

## “Salary Caps in the Sporting World”

**By Paul Harris**  
**March 2002**

In the sporting world, a salary cap is a global limitation on the amount permitted to be paid to the playing staff of a team, over a given time period. Salary caps are already well established in many sports at home and abroad. It is often said that they promote or preserve ‘competitive balance’ between teams.

Renewed impetus has recently been given to the debate over salary caps, in light both of the high player wages/salaries of some professional footballers, and the financial turmoil besetting the Nationwide Football League following the collapse of its broadcasting deal with ITV Digital.

But are salary caps legal?

In exceptional circumstances salary caps may be legal, but they would not be legal at this point in time in English professional football. The basic problem is that a salary cap would operate too restrictively upon players - and there is (as yet) no overriding imperative requiring such restrictions.

Under the restraint of trade doctrine:

“...All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule...”<sup>1</sup>.

A salary cap is plainly an interference or restraint. Indeed, hardly any restraint could be clearer than replacing a free market in the provision of sporting services with a regulated market in which there is a maximum price set for those services.

The battleground would lie over justification for the restraint by reference to the interests of the parties concerned. On this point, Lord MacNaughten went on:

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<sup>1</sup> Per Lord MacNaughten in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535 @ p.565.

“...But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public...” (loc.cit)

The more difficulties there are with implementation, the more unreasonable looks the restraint. But before turning to those practical difficulties below, one has to question the basic assumption that salary caps have an impact on sporting performance at all.

Whilst there can be little doubt that, at the extremes (consider, for example, a nil cap and a £10m per season cap), there would be some difference in performance, the evidence simply does not (yet) exist for a direct correlation between salaries and performance. Think of your own examples from the Premiership. So many other factors go into making a successful squad than simply player salaries. If the impact of a cap on performance is negligible or small, but the direct impact on players' interests is very significant, it will be all the harder to justify the restraint. Put another way, the more disproportionate and unfocused a restraint, the more unreasonable it appears.

The practical difficulties include the level at which to set the cap. Too high and it is meaningless for many clubs. Too low and it massively reduces incentives, to the overall detriment of the game. In the middle and it has an unfair and discriminatory impact. Setting it at different levels (which does happen in some sports!) risks not only being discriminatory, but also ineffective in relation to competitive balance, and reversing the normal rewards for success - to the detriment of the game. Having specific exceptions – the so-called “Larry Bird exception” is just that in the NBA – risks making a mockery of the entire system.

Controversy would also arise over the levels of cap between the divisions. It would be unfair to both lower division clubs and players to handicap their ability to be promoted by *legally* preventing them from spending them as much on players as the Premier League clubs.

In practice, any salary cap for the Premier League would also have to be introduced into all the other top professional leagues in the EU. To do otherwise would be to introduce a huge distortion into a pan-European market.

Indeed, if only selectively introduced in national markets, one would have horizontal price constraints (that is, the fixed wages) amongst cartels of buyers (the clubs in the leagues that apply the cap) resulting in a degree of partitioning of national markets (those same national leagues) and obstacles to the free movement of EU citizens (the top European players). It is easy to see the application of both domestic and European competition law in these circumstances.

However, even a Europe-wide cap brings problems; similar problems to those existing between divisions in a domestic league (only this time they would be between leagues) and also problems arising out of differing exchange rates and rates of inflation.

Enforcement and sanctions present a yet further formidable array of implementation problems.

And then there is the discrimination between players as compared with other parts of the 'team'. On the face of it, managers and coaching staffs should also have their remuneration limited, since they contribute to the sporting success of the teams that they manage/coach at least as directly as the players. Unsurprisingly, such a feature is not part of most salary caps.

In fact, the whole infrastructure of the big, professional clubs is directed towards, or at least contributes to, on-field sporting success. Perhaps, therefore, the directors of Manchester United and Real Madrid should have capped salaries too.

Against the background of all these unreasonable and/or disproportionate impacts upon players (and, in some cases, clubs) would run the argument that there are other measures, less restrictive on individuals, less discriminatory against players and possibly more effective in any event (and, thus, altogether more reasonable), to improve competitive balance. Doubtless, many of these alternative measures would revolve around the distribution of income, including television revenues. That, though, will have to be the subject of another article.

All that said, a salary cap that effectively saves a sport from extinction may well not fall into the same unlawful/unreasonable category. If without the cap, the sport would not exist, then, far from being unreasonable, the cap is the epitome of good sense and financial management- not only for clubs but also for players. It is the stark contrast between the finances of rugby and football in England & Wales that may mark the distinction between lawfulness of the existing caps in the former and potential unlawfulness in the latter. Maybe the collapse of the ITV Digital football broadcasting agreement will bring the sports closer together than they think.

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