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## **A question of sport: does the US treatment of football offer any solutions for the UK?**

by Richard Mooney and Marjorie Holmes

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# A question of sport

## Does the US treatment of football offer any solutions for the UK?

by *Richard Mooney and Marjorie Holmes\**

Competition laws in the United States extend – as in most developed nations – to virtually every corner of the economy. Sport is of course no exception. The history of the major American sports leagues – the National Football League, the National Basketball Association and Major League Baseball – is replete with significant lawsuits impacting league rules. In the last 20 years, however, the sports leagues have largely avoided competition lawsuits by taking advantage of an important exception to the US competition laws.

Specifically, a group of employers may collectively bargain with a properly certified union of employees. For example, groups of hotels routinely join together to bargain collectively with hotel employee unions, an action that would certainly violate US competition laws in the absence of this exception. The players in each of the major US sports are unionised, and the union bargains collectively on their behalf in opposition to the owners. Although there are occasional work stoppages (a strike cut short the 1994 baseball season), the usual result is a multi-year agreement that gives the owners the ability to impose certain restrictions on the movement and compensation of players and provides the players with guarantees of substantial mobility and a large share of the leagues' revenues.

It will surprise few that American football is the most important and successful sport in the United States. The revenue brought in from television rights alone is enormous – for example, a single 30 second commercial during the Super Bowl routinely costs more than \$2m. It is the first league in world history to average more than \$100m per team per season in player compensation. Therefore, although other sports such as basketball, baseball and (to a lesser extent) autoracing are popular, American football is the most useful analogue to English football in comparing the rules and restrictions relating to player mobility and compensation. The following is a short summary of some of these rules, particularly as they impact on elite players, with emphasis on how an English football player such as Ashley Cole would fare under the US system.

### **American football system**

Virtually all football players enter the National Football League (the NFL) through what is known as “the draft,” a complex procedure of allocating players – virtually all of whom have played amateur football while at university – to the various NFL teams. A team that drafts a player has the exclusive right to negotiate with and employ that player for the first years of his career, unless they trade or waive that right. During that period, the star players receive long-term contracts for as much as \$6m–\$10m per year, so that the team can secure the player's

services for many years to come. Those long-term contracts are vital to the team (and therefore remunerative to the stars) because a player whose contract expires can become a “free agent,” as further detailed below.

As a general rule, player contracts may be traded from one team to another in exchange for other players, cash, or picks in the draft. In addition, a player (or his agent) may not discuss potential contracts with other teams while the player is under contract. However, the exceptions to the rule (negotiated by the union) provide players with substantial bargaining power.

The critical provision is that a player whose contract expires and who has played four seasons in the league is a free agent. (Players at most positions in the NFL can, if successful, expect a career of perhaps 10 years (fewer for running backs; more for kickers). Thus, a player who was not a huge star at university and therefore did not receive a large long-term contract immediately upon entering the league has the prospect of developing into an elite player and securing a very lucrative contract in the middle of his career.) A free agent may sign a contract with any team during the “free agent signing period,” which for most players runs from February (after the Super Bowl) until August (the beginning of training camp), and the new team does not owe the old team any compensation. Thus, as a general rule, the player is free to accept the highest offer he can obtain, with absolutely no restriction.

In the latest collective bargaining agreement, the owners achieved a slight limitation on the rights of a free agent. Specifically, each team may name one player each year as their “franchise” player. In doing so, the team may choose to designate the player as a “non-exclusive” franchise player or an “exclusive” franchise player. A non-exclusive franchise player must be offered a salary equal to at least the greater of (1) an average of the top five salaries for players at his position for the preceding year, or (2) a 20% increase in that player's preceding year salary.

By way of background information, each NFL team fields a total of 24 players – 11 offensive players when they have the ball, 11 defensive players when the other team has the ball, a “punter”, and a “kicker”. These are distributed among 11 positions. In addition to the “punter/kicker,” there are five offensive positions and five defensive positions. The offensive positions are offensive lineman (five per team), quarterback (one per team), running back (two per team), tight end (one per team), and wide receiver (two per team); the defensive positions are cornerback (two per team), defensive end (two per team), defensive tackle (one or two per team), linebacker (three or four per team), and safety (two per team).

A non-exclusive franchise player retains the right to negotiate

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potential contracts with other teams, but the current team obtains two important rights in the event that another team offers the player a contract. First, the current team may match the prospective new team's offer; if it does so, the player must stay with the current team. Alternatively, the current team can choose not to match the offer, in which case the player's new team must provide the current team with two first-round picks in the draft as compensation. This is a very substantial deterrent, given the importance of picks in the first round of the draft.

An exclusive franchise player is even further restricted. He must be offered a salary equal to at least the greater of (1) an average of the top five salaries for players at his position for the current year (as determined at the end of the restricted free-agent signing period in April), or (2) a 20% increase in that player's preceding year salary. Although this contract requirement does not, at first glance, appear very different from the one made by a non-exclusive franchise player, the continuing explosive growth in football revenues and other trends in the NFL mean that the average of the top five salaries in one year is likely to be at least 10% less than the average for the following year.

### US salary figures

To place these rules in context, it is also important to appreciate that the National Football League – unlike English football and every other North American sport, with the exception of basketball – has a salary cap. Although the governing rules are extremely complex, the gist is that no team may spend on player salaries more than the salary cap, which is generally approximately 65% of leaguwide gross football revenue, divided by the 32 teams in the league. This restriction – designed (successfully) to maintain league balance – obviously has the effect of limiting salaries, but there is no limit on any particular salary. On the other hand, players are protected by the requirement that a team spends a minimum amount on salaries, generally approximately 60% of leaguwide gross football revenue, divided by the 32 teams in the league.

At this point, it is perhaps useful to consider the figures. Preliminarily, it is important to note that although football is more successful in America than baseball or basketball, and total salaries paid are therefore higher, the very elite players in football actually earn less money than in basketball or baseball. The lowest paid position by a substantial margin is the punter/kicker position. The top 2004 salary was \$2.1m (£1.2m), earned by Adam Vinatieri of the Super Bowl champions New England Patriots, and the average of the top five salaries was \$1.8m (£1.03m). Therefore, a punter/kicker who was designated as a non-exclusive franchise player (which would almost never occur because the position is less important than several others), would have to be offered a contract paying him at least \$1.8m.

At the other end of the spectrum is the position of cornerback, a defensive position that requires virtually world class speed and quickness. (Although the offensive quarterback position is the most glamorous, and the quarterback is generally considered the team leader, the top cornerbacks actually earn slightly more money than the top quarterbacks). The top 2004 salary was \$12.4m (£7.07m), earned by Antoine Winfield of the Minnesota Vikings, which was the most lucrative contract in the NFL last year. The average of the top five salaries was

\$8.8m (£5.02m), the minimum a team would need to offer a non-exclusive franchise player at that position.

### Football in UK and Europe

In 1974, the European Court of Justice 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 article 2 of the Treaty": *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

The far-reaching consequences of this decision were not really apparent until the mid 1990s and the *Bosman* judgment – *Belgian FA v Bosman* [1996] AII ER [EC] 97 – which changed the face of European football forever. The case established that professional footballers can, on the expiry of their contract with a club, be employed by another without the payment of a transfer fee (there is no condition attached to this of having played four seasons in the league, and there is no concept in the UK of a restricted free agent).

Football is distinguished from other sports such as rugby league and cycling because of its massive media interest, making it comparable with US leagues in baseball, American football and basketball.

In Europe, unlike in the US, there is no special exemption or exclusions for sport from the general competition rules. Despite this, in the rugby Zurich Premiership there is a wage cap of £2.25m per club. In France there is also a cap on salaries in rugby with a fixed percentage based on their total revenue. In football, there is no salary cap imposed on clubs. There is no collective bargaining on behalf of the footballers. Procedures such as the drafts for allocating players and appointing a franchise player – whether exclusive or non-exclusive – are unknown.

In the UK, each footballer negotiates his contract (salary and years) with the team who is interested in his services, usually through an agent. There is a Professional Footballers' Association that was formed in 1907 and deals with key issues such as education, training for post-football careers, accident and medical insurance, coaching, investment planning, contract advice and pension management for all its 4,000 members. However, it does not get involved in negotiating salaries or transfer fees.

According to a French football survey, of the 20 highest-paid footballers in Europe, eight are members of the English Premier League, seven play in Spain's Primera Liga, three in Italy's Serie A, and two in Germany's Bundesliga. The highest paid person is Chelsea's midfielder, Frank Lampard, on an annual wage of £5.2m, followed by Real Madrid's David Beckham, Ronaldo and Zinedine Zidane on nearly £4.4m. Many of them make as much again in sponsorship deals, with England's David Beckham being the world's best rewarded player on £17m.

### Ashley Cole case

The Premiership League does, however, have its own private rules which cover club, managers and players. The rules are complex, running to 228 pages. Transfers are not allowed during the season except for twice a year during periods known as "transfer windows" (January and summer).

Recently these rules have been challenged because they make it an offence (which can result in a fine for the club, manager and/or player) even to *discuss* a transfer without the permission

of the club to whom the player is contracted. A fine imposed on Chelsea and their manager José Mourinho for talking to England international defender Ashley Cole (when he was three years into a five-year contract with Arsenal) – with a view to negotiating a transfer – is being appealed. The club was fined £300,000, the manager £200,000 and the player £100,000.

The appeal from the fine imposed by a three-man tribunal led by a retired judge, Lord Justice Sir Philip Otton, is eventually to the Commercial Court; but ultimately it could be referred to the European Court of Justice. The eventual finding will be no less significant than the *Bosman* ruling.

### Lessons to be learnt

Ashley Cole has managed to renegotiate his contract with Arsenal despite the fine saga. His £27,000 per week (£1.4m per year) is now reported to be £70,000 per week (£3.64m per year). Had he been an American footballer, he would have played amateur football while at university and become a draft player.

It is almost unheard of in England for a footballer to go to university, so, assuming education is a benefit, there is the first improvement for Ashley Cole under an American-style system. He would have had a scholarship to go to university and would have obtained a qualification that might help him in his post-football days. After that, as a star player, he may well have been given a long-term contract for more than his five-year contract at £1.4m per year. At Arsenal, despite being a first-choice England defender, it is unlikely that he would be a franchise player. Thierry Henry (who is the star striker for Arsenal) would be the exclusive franchise player (like offensive quarterback positions in the US, strikers in England are viewed as more glamorous than Ashley Cole's left full-back role). Even if he was on an average of the top five salaries for his position from the Premiership League, this would not be satisfactory; and a 20% increase in his current salary would not make him happy at all, as it would not come close to his £70,000 per week deal.

In any event if the Premiership League rules are designed to create a cap on salaries by the back door, they have not worked. Premiership champions Chelsea, a club which made a loss last year, will spend £115m on salaries and transfer fees for next season, a 110% rise on the previous season. Apart from Chelsea, the other Premiership sides are spending less on players' pay, so is a cap really necessary?

### Back to the drawing board

Maybe it is time to go back to the drawing board in how to deal with sport in Europe in the context of competition rules. It is to be hoped that the Chelsea/Mourinho/Cole case will result in the courts reviewing and learning from the experience of the US system. According to sports economists (see "British Soccer Fans, Kicked Again" by Stefan Szymanski and Andrew Zimbalist, *The Washington Post*, 22 May 2005), there are very good reasons why the treatment of sport in the UK should differ from the US. For a start, the UK has promotion and relegation within the various football leagues. On the other hand, teams are moved more often in the US than in England. However, relocation is not completely unknown in Britain: for example, Wimbledon FC became Milton Keynes Dons in 2003. In the US, there are several examples of movements in several sports

but it is not common. In football, six franchises have moved since 1980 (there are currently 32 teams in the league), specifically:

- Oakland Raiders moved to Los Angeles in 1982, in conjunction with winning a lawsuit against the league allowing them to move notwithstanding the league's objection (they moved back to Oakland in 1995);
- Baltimore Colts moved to Indianapolis in 1984;
- St Louis Cardinals moved to Arizona in 1988;
- Los Angeles Rams moved to St Louis in 1995;
- Cleveland Browns moved to Baltimore and became the Ravens (Cleveland later got an "expansion" team, named the Browns); and
- Houston Oilers moved to Tennessee and became the Titans (Houston later got an expansion team, named the Texans).

In the US, the salary capping (and revenue-sharing arrangements in connection with nationwide telecasts of football games) of American football seems to allow good salaries with teams staying solvent due to the fact there is one dominant league. In Europe, along with free competition, there are many examples of clubs going into administration. In England, for instance, 34 clubs have gone into liquidation since the Premier League broke away from the Football League, according to the all-party parliamentary football group report of February 2004. But administration is a normal incidence of a free market. If this is unacceptable, then independent regulation and possibly licensing will have to be considered, as clearly self-regulation by the Premier League and Football Association has not worked.

Traditionally, football in the UK has been supported by wealthy businessmen who treat their clubs as a hobby not a business: for example, Roman Abramovich (Sibneft) owns Chelsea; Delia Smith (a celebrity chef) owns Norwich; Mohamed Al Fayed (Harrods) owns Fulham; the Moores family (Littlewoods) owns Liverpool; Steve Gibson (Bulkhaul) owns Middlesbrough; David Gold (Ann Summers and Empire) owns Birmingham; David Whelan (JJB) owns Wigan. Perhaps there should be special rules on ownership.

In the US, most clubs are also owned by wealthy businessmen. For instance, Paul Allen of Microsoft owns the Seattle Seahawks; Jerry Jones owns the Dallas Cowboys; and Malcolm Glazer owns the Tampa Bay Buccaneers. However, there is regulation of ownership within the NFL, with any sale to a new owner contingent upon approval by both the commissioner of the league and the affirmative votes of 24 of the 32 owners of the NFL; such approval will not be forthcoming unless people are persuaded of the financial resources and management skills of the proposed new owners.

Another possibility is to look at supporters' trusts. These involve buying shares and keeping control in the hands of the supporters on a non-profit basis. These appear to have become very popular for the non-premiership clubs in England.

### More research needed

We do not profess to have an answer to whether sport should be given a special exemption or exclusion from competition rules in Europe. What is clear, though, is that more research is needed in this area. Few people would dispute the fact that sport is more than a commodity that needs to be protected in the public interest.