

They're Playing R. Song. Football and the European Union after *Bosman*

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Abstract

The purpose of this article is to discuss some of the ramifications of the European Court of Justice's (ECJ) ruling in *Belgian Football Association v. Bosman* (hereafter *Bosman*). Much has been written about the background to this case and its possible financial impact upon professional football clubs (cf. Morrow, Morris & Spink, 1996; Szymanski & Kuypers, 1999). This paper discusses *Bosman* and other cases in order to provide those working in other jurisdictions and those from other disciplines, with some basic information about the legal issues that arose in *Bosman*. It documents the football industry's reaction to the decision (especially on the all-important issues of transfer fees and player quotas) and discusses some important judgments that have been handed down since *Bosman*. It also looks at how football's relationship with the institutions of the European Union (EU), had (not) progressed in the five years or so since the *Bosman* ruling. In this respect, particular attention is paid to the European Football Association's (UEFA) and the Federation of International Football Association's (FIFA) troubled relationship with the European Commission – an immensely powerful body which the football industry needs to court if the most serious ramifications of *Bosman* are to be avoided.

Sports Cases in Europe Before *Bosman*

The *Bosman* case has become pivotal in defining labour practices and conditions in European football during late 1990s. The case was one of several brought before the ECJ in attempts to establish the legal position of sports and professional sporting participants in the EU. In *Walrave & Koch v. Association Union Cycliste Internationale* (UCI), the ECJ affirmed that sport was subject to the provisions of Community Law if it constituted an economic activity within the meaning of EC Treaty, Article 2, as amended. This provides that:

The Community shall . . . promote . . . throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states (Treaty of Rome (EC) 1957, Art. 2).

Accordingly, any sports practice is 'economic activity' within the meaning of Article 2 if it contributes to or impacts upon, *inter alia*, growth, economic performance and employment levels within the Community or the standard of living or quality of life of the people who live within it.

Walrave & Koch concerned the activities of two Dutch nationals who were employed as pacemakers on motorcycles in medium-distance bicycle races. The bicycle racers would ride in the lee of the motorcycle and could reach speeds of up to 100 kph, which would be impossible without the assistance of the pacemakers. In 1973 the sport's governing body, the UCI, introduced a new rule stating that the pacemakers had to be of the same nationality as the rider they were assisting. The plaintiffs (Dutch nationals and generally recognised as two of the best pacemakers in the world) brought an action before the Dutch court seeking a declaration that the rule breached EC Treaty, Article 48. The plaintiffs won their case at first instance and were granted a declaration that the new rule was void and an injunction prohibiting the UCI from preventing the plaintiffs working for racers who were not Dutch but who were citizens of other Community member states.

The UCI successfully appealed against the ruling and on further appeal certain issues were referred by the domestic court to the ECJ under EC Treaty, Article 177. Those issues concerned, *infer alia*, whether the rules governing sports events were exempt from the provisions of the Treaty. The Court was also asked whether the fact that the UCI was based in Switzerland and most of its member countries (there being over 100) were not members of the European Community meant that the provisions of the Treaty were not applicable to the UCI in any event.

The second question was dealt with quickly. The Advocate General made the point that:

any Sovereign state is entitled to enact that a particular type of provision in the rules of an international association of private persons shall be deemed unlawful in its territory and shall not be applied there. One is familiar with enactments of that sort in the field of competition law. In my opinion what is true for a sovereign State is true also for the Community (*Walrave & Koch*, 1975: 328).

The Community is a 'superstate' with laws, powers and obligations that apply to those who deal with it even if they are not Community members.

On the question of whether an exception from the provisions of the Treaty should be made for the rules of sport organisations that are designed to ensure that 'national teams' should consist only of nationals of the country, Advocate General Warner said such an exception should be made.

Suppose that an officious bystander, at the time of the signing of the EEC Treaty . . . had asked those round the table whether they intended that (the relevant Treaty Articles) should preclude a requirement that . . . a national team should consist only of nationals of the country it represented. Common sense dictates that the signatories, with their pens poised, would all have answered impatiently, ‘of course not’ – and perhaps have added that, in their view, the point was so obvious that it did not need to be stated (*Walrave & Koch*, 1975: 329).

And in giving its judgment the Court agreed, saying the question of national team composition was ‘a question of purely sporting interest and as such has nothing to do with economic activity’ (*Walrave & Koch*, 1975: 332).

Walrave was applied in *Dorta v. Mantero*, where the Court held that professional and semi-professional football enjoyed the benefits of the Treaty provisions on freedom of movement of persons and of provision of services. However, the case also affirmed that in some circumstances the application of nationality restrictions to those who played in national teams would be a ‘non economic’ issue and therefore exempt from the Treaty of Rome’s provisions.

The case arose after the plaintiff had been asked to ‘scout’ for players willing to play for Rovigo, an Italian club of which the defendant had been chairman at the material time. One of the plaintiff’s ruses in this regard involved placing an advertisement in a Belgian sporting newspaper asking players interested in playing in Italy’s sunnier climes to get in touch with him. The defendant refused to consider employing Belgians and refused to reimburse the plaintiff for costs incurred in placing the advertisement. The rules of the Italian Football Federation banned players who were not Italian nationals from playing in the Italian leagues and the plaintiff had not thought to clarify this before placing the advert. The defendant argued he ought not to be obliged to reimburse the plaintiff if there was no way that the players who responded to it could play in Italy unless and until the rules were changed. The plaintiff argued that the Italian Football Federation’s provisions were invalid because they contravened the provisions of EC Treaty, Articles 7, 48 and 59.

The Attorney General argued that the Italian Federation’s rules were indeed a *prima facie* breach of Community law. However:

There is nothing to prevent considerations of purely sporting interests justifying . . . some restriction on the signing of foreign players . . . so as to ensure that the winning team will be representative of the State of which it is the Champion team. . . . Even sporting activities run on a business basis may nevertheless fall outside the . . . fundamental rules of the Treaty in cases where the restrictions on the ground of the player’s nationality are based

on purely sporting considerations. Provided that such restrictions are appropriate and proportionate to the end pursued (*Dona*, 1976: 582).

This decision reinforced the football authorities' belief that 'purely sporting considerations' meant the imposition of quotas and the transfer system were 'appropriate and proportionate' and justified the provisions of the Treaty of Rome being disregarded despite the Commission's protestations to the contrary. Indeed, there were a number of skirmishes between the two sides on this issue before *Bosman* (McArdle, 2000).

The *Bosman* Case

The organisation of football appears to be on a collision course with more than one area of the Treaty of Rome. This should not occasion surprise. European attitudes are beneficial to football in that the sphere of attractive and lucrative competition is widened. But they also constitute a threat to the game (Weatherill, 1989: 87).

In 1986, Jean-Marc Bosman had signed professional forms with Belgian club Standard Liege. Two years later, he joined another, smaller Belgian club (SA Royal Club Liegeois) on a two-year contract with a monthly salary of approximately 120,000 Belgian Francs. Shortly before this contract expired in the spring of 1990 he was offered a new deal: a one-year contract with his wages slashed to 30,000 Francs – the lowest wage the club could offer under the rules of the Belgian Football Association. Unsurprisingly, Bosman refused to sign the new contract and he was placed on the club's transfer list.

Under the rules of the Belgian Football Association, for one month at the end of the domestic season a player on the transfer list was allowed to move to another club even if his old club objected to the move. The old club could not block the transfer by asking an unreasonable and prohibitive transfer fee because in such cases the Belgian Football Association determined the fee to be paid. They used a complex mathematical formula that involved multiplying the player's annual wage by a figure of between two and fourteen (depending upon the player's age). When this formula was applied to Bosman, the figure reached was almost 12 million Francs.

This was far more than other Belgian clubs were willing to pay, but in May 1990 Bosman negotiated a one-year transfer to a French second division club (US Dunkerque) for a tenth of that figure. Dunkerque also had an option to sign him permanently if they paid another 4,800,000 Belgian Francs by the beginning of August. However, RC Liegeois doubted Dunkerque would be able to raise the cash, so did not apply to the Belgian Association for the necessary clearance certificates to allow Bosman to move to France. The deal collapsed.

RC Liegeois suspended Bosman in accordance with the rules of the Belgian Association (under which he would have been re-classed as an amateur player if the club had not done so).

In late 1990, Bosman started proceedings in the domestic courts. He sought an order that RC Liegeois pay him a salary while he found a new club and asked the court to prohibit the club from seeking a transfer fee for him. He also requested that the case be transferred to the ECJ for determination of the ultimate issue – the legality or otherwise of the Belgian transfer system. All three requests were granted at first instance, but on appeal the referral to the ECJ was overturned.

Over the next three years Bosman plied his trade at three lower-division clubs in France and Belgium on a succession of one-year contracts while his legal proceedings dragged on. In August 1991, UEFA was joined as a defendant in his action (which was now an action for damages) against RC Liegeois. He also started a separate case in the Belgian courts against UEFA itself, contending that its rules were a breach of the EC Treaty, Article 48 (freedom of movement between member states) and Articles 85 and 86 (imposition of restrictive practices and abuse of a dominant position). In April 1992, he amended his claim so as to seek an order that neither its transfer rules nor the rules concerning overseas player quotas were applicable to him.

In June 1992, the Belgian Court of Appeal restored the court of first instance's decision to make a reference to the ECJ under EC Treaty, Article 177. The reference sought a preliminary ruling on the compatibility of both the Belgian transfer system and UEFA's rules with the provisions of Articles 48, 85 and 86. The questions that the ECJ was asked to consider were: when a player whose contract with a particular club had expired joins another club, does the EC Treaty prohibit the first club from requiring payment from the club that signs him? Secondly, do the provisions of the Treaty prohibit a national or international sporting association from restricting the right of foreign players from other countries in the European Community to play in the competitions that association has organised? (McArdle, 2000).

The first point to be addressed concerned the extent of the ECJ's jurisdiction over UEFA's rules and regulations. UEFA is a confederation of FIFA, the game's international governing body, and UEFA's regulations require FIFA's approval. Both UEFA and FIFA are based in Switzerland and are governed by Swiss law. However,

its members are the national associations of some fifty countries, including in particular those of the (European Community) member states which, under UEFA statutes, have undertaken to comply with those statutes and with the regulations and decisions of UEFA (*Bosman*, 1996: 145).

To illustrate the extent of UEFA's influence, in the qualifying stages for the 1998 World Cup there were nine European Groups accommodating an unprecedented 51 countries and playing across a geographical area that extended from Iceland to Azerbaijan. Israel is also a member of the UEFA confederation, for obvious political reasons.

So far as the Advocate General was concerned, the fact that UEFA was based in a non-member state, that the majority of countries playing under its auspices were non-members and that the practices complained of had been *formed* in a non-member country (ie Switzerland) were all immaterial so far as Community Law was concerned. If a company or other body based in a non-member state engages in practices that effect competition or freedom of movement within the Community, then the provisions of the Treaty will be applicable so long those practices have been *implemented* within the Community. See, for example, *Ahlstrom Osakyhtio v. Commission*, where a concerted practice (namely, a cartel among wood pulp producers) 'though formed outside the Community, was implemented within it and accordingly fell within the Community's jurisdiction under the territoriality principle uncontroversial in international law' (Weatherill & Beaumont, 1993: 614). The issue was irrelevant, despite Monsieur George's ejaculations about the benefits of being based in Switzerland. 'The present proceedings concern application of (UEFA's) rules within the Community and not the relations between the national associations of the member states and those of non-playing countries' (*Bosman*, 1996: 159). There are obvious tax advantages for governing bodies who choose to base themselves in Switzerland, but they are still subject to Community law if their decisions impact upon the Community's citizens.

Once the jurisdictional issue had been resolved, the next plank of UEFA's and the Belgian Association's defence was the predictable one that recourse to law was not appropriate for dealing with sports issues. However, as explained above, *Walrave* and *Dona* had already established that Community law was applicable to sport if it constituted an economic activity. In summarising the effect of those two cases, Advocate General Lenz stated that:

- (i) the rules of private sports associations are also subject to community law.
- (ii) The field of sport is subject to Community law *in so far as it constitutes an economic activity*.
- (iii) The activities of professional football players are in the nature of gainful employment and are therefore subject to Community law.
- (iv) Either Article 48 or Article 59 applies to those activities, with no differences arising therefrom.
- (v) The Court allows certain exceptions to the prohibitions contained in those provisions (*Bosman*, 1996: 104. Emphasis added).

UEFA argued that it was only the 'superclubs' of Europe whose activities could possibly be said to 'constitute an economic activity' (*Bosman*, 1996: 104). The provisions of EC Treaty, Articles 48, 85 and 86 ought not to be extended to the activities of humble little clubs like RC Liegeois in any event, for the restrictions were certainly proportionate and appropriate when applied to them. However, the Advocate General's opinion was that once professional football had been deemed to be an economic activity, 'the size of that activity is immaterial, as is the question of to what extent it leads to a profit' (*Bosman*, 1996: 104). He had sympathy with UEFA's argument that transfers existed in order to subsidise the smaller clubs, and that applying the provisions of EC Treaty, Article 48 would have consequences for the entire organisation of football, not just the professional game. But 'that argument relates to the *consequences* of the Court's decision, not the question of the *applicability* of Community law, and thus cannot be an obstacle to that applicability' (*Bosman*, 1996: 105).

The Advocate General's most trenchant criticism was reserved for the Belgian Association's argument that as most professional clubs in Belgium did not make a profit Article 48 ought not to be applicable:

If I understand that argument correctly, the (Belgian Football Association) is submitting that the rules on transfers relate merely to the mutual relationships of clubs, while Article 48 is relevant only to the employment relationship between the club and the player. That argument cannot be accepted. The distinction suggested . . . is of an artificial character and does not correspond to reality. The rules on transfers are of direct and central importance for a player who wishes to change club. *That is shown precisely by the present case: if it had not been for the transfer rules, nothing would have hindered Mr Bosman's transfer to US Dunkerque.* It thus cannot seriously be maintained that those rules concern merely the legal relations between clubs (*Bosman*, 1996: 104).

Advocate General Lenz was equally dismissive of two other arguments put forward by UEFA. First, it suggested that even if Community Law was applicable to sport, Article 48 in particular was not appropriate for solving football's specific problems. The Advocate general reiterated that 'professional football is an economic activity and is therefore subject to Community law' (*Bosman*, 1996: 104). He also dismissed the argument that the case concerned a dispute between a Belgian player and the Belgian Association, and that it was a purely internal situation to which Article 48 was inapplicable. The obvious response was that 'the main action originates in a failed transfer from a *Belgian* to a *French* club. . . There is thus evidently a situation which extends beyond the frontiers of one member state' (*Bosman*, 1996: 105-6).

Having reached the conclusion that Article 48 was applicable, the Advocate General went on to consider whether UEFA's quota rules breached its provisions. 'No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature', he decided. Furthermore:

They represent an absolutely classic case of discrimination on the ground of nationality. Those rules limit the number of players from other member states whom a club in a particular member state can play in a match. Those players are thereby placed at a disadvantage with respect to access to employment, compared with players who are nationals of that member state (*Bosman*, 1996: 106).

The rules may have only limited the number of foreigners who could *play* in any match rather than the number of foreigners a club could actually have on its books, but that still amounted to a restriction on freedom of movement. 'Every club which plans and acts in a reasonable manner will take the rules on foreign players into account in its personnel policy. No such club will therefore engage more – or significantly more – foreign players than it may play in a match' (*Bosman*, 1996: 107). By way of example, the Advocate General cited the two financially strongest clubs in his native Germany, Bayern Munich and Borussia Dortmund, who had just five and six foreign players respectively on their staff in the 1995/96 season out of squads of 21 and 25 players.

In *Dona* the Court had allowed the imposition of restrictions on the number of foreign players who could play in national leagues. But the justification for those restrictions lay in '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*, such as, for example, matches between national teams of different countries' (*Dona*, 1976: 582). The Advocate General in *Bosman* was troubled by the ramifications of this decision. 'In view in particular of the fact that matches between national teams – as in the football World Cup – nowadays indeed have considerable financial significance, it is hardly still possible to assume that this is not (or not also) an economic activity' (*Bosman*, 1996: 108). He was able to avoid the matter 'since the question is not relevant to the present case' (*Bosman*, 1996: 108). Of more immediate relevance were three other arguments put forward in an attempt to justify the discriminatory provisions:

First, it is emphasised that the national aspect plays an important part in football; the identification of the spectators with the various teams is guaranteed only if those teams consist, at least as regards the majority of players, of nationals of the relevant member state.

Moreover, the teams that are successful in the national leagues represent their country in international competitions. Second, it is argued that the rules are necessary to ensure that enough players are available for the relevant national team; without the rules on foreigners, the development of young players would be affected. Third and finally, it is asserted that the rules on foreigners serve the purpose of ensuring a certain balance between the clubs, since otherwise the big clubs would be able to attract the best players (*Bosman*, 1996: 109).

All these arguments have traditionally been trotted out by clubs and the various governing bodies when the need to defend quotas or the transfer fee system has arisen, and on this occasion the ‘spectator identification’ argument struck the Advocate General as particularly fallacious:

As to the identification of spectators with the teams, there is . . . no need for extensive discussion to show the weakness of that argument. . . . The great majority of a club’s supporters are much more interested in the success of their club than in the composition of the team (*Bosman*, 1996: 109).

Even if the ‘national aspect’ arguments did have any merit:

it could not justify the rules on foreigners. The right to freedom of movement and the prohibition of discrimination . . . are among the fundamental principles of the Community order. The rules on foreign players breach those principles in such a blatant and serious manner that any reference to national interests which cannot be based on Article 48(3) must be regarded as inadmissible as against those principles (*Bosman*, 1996: 109).

The Advocate General was also aware that the way in which young players were developed gave the lie to the argument that youngsters’ development, citing Ajax Amsterdam as a rare example of a top club that had invested heavily and consistently in its youth policy (*Bosman*, 1996: 111). This applies as much to English clubs as it does to Dutch ones, for with one or two notable exceptions most clubs have relied on established stars from other Premiership sides, or (post-*Bosman*) from other countries in an attempt to buy success. A quick trawl through the Rothman’s guide shows that transfer turnover has doubled since the inception of the Premier League, but that the amount of money is being paid to smaller clubs by way of transfer fees is decreasing. Young players benefit enormously from playing with and against top-quality players of whatever nationality, but ‘it is admittedly correct that the

number of jobs available to native players decreases the more foreign players are engaged by and play for the clubs. . . . That is a consequence that the right to freedom of movement necessarily entails' (*Bosman*, 1996: 111).

The important point that this part of the judgment established was that professional football had consistently chosen to ignore the fundamental basics of Community law and hoped it would be left alone, rather than work out how it could best comply with its EC Treaty obligations. *Bosman* highlighted the need for clubs to develop lawful player development systems rather than rely on quotas and in buying and selling established players among themselves.

The argument that restrictions on foreign players preserved a balance between clubs because they prevented the biggest sides from swallowing up all the talent and thereby widening the gulf between those clubs and the smaller ones attracted a degree of sympathy from the Advocate General. But the onus fell on football's authorities to show their significance was so great that they ought to be regarded as an exception to the provisions of EC Treaty, Article 48 under the 'appropriate and proportionate' test. They had failed to discharge that burden. The Advocate General also pointed out that while the rules on foreign players had been worked out with, or approved by, the Commission, this did not give them any particular legal significance or place them in a privileged position. 'The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions. It is for the Court of Justice alone to give binding interpretations of those provisions' (*Bosman*, 1996: 112).

Advocate General Lenz further said that young players and smaller clubs could be protected by means other than an unlawful restriction on freedom of movement. He suggested that a policy of collective wage capping or the distribution of funds on a more equitable basis might have the desired result while preventing further EC Treaty breaches. The issue has come full circle, for the perceived need to protect smaller clubs had, of course, been one of the reasons why a maximum wage and retain-and-transfer had been introduced in England a century before. The *Bosman* ruling might oblige football's authorities to go down the 'redistribution of funds' route in preference to trying to carve out a path through the legal minefield of wage restraint and transfer systems. *Walrave* and *Dona* prevented UEFA and the Belgian FA from arguing that the restrictions were of a non-economic nature and that Article 48 did not apply (*Bosman*, 1996: 135). Having reviewed all the authorities' other points at length, the Advocate General was moved to conclude that 'the transfer rules hitherto in force are not justified by reasons in the general interest' (*Bosman*, 1996: 145). The problem was that, although the end results of the transfer system might be in the sport's best interests, the means of achieving those ends had to be lawful. Failing that, there had to be sufficiently compelling reasons for maintaining a transfer system that was manifestly incompatible with Article 48. The authorities had failed to satisfy the court on either point.

The Court shared the Advocate General's view that the transfer system was unlawful under Article 48 and held that because this was the case, 'it is not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty' (*Bosman*, 1996: 161). However, the decision not to rule on Articles 85 and 86 means the legality of transfers that take place between two clubs based in the same state remained unclear. Article 48 only applies to restrictions that prevent free movement between one state and another, but as Weatherill (1996: 1021) points out:

The juxtaposition of a domestic system requiring the payment of transfer fees and an absence of fees payable on cross-border deals affects inter-state trade patterns. The distortive effect on the wider market of a horizontal agreement between clubs relating to player acquisition brings it within Article 85(1).

In other words, while the football authorities knew that, post-*Bosman*, the payment of a fee for an out-of-contract player moving from, say, Barcelona to Arsenal was unlawful, it was unclear whether the position was the same in respect of an out-of-contract English-qualified player moving from, for instance, Portsmouth to Southampton.

The Immediate Impact of *Bosman* at Governing Body Level

Within the game of association football, it was generally believed that:

- EC Treaty, Article 48 prohibited regulations that prevented a footballer who was a national of one member state from moving to a club in another member state once the player's contract with his former club has expired unless a transfer fee had been paid.
- EC Treaty, Article 48 also prohibited 'quota rules', which restricted the number of players from other member states who may play for any particular club.
- The extent to which the provisions of EC Treaty, Articles 85 and 86 apply to professional football remained unclear since the Court felt its decision in respect of Article 48 had made consideration of those provisions unnecessary.
- EC Treaty, Article 48 has no application 'to situations which are wholly internal to a member state, in other words where there is no factor connecting them to any of the situations envisaged by Community Law' (*Bosman*, 1996: 156).

The last point was the one that has caused most difficulty since the case. Many commentators felt it meant that transfer fees payable in respect of an out of

contract player between two clubs in the same member state were still lawful. However, Weatherill (1996) and others argued that the payment of *any* fee for a player has an impact on cross-border trade in the professional football industry and that the question of which states the two clubs were based in was irrelevant. In January 1996, representatives of the Premiership's top clubs lobbied UEFA for clarification of who was right: Did *Bosman* prevent fees being received in respect of transfers of out-of-contract players moving within the same country rather than to another member state? To this end, a meeting was arranged with representatives of the European Commission. Karel van Miert, the Community's Competitions Commissioner, stressed that 'national transfer fees were indirectly affected by the Bosman ruling. Any new system devised by UEFA would have to cover transfers within Europe and within European countries' (Sports News, 6 Feb. 1996: 24). However, after taking legal advice from two QCs, the Premier League remained convinced that *Bosman* only outlawed transfer fees in respect of cross-border transfers of out of contract players. The reason for this uncertainty was that the provisions of Article 48 are concerned with access to a market rather than behaviour within that market once access to it has been obtained, hence the governing bodies' belief that the decision only impacted on cross-border transfers. The argument of Weatherill (1996) and others was that:

initial access may well have been obtained, but if further access is then immediately restricted, especially in comparison to fellow citizens coming in from abroad, then surely Article 48 comes into play. The necessary 'foreign element' of a foreign national, a citizen of another member state, would be present, and the situation would rise above the 'wholly internal' as envisaged by the European Court of Justice (Miller, 1996: 49).

The quota system

Early in 1996, the Commission threatened UEFA with a seven-figure fine if it failed to change its quota rules to take account of *Bosman*. UEFA's stance had been supported by FIFA (general secretary Sepp Blatter stating that the *Bosman* ruling 'went against the principles of football') and Tom Pendry (then Britain's shadow sports minister) called for European Law to be amended so that football's transfer system and quota rules would be protected. But the Commission would not be denied. An exasperated spokeswoman for the Commissioner, Padraig Flynn, was adamant that the Commission would not stand idly by while UEFA flouted the Treaty and the 'clear ruling' of the Court in *Bosman*. 'Nobody is above European Law. Individual states are not above European Law so you can't have a private organisation like UEFA saying that they are' (Sports News, 17 Jan. 1996: 20). Rick Parry, then Premier League Chief Executive, also took the Commission's side, wisely opining: 'I feel very

sceptical that the Community will exempt football from its Article 48 on freedom of movement of workers because it is the bedrock of Community Law. . . . The idea of a blanket exemption for sport is absurd' (Sports News, 13 Feb. 1996: 24).

UEFA countered by reminding the Commission that the existing quota rules had been the result of a 'Gentleman's Agreement' reached between the two in 1991, but of course the Advocate General in *Bosman* had expressly stated that this agreement had no validity at all. It was not for the Commission to rule on how Community Law was to be interpreted. But UEFA continued to be characteristically bullish. In January 1996, it told national associations (by fax) to abide by the quota restrictions for UEFA competitions for the rest of 1995/96 'in the interests of continuity and fairness' (McArdle, 2000). But its subsequent climbdown was as humiliating as it was predictable. Shortly after this missive, Commissioner Flynn instigated proceedings under Article 171 (as amended by the Maastricht Treaty and now Article 228) and gave UEFA six weeks to comply with *Bosman* or risk the case being returned to the court and fines being levied. On 19 February, two weeks before the deadline expired, UEFA announced that the so-called 3+2 rule (three foreigners plus two assimilated players) would be scrapped forthwith. However, it called upon all those clubs still involved in UEFA competitions to observe a 'Gentlemen's Agreement' until the end of the 1995/96 season. The Commission said it was 'partly satisfied' with this, but stressed that UEFA would have no way of enforcing the 'Gentlemen's Agreement' if any club unilaterally decided to flout it (Sports News, 21 Feb. 1996: 24). In October 1996, UEFA announced that all references to player nationality would be removed from its regulations governing club competitions and that it was also working on a new international transfer system.

The transfer system

Further amendments to the transfer system followed soon after. In March 1997, FIFA announced that 'a compensation fee will no longer be paid between clubs in Community countries if the relevant player's contract has expired, irrespective of the player's nationality' (Sports News, 27 March 1997: 26). Jean Marc DuPont, *Bosman*'s lawyer, said the decision was 'logical'. 'It would not be moral for a club to have some players from Community countries having rights and the rest from elsewhere in the world being wage slaves' (Sports News, 22 March 1997: 12).

This announcement prevented another lawsuit over the precise effect of the *Bosman* ruling, for it coincided with the then Wimbledon player Vinnie Jones's purported intention to take the English Football Association to court over the issue of transfer fees for out-of-contract players who moved from one English club to another. It was also rumoured that Sheffield Wednesday's Des Walker had considered commencing similar proceedings, while Newcastle

United threatened to challenge the whole domestic transfer system in order to avoid paying £2 million for Shay Given, who joined them from Blackburn Rovers when his contract expired. The broad interpretation of *Bosman*, prohibiting transfer fees in respect of *all* out of contract players, neatly sidestepped this issue. However, the Premiership and the Professional Footballers' Association are apparently in favour of this prohibition on fees being only applicable in respect of out-of-contract players who are over the age of 24. In their opinion, a transfer fee should still be payable in respect of younger players as 'compensation' for clubs' expenditure in 'training and development' (Gardiner, 2000). As of October 2000, the Football League had yet to agree to the implementation of the scheme, but in any case it would appear to be fundamentally at odds with the provisions of EC Treaty, Article 48 (new Art 39). There is certainly nothing in the *Bosman* judgment that could be cited as a justification for an age-based restriction. If such a development does occur, it will occur as a consequence of the European Commission giving ground in order to get football's authorities out of the hole they have dug for themselves.

The Immediate Impact of *Bosman* at Domestic Club Level

On players' contracts

The contractual provisions applicable to players at British clubs are straightforward enough, at least until they are out of contract or seek to move elsewhere. Players' contracts always terminate on 30 June of the relevant year. If the club wishes to retain the player, it must offer him a new contract by the third Saturday in May, the terms being no less beneficial to the player than those of his previous contract. The player must be given a minimum of one month to consider, and the club is obliged to continue paying his wages during that time. If the club does not want to retain the player on an improved contract, it may offer the same terms or make him an offer lesser terms. If the player turns either of these down, he is entitled to a free transfer. Alternatively, the club may allow him to leave on a free transfer in any event, or make the player no offer and release him. If the player and the club cannot negotiate a new agreement by 30 June, they may agree a 'conditional contract' that will run until the player can find a new club or they reach agreement on new terms. Once a player finds a new club, he will sign the standard form contract drawn up by the Professional Football Negotiating and Consultation Committee.

On quotas

So far as quotas are concerned, the Premier League amended its rules in the wake of UEFA's climbdown so that a team could field no more than three players 'who were not citizens of the European Union or the European Economic Area' (Premier League, 1996: Sect. B, para. 10). This is a little confusing since the 'European Economic Area' (EEA) is usually taken to

comprise those countries that are member states of the EU *and* those that are member states of the European Free Trade Association (EFTA) but have ratified the EEA agreement. The effect of this provision was to prohibit restrictions on the participation of players who were citizens of the fifteen EU member states, citizens of Iceland, Norway, Liechtenstein (members of EFTA that ratified the EEA Agreement) and, probably, Switzerland (an EFTA member that has not ratified the EEA agreement). Were this provision still in force, the waters would have been muddied further by virtue of the Associate Member agreements reached with countries joining the EU in the near future.

The English Football Association's rules were different. The rules for the FA Cup for 1996/97 prohibited the playing of more than three players 'who are not citizens of the European Union or the European Free Trade Association'. In theory, this gave Swiss citizens playing for a Premiership club – Stéphane Henchoz when Blackburn Rovers were in the Premiership; Ramon Vega of Tottenham Hotspur – an unfettered right to play in the FA Cup even though their right to play in the Premier League was, arguably, subject to restrictions. Similarly, the Football League's foreign-player rules prohibited restrictions on players who were 'citizens of countries within the European Economic Area or colonies of the United Kingdom' that each club can play. A literal interpretation of this provision could have resulted in clubs packing their squads with players from Britain's two remaining 'colonies' – Bermuda and Gibraltar (Miller 1996b).

Three weeks after the *Bosman* judgment, the German Football Association and the Bundesliga came to a 'Gentlemen's Agreement' not to use extra foreign players until the end of the 1995/96 season. In April 1996, transfer fees for out-of-contract players were abolished and an unlimited number of 'non-German' players were allowed, so long as each club had at least twelve German players in their squads. This was soon amended to allow an unlimited number of 'UEFA players' and restricting to three the number of players that a club could sign from non-UEFA countries (thereby lawfully discriminating against 'foreigners' from outside the Community).

The Spanish Association's regulations already allowed for free transfers for out-of-contract players, and in spring 1996 the existing restrictions on foreign players were amended so that clubs were no longer restricted to playing a maximum of four 'foreigners' (a term which included Community nationals from other member states). The number of nationals from other Community member states who can play for each club is now unlimited. From the 1998/99 season, clubs would be allowed to register a maximum of six players who hail from outside the Community (in squads that may contain no more than 25 players) and could field four of those in any one match. Some Spanish players were not enamoured of these changes, however. In January 1997, they announced they would consider taking strike action if clubs did not agree to a maximum of three non-Community players each for the 1997/98 season, with

subsequent annual reductions to a maximum of one 'foreigner' per club by 1999/2000. Gerardo Movilla, Players' Union President, pointed out that there were over 200 non-Community players in the Spanish first and second divisions (mostly from South America), which was more than the total of all the Community members combined.

In March 1996, Belgium scrapped its entire domestic transfer system and its limits on the number of all foreign players (not just Community nationals). Portugal and Austria both lifted all restrictions on all non-nationals from the start of the 1996/97 season. At the same time, Serie A players in Italy came out on strike in an attempt to secure the limits that the players themselves wanted to be imposed on the number of non-Community nationals.

The EU Commission's Impact on Sport

The impact of the various institutions of the European Community upon football and other sports is vast, and most sports organisations are only just beginning to comprehend the all-pervasiveness of Community law: at least in this respect, football is ahead of the game.

Within the EU the most influential organ by far is the European Commission (cf. Steiner & Woods, 1998). Richard Parrish (1998) states that eighteen of the 24 European Commission's Directorate Generals have an impact on the operation of sport. The activities of Directorate General IV having the greatest impact, being responsible for general areas such as broadcasting rights, ticketing, product endorsement, government funding of sport and, crucially for football, restrictive practices such as transfers and restrictions on foreign players. However, formal responsibility for sport rests with Directorate General X, which has responsibility for cultural issues. Its work on the relationship between sport and EU law in the early 1990s gives lie to the suggestion that the *Bosman* ruling came as a shock to those wielding power and influence in the football industry.

In 1993, European Commission Directorate General (DG) X commissioned a report from the accountants Coopers & Lybrand on EC law's impact on sports. A cross-section of sports governing bodies (eg. UEFA), government departments and individuals were consulted and the conclusion was that sport was affected by a range of EU laws and policies, both directly and indirectly. However, the report found there was very little co-ordination within the Community on sports issues. In particular, the report said DG X should ensure that sports' interests were taken into account when EU policies were being drawn up. In response, a dedicated Sports Unit was created within DG X to carry out this task and to attempt to ensure that a coherent approach to sports issues was adopted by the eighteen DGs whose decisions impact on sport. This Sports Unit also manages the Union's sports funding program.

So far as football was concerned, the Coopers & Lybrand report drew attention to UEFA's power under Article 14 of its own regulations to prohibit

matches that were played in one country from being broadcast in another country. Coopers & Lybrand took the view that this regulation was potentially an abuse of a dominant position and therefore an infringement of EC Treaty Article 86 (now Article 82) of the Treaty of Rome. It took on board UEFA's submission that limits on televising matches was necessary to ensure match attendance, although this is a view that few other sports seem to share and is one that is not substantiated by any empirical evidence. However, it stressed that UEFA ought to take steps to 'eradicate abuse of Article 14' (Coopers & Lybrand, 1993: 192).

The report also stressed that making the purchase of tickets dependent on the purchase of other services (such as travel and accommodation) and prohibiting nationals of one member state from buying tickets from an agent in another state were manifest abuses of EU law. It should be possible to eliminate such abuses, the report said. Yet it was precisely these practices that caused such a furore in the run-up to France 98, five years after this report emphasised their illegality. The Commission's investigations into that ticketing fiasco concluded that the Organising Committee could not be expected to know their policy broke the law – but Coopers & Lybrand had worked that one out many years previously and the Organising Committee had plenty of time to take its findings on board. The report was also wary of sports bodies granting 'official' labels to certain products in return for payment, and said the bodies concerned had to make clear that this was sponsorship rather than endorsement of a particular brand. Significantly, though, the report concluded that 'so long as the economic importance of this matter remains relatively limited, the EC should not intervene' (Coopers & Lybrand, 1993: 8). Neither 'relatively limited' nor 'economic importance' was defined.

The report contained some cogent criticisms of various sports bodies' policies in respect of transfer systems and foreign quotas. Needless to say, football came out badly under both categories. Indeed, by the time the report was published, a number of footballers had made complaints in respect of the transfer fee system, which (the report said) possibly amounted to an abuse of a dominant position under Article 86. The football authorities had always said that these fees amounted to compensation for player development and were therefore vital to small 'feeder' clubs. As the *Bosman* case was already in the pipeline the report refrained from making long-term recommendations, although it did say that football authorities should implement certain temporary measures such as ensuring that contractual terms were clear and that domestic governing bodies' rules complied with national labour law.

Football, basketball and (to a lesser extent) athletics and cycling were identified as 'problem sports'. In seeking to justify its restrictions, UEFA adopted the nineteenth-century perspective and argued that lifting the restrictions would lead to top teams hoarding talent, causing a decline of youth policies and a loss of support for small local sides. The Coopers & Lybrand

report accepted there may have been some merit to these arguments, but repeatedly stressed that sports bodies had to move towards bringing their rules into line with EU law on free movement (Coopers & Lybrand, 1993).

Recent and Possible Future Developments

In July 1998 a Belgian court held that FIFA's international transfer fee system was as much an unlawful violation of EU law as UEFA's Europe-wide one was. The court ruled the agreement reached by FIFA and UEFA allowing clubs to claim compensation for releasing non-EU players even though they have reached the end of their contracts was unlawful. The case concerned Hungarian Tibor Balog, who successfully brought an action against his former club Charleroi FC for claiming a transfer fee when his contract with them ended on the ground that to claim a fee would, once again, breach the EU's competition laws. The court granted interim measures, allowing Balog to join another Belgian club, Westerlo. In the previous year, during a dispute over Brazilian striker Ronaldo's move to Inter Milan, the European Commission had warned FIFA and UEFA that the international system of transfers for non-EU players was equally restrictive. Commission sources said the *Balog* decision only reinforced its position that competition policy applied to the commercial aspects of sport ('Balog wins "second *Bosman*" case', 1998). Similarly, the International Rugby Board (IRB) amended its rules in January 1996 so that players leaving a rugby union club in one country to join a club in another had to wait for six months before they could play for the new club. The Commission immediately made it known that EU law was being breached, and that reducing the length of the residency qualification would make no difference. The IRB backed down, thus allowing French international Philippe Sella to play for the English club Saracens as soon as he joined them in February 1996 (Sports News, 3 Feb. 1996: 20).

The *Malaja* decision (*Malaja v. French Basketball Federation, 2000*) ensures that reciprocal agreements which have been made with states outside the Community and the EEA mean that players from those countries will be classed as 'non-foreigners'. An association agreement with Turkey reached in accordance with the terms of the EC Treaty, Article 39 contains provisions regarding the free movement of workers. There are also Association Agreements with a number of central and eastern European countries that hope to become members of the EU in the near future, and with Morocco, Tunisia and Algeria, which provide for equal treatment at work and freedom from discrimination on the grounds of nationality.

For at the risk of stating the obvious, it should be stressed that the ramifications of *Bosman* are not limited to football but extend to any sport that can be said to constitute an 'economic activity'. As Coopers and Lybrand predicted, the fall-out has been particularly acute in basketball. In Spain, a 'two foreigners' rule had to be changed after European Club Champions Costa

Naranja pointed out that Briton Andrea Congreave could no longer be considered a 'foreigner'. Early in 2000, Polish basketball player Lilia Malaja won a case before the French courts that effectively recognised the right of nationals from associate members of the EU to be treated in the same way as EU nationals. She was denied a transfer from a Polish club to a French one because the French Basketball Association placed restrictions on 'foreigners', but she successfully challenged their rules on the ground that the Article 39 Association agreement between Poland and the EU prevented the application of those restrictions to her. The initial effect of this decision will be to extend the right to work to the nationals of the 23 countries who already ply their trade in the EU – however, it will not allow workers to come to EU countries to begin employment. Recently, the Advocates General have given preliminary rulings on discriminatory provisions governing transfer deadlines in professional basketball (*Lehtonen v. FRSB*, 1999) and whether amateur judo constitutes an 'economic activity' for the purposes of EU law (*Deliege v. ALFJ*, 1999).

As far as football is concerned, the decision in *Mulaja* means that 'those (foreign nationals) already here will enjoy exactly the same post-Bosman freedom to cross borders once their existing contracts come to an end' (Gardiner, 2000: 1). In 1993, Hungary's Astvan Kozma was forced to leave Liverpool FC because he had not played enough games for the club in the previous season and his work permit was thus withdrawn. *Malaja* means any other player from an Associate Member state who is already playing for a club in a 'full' EU Member state will not suffer the same indignity.

The status of players from outside the EU, the EEA or the Associate Member states has also undergone recent change. Players from Africa (such as Liberia's George Weah and Rigobert Song from Cameroon) and the Americas (including Costa Rica's Paulo Wanchope and the USA's Kasey Keller) in particular are still required to obtain a work permit before they may play in the UK. The Department for Education and Employment has responsibility for issuing permits, and the rules governing them were amended in July 1999. Before that date, a foreign player would not usually be eligible for a work permit unless he had played in approximately 75 per cent of his national side's matches in the previous two seasons. He was also required to be one of the six most highly paid players at the club wishing to sign him. The work permit was only for one year's duration; thereafter (as Kozma discovered) an extension would only be granted if the player was turning out regularly for the club and was making 'a significant contribution to the British game'. In *R v. Secretary of State for Employment, ex p Portsmouth Football Club* (1988) it was held that the 75 per cent test was not to be applied too rigidly: if a player had missed international games through injury, that should be taken into account.

Under the new rules, the wage requirement has been removed and work permits apply to the whole duration of a player's contract. However, the requirement that one must be an international player is retained and the FIFA

ranking of the player's national side is added to the list of factors to be taken into account when determining whether a permit will be granted (Welch, 2000). Gordon Taylor of the Professional Footballers' Association said the changes would 'open the way for cheap foreign imports' (Sports News, 3 July 1999: 24). In contrast Tony Banks, then Minister for Sport, felt they would 'allow clubs to recruit the best available international talent (while providing) opportunities for home grown young players' (Welch, 2000: 6). Only time will tell whether Taylor's fears are well founded.

On the whole issue of quotas and transfers, football's authorities are not giving in quietly. In March 2000, EU officials met FIFA's Sepp Blatter (not a man for whom many within the Commission have much respect) and UEFA's Gerhard Aigner and once again they made a case for football being exempt from the EU's employment laws. FIFA suggested that a club side should always have six players eligible for the national team on the field of play – a proposal which would conflict with the *Bosman* ruling on quotas and not one which the Commission is willing to contemplate in the foreseeable future.

The governing bodies' main problem, it seems, is that they and the European Commission are miles apart on the important issues. Since the Commission so obviously has the law on its side, the governing bodies have to make all the running if they are to persuade the Commission to treat football nicely. Given UEFA's and FIFA's obstinacy in the years before *Bosman*, it seems there are few within the Commission who believe they owe football, or (more accurately) the men who run it any favours – one gets the distinct impression that much of this is personal.

This gulf continues to manifest itself in these organisations' approaches to quotas and the transfer system. The Commission is of the opinion that FIFA's current stance on transfer fees remains at odds with EU law. It appears that so far as the Commission is concerned, forcing clubs to pay transfer fees for players whose contracts have not yet expired breaches the EC Treaty, Art 81. At least, that appears to be the position of Jean-Francois Pons, the Deputy Director general of DG IV and the man with responsibility for sport and EU competition policy. During the Nicholas Anelka saga it was argued (rightly, I submit) that even though the player was still under contract he could terminate that contract upon payment of damages and move to whichever club offered him the best personal deal. Arsenal's decision not to pursue the case through the courts (they transferred him to Real Madrid for £22 million) probably preserved the last vestiges of football's transfer system, at least for now.

FIFA, of course, share the domestic governing bodies' view that the payment of a transfer fee for players under contract does not conflict with *Bosman*. In contrast, Pons says the following:

The Commission takes the view that both the prohibition on all transfers following unilateral termination (assuming compensation

for breach of contract has been paid) and the obligation on a new club to pay a transfer fee to the old club in cases of termination by mutual consent infringe Art 81(1) without being able to benefit from exemption under Art 81(3). The Commission has taken the preliminary view that through the establishment of the above mentioned rules, clubs have agreed:

- To reject their freedom to take on players who have unilaterally terminated their contracts;
- Not to recruit players without payment of a fee, and to decide whom should be responsible for fixing and paying the fee.

According to the preliminary position taken by the Commission, these arrangements have as their object and their effect the restriction, to an appreciable extent, of clubs' freedom of action, which represents a violation of Art 81(1) (Pons, 1999).

If Pons' comments do reflect the Commission's position, and there is no reason to believe they do not, it is difficult to see progress being made on either the quota or the transfer fee issue. There may be some light at the end of the tunnel in the guise of Mario Monti, the head of DG X, who on 17 April 2000 suggested there could be some scope for derogation from the Treaty if it was required for 'genuinely' sporting reasons. This would not allow breach of fundamentally important aspects of the Treaty such as the provisions relating to freedom of movement or competition law. However, Monti inferred there may be scope for the payment of 'compensation' so long as that was limited to the cost of a player's training and development. Furthermore, commenting on the need 'to apply the competition rules in a manner which does not question the regulatory authority of sporting organisations vis-à-vis genuine "sporting rules"', Monti (2000) stated:

Rules which are inherent to a sport or which are necessary for its organisation or for the organisation of competitions so-called 'sporting rules' should not, in principle, be subject to the application of competition rules. Sporting rules applied in an objective, transparent and non-discriminatory manner do not constitute restrictions of competition. This approach is in line with the recent judgement in the *Deliège* case. . . . Selection rules applied by a Federation to authorise the participation of professional or semi-professional athletes in an international sports competition have inevitably the effect of limiting the number of participants in a tournament. Such limitation does not in itself

constitute a restriction of the freedom to provide services as long as it derives from a need inherent in the organisation of the international sports event in question.

Two other recent football-related developments at EU level should be mentioned – namely, the fall-out from the ticketing fiasco of France '98 and the holding of the first European Conference in sport. In the summer of 1999, the Commission imposed a symbolic fine of 1,000 Euros on the organisers of France 98 for their use of discriminatory ticketing arrangements. Non-French citizens were initially advised that tickets could only be purchased from national football federations and tour operators, and as a consequence almost 570,000 of tickets sold for matches found their way to applicants who were able to provide addresses in France. These arrangements amounted to an abuse of a dominant position and as such were contrary to EC treaty, Article 82. While the Commission said a hefty fine would normally be visited on those who violated Article 82 it noted that the ticketing arrangements for France 98 were no different to those adopted for previous World Cup finals (even though the Coopers and Lybrand (1993) report had stressed those earlier arrangements' illegality). It also noted that the organising committee had been most constructive in its dealings with the Commission. However, 'the Commission expects tournament organisers in the future to ensure that any ticketing arrangements comply fully with EU competition rules and will not hesitate to take action against them where they fail to do so' (Gardiner, 1999: 13).

Also in the summer of 1999, the first EU conference on sport was held in Olympia. Organised by the Sports Information Unit of DG IV, the conference made recommendations on a European model for sport, future relationships between sport and television and the 'tight against doping'. Most of the recommendations need not concern us here, for Conference inevitably made many glib, groundless and factually inaccurate assertions that take the EU no closer towards a coherent and worthwhile European policy for sport. Its conclusions speak of the need to 'keep sport safe from political and economic manipulation' (both of which have always been features of organised sport) and the fear that 'over-commercialisation' would 'eventually distort sport's values' (whatever those may be). Apparently, drug use 'violates the basic principles of sporting ethics' and conference rails against 'the drug culture' and 'permissiveness' generally ('The European Union and Sport: Current Situation and Outlook', 1999). While the conclusions reached include some thoroughly worthwhile recommendations about, inter alia, protecting young people involved in sport, paying more than lip service to equal opportunities and the need to improve disabled people's access to sports facilities, these initiatives will be lost among the dross that accompanies them.

Conclusions

The *Bosman* ruling has had more effect on the contractual status of professional footballers in the few short years since the decision was handed down than the previous cases achieved in their entirety. Retain and transfer suddenly seems a quaint historical anachronism, quota systems a relic from a bygone age and player loyalty a contradiction in terms. The ECJ's decision has serious implications for the smaller clubs, particularly if the big teams persist in buying established players on long-term contracts and for huge salaries rather than taking a chance on players from the lower divisions. None of this is the fault of Jean-Marc Bosman, the European Commission or the ECJ, for the game's authorities had been given plenty of notice that their practices were a fundamental violation of EC law and that something had to change. FIFA's and UEFA's arrogance, their belief that the football industry was 'special' and that being based in Switzerland amounted to some form of sanctuary was never tenable. Perhaps the only surprise is that football was allowed to get away with so many illegalities for so long; the governing bodies certainly cannot say they never had the opportunity to put their own house in order.

At present, it seems that the European Commission is not minded to grant football an exemption from the rigours of EU law. Unless the Commission has a dramatic change of heart a choice will have to be made between introducing a system that effectively regulates player movement while complying with the law or maintaining the status quo and letting the smaller clubs die for want of income. Manchester United's 'memorandum of cooperation' with Royal Antwerp – non-EU residents benefit from Belgium's less stringent immigration laws (a salary of £15,000 a year and you're in), obtain an EU work permit after eighteen months at Antwerp and then joined United – is an imaginative attempt to cash in on *Bosman*. It also reveals, not that there was ever much doubt, that the big boys are not at all concerned about the small clubs and they have no intention of nurturing the grassroots voluntarily.

A European super league is no more than ten years away and in thirty years' time there may well be no more than thirty full-time professional clubs in England and Wales. One hundred years from now, historians will be writing about football as an incredible social and cultural phenomenon of the twentieth century which changed out of all recognition because those who held positions of authority failed to look after it properly.

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