerable commercial significance’,²⁹ they could be dismissed as a delaying tactic, but the issue was far from clear-cut.

The Commission was puzzled because it knew what it had to avoid (i.e. the pre-Bosman arrangement) but it could not assess the precise implications of the alternative options. These options were as follows:

1. it could simply remain inactive thereby obliging the clubs and football’s governing bodies to reform the regulations. This was a risky option because many clubs opposed change (thus, at that point they could not be credibly expected to implement change) and the complete liberalization of the system would deprive small clubs, football’s grassroots organization, of the income they need and receive when they ‘sell’ players to wealthy clubs;
2. it could seek a gentlemen’s agreement – the legislative option being excluded due to the lack of a legal basis in the Treaty.

In both cases, the key question remained the same: how far should change go? Should transfer fees be abolished? If not, how should they be calculated? Should one rely on the pure logic of the market?

The Specificity of Sport as a Guide and Limit

After the Bosman ruling, the implementation by the European Commission of the principle of the free movement of workers and the free provision of services in professional football was guided, legitimized, and constrained by the embedded social dimension of sport and the need to protect, as much as possible, small clubs from the potentially negative consequences of the Bosman ruling.

²⁷ They include Real Madrid FC, FC Barcelona, AC Milan, Juventus FC, Manchester United FC, and FC Bayern München.

²⁸ They considered that the proposed changes would enhance the bargaining position of players. Interviews with European Commission officials, 12, 18 and 19 September 2001.

²⁹ Weatherill, ‘Fair Play Please!’ , p. 51.

This ruling did not explicitly address certain problematic aspects of the regulations governing the transfer of players whose contracts have not expired. For example, even after this ruling, clubs enjoyed an unfettered right to unilaterally define the amount that another club had to pay to acquire the services of a footballer under contract. Unlike most other professionals, footballers under contract did not have the right to resign from one job and freely get another. This fundamental rule of the international transfer system was clearly incompatible with the principles of free movement of workers and the free provision of services within the emerging single European market. The impact of the Bosman ruling could not (and did not) remain confined to the post-contractual stage. Rather, it forced the officials of the European Commission, UEFA and FIFA to realize that the time had finally come for a change in the regulations that governed the contractual stage as well.

The task they faced was extremely complex because the ECJ had not defined the specific content of the non-economic dimension of sport. Thus, the frontier between the economic aspects of sport (where EU law applies) and the non-economic aspects (where EU law does not apply) had to be defined as well as acted upon. In addition, the relative autonomy of the Commission had been curtailed by the ECJ's criticism of the 'three plus two rule'. Moreover, the Commission was facing strong opposition from FIFA and UEFA, whose officials argued that football was a special case and should be treated accordingly.

Nevertheless, this argument had been undermined by the increasingly spectacular amounts paid by top European clubs for the services of footballers,³⁰ the emergence of new market practices, such as the acquisition by investment companies of controlling stakes in several football clubs,³¹ the increasing involvement of private television channels in the definition of key aspects of European as well as national and world football tournaments in exchange for astronomical sums³² and the spiralling cost of top players' wages. In that sense, the

³⁰ For example, in the summer of 2001 Real Madrid FC paid US\$68 million for the transfer of French international Zinedine Zidane.

³¹ For example, in the late 1990s the English National Investment Company (ENIC) controlled four clubs (Glasgow Rangers, Slavia Prague, Vicenza and AEK Athens).

³² The price of the exclusive television rights for the Italian football league increased 58-fold between 1984 and 1998. V. Reding, 'The European Community and

Bosman ruling simply highlighted the change that had already taken place and to a large extent provided ammunition to the Commission, whose officials argued that 'if the sporting world behaves as an economic industry, it shall be regulated accordingly'.³³

Faced with this situation and the unwillingness of football's governing bodies to devise a new system that would comply with EU law, the Commission had to use its powers under competition law, which is what it typically does when it attempts to liberalize previously protected or uncompetitive markets. Commission officials focused on one key argument:³⁴ the use of transfer fees agreed between clubs amounted to a restrictive practice that contravened EU competition law because the definition of the fees was not based on a clear, objective and transparent criterion that would reflect actual training costs. Moreover, FIFA defined the transfer regulations unilaterally.³⁵ Finally, players did not have the right to resign and were therefore deprived of the right to provide their services freely.

This logic, which permeated the stance of the European Commission throughout the 1990s, along with the Bosman ruling of the ECJ raised the issue of change and highlighted the main aspect of the system of transfer regulations that ought to be changed. However, it could not provide a guiding device for the definition of the new system, primarily because of the particular nature of football, and sport in general. This particularity consists of a number of key elements that demonstrated that the arguments against change had a clear practical basis.

First, unlike other private firms, professional football teams need a degree of stability in terms of personnel so that they can pursue their objectives successfully. The full implementation of the principles of free movement and free provision of services in this sector could allow players to move from one club to another in a manner that would severely undermine the clubs' ability to compete. Wealthy clubs would be able to attract the best players throughout the football

European Sport: From the Economic to the Social Dimension', speech given at the Ninth Sports Forum of the Konrad Adenauer Foundation, Eichholtz, 3 May 2001, p. 11.

³³ Interview with Commission official, 18 September 2001.

³⁴ *Libération*, 1 September 2000.

³⁵ European Commission officials stressed that the involvement of all interested parties would have a positive impact on the stance of the ECJ as well. Interviews with European Commission officials, 18 September 2001.

season by paying even higher wages. This would lead to two very important consequences. It would undermine the capacity of less well-off clubs to compete. More importantly, small clubs renowned for their ability to identify, train and sometimes even educate young talented players³⁶ would no longer be able to perform this vital function. If players were allowed to benefit from the unfettered implementation of the aforementioned freedoms, those clubs that are small would be unable to rely on transfer fees and the key income they secure by selling players. In short, the unfettered implementation of the principles enunciated by the Treaty would deal a fatal blow to the structure of football.

Second, the nature of competition in sport is special since it relies, at least in part, on the concepts of equal opportunity, fair play and solidarity.³⁷ Unlike other economic actors, football clubs do not seek to dominate in a manner that completely eradicates competition. Rather, winning in football (and other sports) is meaningful only to the extent that opponents remain reasonably able to compete. In other words, 'there is an interdependence of interest between participants in sporting competition'.³⁸

Third, a player's career usually starts at a young age and does not last for many years. Indeed, a footballer's professional career typically comes to an end soon after the age of 30.

Fourth, the number of professional athletes in Europe is estimated at a mere 15,000–20,000.³⁹ They originate in either the amateur sector or school sports. One of the key characteristics of the organization of sport in Europe is the principle of solidarity that links the various levels of sporting practice, from recreational to top-level professional sport. Its protection is a key function performed by sports federations.

³⁶ AFC Ajax Amsterdam, FC Nantes Atlantique and Athletic Club de Bilbao are only a few of the European clubs that operate renowned 'youth schemes' or 'academies'.

³⁷ European Commission, *The Helsinki Report on Sport: Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework*, COM (99) 644 final.

³⁸ Weatherill, ' "Fair Play Please!" ', p. 54.

³⁹ Observatoire Européen de l'Emploi Sportif, *Sport et emploi en Europe: Rapport final à l'attention de la Commission Européenne*, Brussels, EC, 1999, p. 36.

Fifth, the 'pyramid structure'⁴⁰ of these organizations may give sporting federations a practical 'monopoly' that in principle constitutes a violation of EU competition law. This form of organization had negative effects on players' rights. Indeed, players were deprived of the right, typically enjoyed by other employees, to take legal action in national courts when they felt that their rights had been violated. This archaic system exemplifies the autonomy of sports federations and is largely a residue of amateurism. However, it would be absurd to have, for example, two or more national federations making arrangements for two national teams, competing internationally to host the same sporting events, organizing two cup competitions, etc.

The Advent of the New System of Transfer Regulations

The Commission's use of its powers under competition law, which, by definition, focuses on the *economic* aspects of sport, was not an indication of its unwillingness to acknowledge and act upon the peculiar nature of sport. Rather, it served a tactical purpose, namely, the opening of the debate regarding the new system of transfer regulations. The idea that sport is a peculiar type of 'industry' was evident in the arguments used by Commissioners and Commission officials during the preparation of the new system of regulations.⁴¹ The arguments used by Commission officials in the ECJ were also illustrative of this twofold strategy. They acknowledged that if clubs are to maintain a minimum of stability, which is a vital element of their ability to compete, it is necessary to restrict the number and the duration of 'transfer windows', i.e. the periods in which transfers between clubs of players under contract can take place.

The strict implementation of the principles of the free movement of workers and the free provision of services in the field of professional football would preclude this measure. In essence, the stance adopted by the Commission was an indication of its willingness to acknowledge and respect the specificity of sport and to combine it

⁴⁰ Typically, it comprises grassroots federations and clubs, and regional, national and European federations. European Commission, 'The European Model of Sport', at http://www.europa.eu.int/comm/sport/doc/ecom/doc_consult_en.pdf, 1998, pp. 2–3.

⁴¹ See for example Commissioner Reding's statement to BBC online news, 7 September 2000.

with the need for change in the football transfer system in accordance with (1) EU law and (2) the jurisprudence of the ECJ. The new principles that govern only the transfer of professional football players *between* member states⁴² exemplify this twin strategy promoted by the European Commission.

The number of transfer windows has been limited to two per season but each player is allowed to move only once every year. Contracts can last between one (minimum) and five (maximum) years.⁴³ Unilateral breaches of contract are possible only at the end of the season. The principle of financial compensation is maintained. A fee is paid if a contract is breached unilaterally (either by a player or a club). Young players and the interests of the clubs that train them will be protected. Indeed, for players under the age of 23, a system of training compensation has been put in place to encourage and reward the training efforts of clubs. In addition, international transfers of players under the age of 18 will only be authorized subject to agreed conditions, and the football authorities will establish and enforce a code of conduct to guarantee the sporting, training and academic education of these players. Solidarity mechanisms will be created that will redistribute a significant proportion of income to clubs involved in the training and education of players, including amateur clubs.⁴⁴ An arbitration body will be created with members chosen in equal numbers by players and clubs and with an independent chairman, but arbitration will be voluntary and will no longer rule out recourse to national (civil) courts.

This set of principles has been transposed into FIFA's regulations on international transfers in July 2001 and came into force in September 2001. Moreover, following the Commission's call on FIFA and UEFA to encourage dialogue between clubs and players, FIFA and FIFPro (the umbrella organization that represents professional

⁴² European Commission, 'Outcome of the Discussions Between the Commission and FIFA/UEFA on FIFA Regulations on International Football Transfers', press release IP/01/314, 5 March 2001.

⁴³ The calculation of the compensation fee will be based on an estimate of the training and education costs incurred by clubs. This estimate will be country-specific in the EU, defined by national football associations, and will cover four categories of players.

⁴⁴ In cases of international transfers, the new employer will pay 5% of the total financial compensation to all clubs that have contributed to the player's training up to the age of 23.

footballers' associations) reached an agreement regarding FIFPro's involvement in the implementation of the new regulations. The new principles introduce a number of key changes that embody a unique combination of the principles enunciated by EU legislation, on the one hand, and the specific nature of sport (and football) on the other.

From the players' perspective, the new system⁴⁵ is beneficial because it affords them more freedom and enables them to protect their rights effectively. Despite these changes, clubs can still maintain a minimum of stability as only two transfer windows per season and only one move per season per player are now allowed. Moreover, the introduction of an objective (as opposed to an arbitrary) system for the calculation of transfer fees allows them to limit their operating costs. Finally, small clubs that operate 'academies' and similar schemes can still count on the income generated by transfer fees. However, the key question relates to the manner in which the role of the Commission was shaped.

What are the *operational* and *political* characteristics of the system that have allowed the Commission to consent to it? Arguably, the final outcome has a number of characteristics that reflect the idea that sport is a multifaceted activity whose unique nature must be taken into account in the course of implementing the freedoms of (1) movement of workers and (2) provision of services.

From the Commission's perspective, the final outcome is the result of internal consensus, the lack of which had undermined the role of the EU's executive body in the crucial period of the mid- to late 1980s. Indeed, the involvement of Commissioners Monti (competition), Reding (education and culture) and Diamantopoulou (employment and social affairs) after 1999 reflects this consensus as well as the multifaceted nature of sport.

Moreover, this agreement does not entail the use of *new* EU legislation. The Commission managed to avoid the submission of a new legislative proposal, at a time when the emphasis of political discourse at the level of the EU had shifted to the need for reform along neo-liberal lines. Thus, it has also avoided accusations of excessive activism by using existing structures to reach the desired outcome.

⁴⁵ Initially, FIFPro objected to the new system. *Le Soir*, 7 March 2001. This was essentially a tactical move in the players' effort to gain a substantive role in the implementation of the new system.

The actual implementation of the final outcome relies on the action of national, European and international federations whose autonomy is largely preserved. This enhances the legitimacy of the implementation process. The autonomy of the world of sport is a concept that the Commission intends to build on by promoting former commissioner Diamantopoulou's idea of a collective agreement⁴⁶ that would bring together representatives of clubs, federations and players. The objective is to re-balance the structures that govern European football, to make them more representative and to improve other aspects of professional football such as working conditions, the calendar of football events, and the regulation of resting time, in a manner that resonates with (1) the wider normative order that underpins the operation of the single market (social market economy) and (2) the positive experience of the member states where a national collective agreement is already in place (e.g. Spain, France, Denmark and the Netherlands).⁴⁷

The final outcome was also congruent (to some extent) with the 'European social model'. It has allowed the Commission to avoid the charge typically made against it that it promotes ultra-liberal policies, while managing to promote the free movement of workers and the free provision of services in a proportional manner. In fact, the Commission has offered no guarantees as to the compatibility of the new system with the Treaty. Commissioner Reding pointed out that commissioner Monti (who had the lead in this dossier) did not sign an agreement with the interested parties.⁴⁸ Moreover, Commission officials were eager to stress⁴⁹ that a great deal will depend on the capacity of FIFA, UEFA and, above all, FIFPro⁵⁰ to protect the new system from players who may wish to bring a test case to the ECJ.⁵¹ It

⁴⁶ Interview with European Commission official, 19 September 2001.

⁴⁷ Interviews with European Commission officials, 12 and 18 September 2001.

⁴⁸ European Parliament, 'Verbatim Report of Proceedings', 13 March 2001, at <http://www.europarl.eu.int/cre/pdf/20010313i.pdf>, p. 53.

⁴⁹ Interview with European Commission official, 19 September 2001.

⁵⁰ *International Herald Tribune*, 7 March 2001.

⁵¹ Commissioner Reding too has alluded to this possibility. European Parliament, 'Verbatim Report of Proceedings', 13 March 2001, p. 53. For an excellent analysis of the reasons why aspects of the new systems may be incompatible with EC law see Weatherill, 'Fair Play Please!', pp. 70–1. One of the examples that Weatherill highlights is the requirement that up until the age of 28 a player must abide by a contract for at least three years or else suffer suspension. This seems to go 'beyond the

is clear that the involvement of the Commission in the handling of this issue has not been a happy occasion for the EU's executive body. Mario Monti's assertion that this marks 'the end of the Commission's involvement in disputes between players, clubs and football organizations'⁵² is indicative of this sense. In addition, the efforts made to promote the 'social dialogue' mentioned above must be seen from this perspective.

CONCLUSION

The purpose of this article was to explore the role of ideas in the transformation of broad Treaty-based principles into concrete reality in previously uncharted territory. Sport is a multifaceted activity but the EU can only regulate the economic facets. Faced with this reality, the Commission tried to reconcile Treaty-based obligations with the demands of the broader, non-economic facets of sport. In the analysis of this case, a twofold argument has been put forward.

Ideas are road maps that direct executive activity, legitimize and constrain it by articulating the relevant deeply embedded conceptions regarding the nature of the activity concerned. Ideas play this role by means of their operational and political characteristics, that is, by resolving operational problems in a way that directly resonates with the normative order that underpins the institutional context in which political decisions are made and implemented. The 'flipside' of this argument concerns the use of ideas by self-interested political actors who seek to legitimize their own views and activity. In that sense, ideas are 'weapons' used by actors in their quest to protect and promote their interests.⁵³ This paradoxically supports the first claim. Political actors use ideas precisely when these ideas are seen as legitimate and shared. This is when they are politically consequential.

space allowed by the Court's acceptance in *Bosman* that . . . the aims of maintaining a balance between clubs by preserving a degree of equality and uncertainty as to results . . . must be accepted as legitimate', Weatherill, ' "Fair Play Please!" ', p. 70.

⁵² Cited in Weatherill, ' "Fair Play Please!" ', p. 72.

⁵³ Despite the vigorous rhetoric used by many national governments against what they perceived as an unwarranted attack against the autonomy of sport, they implicitly acknowledged that the ECJ's assertion that the Treaty covers the economic facets of sport was correct.

The socially constructed notion that sport is much more than an economic activity did not allow the Commission to simply rest on the ECJ's Bosman ruling, which it had the power to do. Rather, the Commission had to help find a way to reconcile it with the ECJ's jurisprudence. On the other hand, the same notion has been used by the supporters of the status quo as a weapon in their new attempt to stifle change. Both were legitimate uses of the same idea but they also reflected wider concerns regarding the potentially negative implications of the unfettered implementation of the free movement of workers and the free provision of services on sport in general and football in particular. In that sense, it can be argued that the idea that sport is a peculiar and multifaceted industry both channelled and constrained the debate (and its outcome) regarding the regulation of sport.

The central conclusion that can be drawn from this case concerns the relationship between ideas and agency. The role of ideas in political processes has been criticized for placing excessive emphasis on contextual (here immaterial) factors to such an extent that they obscure the important role of agents. This article has sought to contribute to a growing body of literature⁵⁴ that highlights the fact that reliance of ideas as explanatory factors does not necessarily ignore the role of agency. In fact, ideas channel agency. Agents are constrained by the ideas that constitute the broader normative context in which they operate. On the other hand, they also use ideas as weapons in an attempt to make their arguments more appealing. In that sense, ideas are both constraints and resources.

⁵⁴ See, for example, Hansen and King, 'Eugenic Ideas'; Blyth, *Great Transformations*.