

“What Position do Team Salary Caps Play in the Game of Competitive Balance?”

By Paul Harris
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Introduction

In the sporting world, a salary cap is a global limitation on the amount permitted to be paid to the playing¹ staff of a team, over a given time period. Salary caps are already well established (in both sporting and legal cultures) in certain US and Australian team sports, such as basketball and rugby league².

The ‘competitive balance’, that is, the relative measure of sporting abilities amongst teams in the same competition, is an issue that continues to occupy not only the European Commission³ but also the sporting public. Nobody wants to see one team dominate all competitions in a sport, at least not on a continuous basis. To avoid this outcome, there has to be an even competitive balance.

Former European Competition Commissioner Karel Van Miert has suggested that a salary cap is one possible method of addressing the complex problems of both sporting and economic competition that face the modern world of professional team sports in Europe⁴. Salary caps also constitute item 1 on the agenda of a soon-to-be-convened Task Force of UEFA, the European governing body of football⁵.

Salary caps would amount to a revolution in modern, mainstream, professional team sports in Europe. This article analyses some of the difficulties that would be encountered in the introduction of salary caps into the game of professional football in Europe⁶. My legal thesis is that, although a salary cap is a tool that can

¹ See below in the text on the question of whether the cap should be limited to players.

² Other examples include NFL (American) football and AFL (Aussie Rules) football.

³ So much so that the state of sport in the EU will be the subject of a special report to the Helsinki meeting of the European Council in December 1999.

⁴ Speech of Mr. Van Miert to the European Sport Forum, 27.11.97. The same issue was a topic of discussion at the First European Conference on Sport at Olympia, Greece, 21-22 May 1999; see, for example, the discussion paper “The European Model of Sport”.

⁵ Source: UEFA.

⁶ In fact, salary caps on professional footballers in England have existed before. In the celebrated case of Eastham v. Newcastle United F.C. & the FA & the Football League [1964] 1 CH 413, one of the first prominent cases applying the doctrine of restraint of trade to professional sportsmen, a peripheral issue was the degree to which the recent removal of the salary cap had had any effect: see pp.434-5.

potentially⁷ aid in constructing or maintaining the 'competitive balance', it is too blunt a tool. It greatly interferes with individual freedom of contract/trade, and does so to a larger extent than is reasonable and necessary in the interests of the competitive balance. As such, it may well amount to a common law restraint of trade⁸.

I begin, though, with a non-exhaustive analysis of the difficulties arising out of implementation of such a cap. This closely related analysis also leads to the conclusion that salary caps are to be avoided, principally because of their unworkability and unfairness, but also because of the intense resistance that they would be likely to meet in a culture to which they are alien.

I conclude by arguing that the better response, one less restrictive of individual rights, more effective in promoting competitive balance, more workable/enforceable, and less alien to European culture is a more aggressive distribution of television revenues, particularly one that is focused on promoting other desirable aspects of the game of football, such as the development of team sports at youth level⁹.

In short, the revolution that is represented by salary caps is to be resisted.

What level cap?

Assume there were to be a salary cap on all football squads in the Premier League (just consider that one league/division for the moment). At what level would it be set? If it is set at the level of the highest remunerated squad of players, then it will be of no effect whatsoever, because it is clear that spending on players' wages by Liverpool or Manchester United, for example, dwarfs that of Southampton or Wimbledon and that the latter two clubs are not able now, nor are they likely in the short or medium term to be able, to raise their wage expenditure up to the level of the former two teams.

On the other hand, if the level for every team were to be set at the level of the lowest remunerated squad (leaving aside the furoré that would be created amongst all the other teams and supporters), the impact would be hugely disproportionate and discriminatory; Liverpool and Manchester United would have to discard a significant proportion of their players (assuming they were contractually/financially able to do so¹⁰), while Southampton and Wimbledon, for example, could continue training and playing with exactly the same squad¹¹.

Further, assuming that salary levels play a role in the performance of players and/or the team as a whole, which is the whole rationale for their existence¹², the effect could be reduce teams to the lowest common denominator of playing standard¹³. That would be against the interests of the game, the supporters, UEFA and, presumably, the European Commission.

⁷ See below in the text on the efficacy of salary caps.

⁸ And for similar reasons to a breach of section 2 of the Competition Act 1988 and/or to a breach of Article 81 of the EU Treaty.

⁹ This is one of the three principal aims of the Commission: *ibid*, fn.5.

¹⁰ See further below in the text on the question of existing contracts.

¹¹ The National Rugby League (NRL) in Australia is a smaller league than the Premier League, and while there is a range of club turnovers they are not so exaggerated as in the Premier League. Thus, while the present level of NRL salary cap, \$3.25m for the top 25 players, affects the biggest earning/biggest spending clubs more than the smaller ones (\$3.25m being less than the bigger clubs currently spend on their top 25 players), it does so far less than in a league with huge differences in turnover and wage bills. Interestingly, the level of the new NRL cap has been pitched, on a very approximate basis, at 50% of the turnover of the average, but well-performing, NRL club, though half an eye was also had on the level of cap and wages in the competing markets for players, namely ARL and Rugby Union. It is difficult to see, though, how there could be any sensible relationship of cap to turnover in today's Premier League.

¹² But see also below in the text on the efficacy of salary caps.

¹³ This results assumes that some of the best, highest paid players would take their skills elsewhere (e.g. outside Europe) and, in the longer term, that football would be less able to attract the best sportsmen.

If the level of the salary cap is pitched somewhere in the middle of the present range of spending, the outcome is the worst of both worlds. The top teams have to disrupt their squads and suffer on the playing field, which benefits no reasonably minded person. The bottom teams cannot afford to spend at the higher level in any event, which means that the cap is of less utility in addressing their competitive imbalance¹⁴.

In Australia, salary caps for teams playing in the major rugby league competition¹⁵ have, at times, been set at different levels (for the same league/division), to take into account the effect of expenditure on the club's viability¹⁶. Thus, within the one league/division there have been, at the same time, different levels of playing (or should I say paying) fields¹⁷. Notably, when it operated, this system was the exact opposite of what one would expect from the point of view of competitive balance. Thus, it was the poorer clubs, those generally doing worse in the league, that had the lower salary caps, not the other way round¹⁸.

It is hard to imagine initial agreement to such a formal, entrenched situation of discrimination in the Premier League, let alone its survival. It is also difficult to see how lower salary caps for the worse performing teams can hope to address the competitive imbalance. A better way to prop up clubs that are performing poorly financially, if that is thought appropriate, is to provide them with more funds from other sources within the game, rather than to penalise the players who, perhaps more than anyone else, can seek to reverse the club's sporting, and hence financial, misfortunes.

Perhaps the best system of differentiated salary caps one could hope for, as a theoretical example, would be an agreement that there should be a freeze on spending on squad wages by the team topping the table at the end of the season, with various percentage increases in wages permitted for teams finishing down the table, with the biggest allowed increase (up to the level of the cap) for the (non-relegated) team at the bottom¹⁹.

In practice, such a theory is unlikely to work. First, it is an odd system in which the star sportsmen are directly and personally penalised for success. It runs counter to the fundamental direction of modern English sporting and commercial culture²⁰. Second, having just escaped relegation, it is unlikely that a club will be in a financial position to pay big increases in wages²¹.

In theory, though, a system such as that just set out, with different levels of cap for different teams, is not such a bad one from the point of view of competitive balance. Indeed, it could be argued that a complete reversal of the structure of incentives and rewards is exactly what is required in the interests of the competition as a whole i.e. loser takes all (so that he becomes a winner). Certainly such a system could be constructed.

If there were to be a system of differentiated caps, there would be no justification for having the increased payments for poorer placed teams limited to the level of the cap that is faced by the top club. If the idea behind the system is to improve both the competitive balance and the level of

¹⁴ A half solution to this problem is making the smaller clubs adhere to, in effect, a salary floor (that is, a minimum spending level on players), as well as a salary cap. In practice, the NRL operates a *de facto* salary floor.

¹⁵ Now known as the National Rugby League (NRL) but formerly the New South Wales Rugby League (NSWRL) and Australian Rugby League (ARL).

¹⁶ See *Adamson v. NSWRL* 100 ALR 479.

¹⁷ Though it is true that the intention was that the cap should eventually be set at the same level for all clubs in the league.

¹⁸ Under the latest NRL Rules the cap is the same for all teams. It is set at \$3.25m for the top (i.e. highest paid) 25 players, plus \$500,000 for any and all other players, including youth team players etc.

¹⁹ Thus making a salary cap system similar, in some ways, to a beginning-of-season draft pick system.

²⁰ One can count on one hand the number of minutes it would have taken a member, or members, of last season's Treble winning Manchester United team (or their agents) to challenge a system that, in effect, would have seen them donate their win bonuses to the players of, say, Everton or Newcastle United. What is more, it is difficult to imagine players on any other team acting any differently.

²¹ Even if that club did wish to reward players who had, in effect, failed in the previous season.

standards, then the bottom club (assuming it had the resources) ought to be allowed to spend whatever it takes to become more competitive in the following season, with only the higher and winning teams capped. If the bottom team ended up coming top in the next season, and the previously capped team came last, then, in the season after that, the spending allowances would be reversed. Thus, the objective of promoting uncertainty of outcome (in the sense of different winners of the championship) would also be realised.

But, realistically, and leaving aside the legal difficulties referred to below, what are the chances of such a system being agreed to? Is it not the case that the clubs, and the fans, would all prefer perennially to struggle for the ultimate sporting glory, provided they could keep the pot of gold that comes with it?

Existing contracts

Assume a system of salary caps were to be introduced. Assume that under present contractual arrangements some players command wages that comprise such a high proportion of the salary cap that, in order to fit a whole balanced squad into the level of the cap (including replacements for playing positions in case of injury/suspension etc.), those highly valued players cannot reasonably be accommodated. What then? Those players could be transferred, but are likely to encounter the same problem at other clubs. The players could be removed from the playing squad, but that would not only almost certainly be a breach of contract but would engage the wrath of the fans (and run counter to the objective of maintaining high playing standards). No matter what, the players would still have to be paid their wage entitlements under the on-going contracts (or damages in lieu), so the aim of bringing about a certain financial equilibrium between clubs would be defeated²².

In these circumstances, one common 'solution' has been to ignore the salary cap for these players altogether. Thus, in the National Basketball Association (NBA) league in the US, the salary cap rules have allowed teams to re-sign existing players outside the scope of the salary cap²³. Is not the effect of this arrangement simply to entrench the sporting disparity between teams? Clearly it is. In the NRL, players on pre-December 1997 contracts, who would not reasonably fit into the salary cap of \$3.25m²⁴, are also effectively ignored for the purposes of the cap²⁵.

Yet it is difficult to see how to avoid this situation, since no established player in his right mind would agree to a reduction in payments under existing contractual arrangements, so as to facilitate the imposition of a cap that operates to his direct and on-going financial detriment. What is more, that player would have English contract law on his side to defend any attack on his existing contract.

In the post-*Bosman*²⁶ era it is reported that the trend has been for longer term contracts for top players, so as partly to counter the effects of free end-of-contract transfers. Having a profusion of long-term contracts, for highly paid players, outside the scope of the cap, would fundamentally undermine any efficacy that it has (see below) and also serve to highlight the unfairness and

²² Note that in the National Rugby League (NRL) Rules there are complex - and controversial - provisions dealing with the making of redundancy payments to players who are affected by the cap, which redundancy payments are taken into account in calculating team expenditure under the cap (though it is not clear why they should be taken into account, if those players are no longer playing for the team).

²³ Care needs to be taken in drawing direct lessons from the NBA in this context. The NBA operates a system of collective bargaining for players' wages, but nobody has suggested that that is an option for European footballers. Further, that NBA collective bargaining agreement has recently changed. There will shortly be a limit on individual player's salaries as well as an overall team cap. The point is, though, that for a long time certain players have been paid outside the cap. Indeed, the exception has long been referred to as the "Larry Bird exception", although perhaps its most celebrated beneficiary has been Michael Jordan.

²⁴ Some of the highest paid players presently earn in the region of \$1m in wages per season.

²⁵ They are assigned nominal - some would say 'make-believe' - wages for the remainder of their contracts, for the purpose of the calculation under the cap. The intention is that, when those contracts come to an end, all those players will happily sit by and watch their wages drastically be reduced. Keep watching this space.

²⁶ See Case C-415/93, [1995] ECR I-4921.

discriminatory impact that the cap has on other players. Finally, would not any sensible player's agent or employment lawyer insist on a renegotiation and extension of a top player's contract the moment salary caps seriously appear on the horizon?

To some degree, the impact on existing contracts of a salary cap can be countered by announcing a start date of the cap at some point in the future, say in 2 seasons time. This approach was adopted in rugby league in Australia. It had the effect of allowing the players to organise themselves to mount a successful legal challenge to the system²⁷ before it even began operation²⁸!

Europe-wide salary cap

It has long been apparent that there is (at least) a Europe-wide market for top professional players, all the more so post-*Bosman*. Indeed, it is a fundamental aim of the EU that these Europe-wide markets should be actively encouraged and fostered. If a salary cap were to be introduced into the Premier League, it would also have to be introduced into the Bundesliga and Serie A, and all the other top professional leagues. To do otherwise would be to introduce a huge distortion into the market. Worse, the distortion would be such as to partition national markets and hinder the free movement of players. For example, let's say the cap operated only in England. No top player from Italy would want to transfer into the English market where his wages would be artificially constrained.

Thus, 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 partitioned national markets (those same national leagues) and obstacles to the free movement of EU citizens (the top European players). Outside the sporting context, an arrangement with such glaring anti-competitive characteristics would certainly lead to prohibition under (now) Article 81 and engage substantial fines from the Commission. Yet here is the same Commission suggesting it as a possible solution for the world of team sports²⁹!

The Commission should think again in these circumstances. *Bosman* clearly indicates that the ECJ would frown upon any restraint that has the latter 2 effects at least.

To avoid these problems, the cap would have to be Europe-wide³⁰. But that solution in turn brings problems. The cap would have to be set at the same level in each national league. Otherwise, to a greater or lesser extent, there would be, again, an obstacle to free movement and a partitioning of national markets. In addition, one of the spurs behind the current thinking of the Commission and UEFA is the huge amount of money that has poured into the game in recent years from television revenues. A large part of that money has been generated by Europe-wide competitions, notably the UEFA Champions' League. Were the cap to be unevenly applied between leagues, there would be an unfair, rule-based advantage presented to those sides from whichever national league happens to have the highest cap. Ironically, this advantage would operate in the very leagues which have the most pan-European flavour and with which UEFA is most directly concerned.

Ultimately, profound dissatisfaction with the application of the cap in those competitions could lead to withdrawal of clubs and, over time, a reduction in the very television revenues that prompted the introduction of the cap in the first place.

But imposing the same cap on different European leagues would probably result in exactly the same problems concerning the correct level as are set out above, only this time the dispute would be

²⁷ Strictly, the legal challenge focussed principally on the draft system which operated along side the salary cap system and was seen as an easier target. In practice, the two were intimately connected. Indeed, it was even argued by the League that the two had to be operated together and were mutually complementary.

²⁸ See *Adamson*, supra.

²⁹ It is odd that the Commission should consider salary caps at all being, as they are, horizontal price-constraints, normally the Commission's *bête noire*.

³⁰ In reality, the Commission must only seriously be considering a Europe-wide cap for these reasons.

between leagues, rather than between different clubs within a league. It is inconceivable that the Premier League would agree to enter into a competition in which they were not even allowed to spend the same amount as the Serie A clubs on players. Yet, if the level is sufficiently high to accommodate all of Barcelona, AC Milan and Chelsea, it is likely to be pie in the sky for Dynamo Kiev or Galatasaray and would, therefore, be of a far less significant effect in evening out competitive imbalance³¹.

Further, unlike in US or Australian domestic leagues, exchange rate movements would just exacerbate the problems. Let's say the cap were set in euros. That level could be applied directly in France in Germany, and would stay constant throughout the season. Let's say, though, that during the season the pound depreciates against the euro. The depreciation might be sufficient to allow one extra player to be squeezed into the English club's squad, or to allow a mediocre player to be replaced by a top player - of course, neither movement in squad structure resulting from sporting outcomes. However, during this same period, no movement at all could have occurred in the French or German squads.

Such movements could be particularly pronounced for certain of the, say, East European or former Soviet Union clubs. For some of these teams, adding 3 or more players might make a crucial sporting difference.

Similarly, the transnational cap would have to be able to cope with different levels of inflation. If the cap is, say, 15 million euros per squad per season, then, in those countries with no inflation the cap can remain the same the following season. However, if the cap stays the same for those countries that have had 20% inflation, then the real purchasing power of that cap will have been correspondingly reduced³² in comparison with the zero-inflation countries. The incentive will be for players to leave the high-inflation country and there will be little incentive for others to come in from overseas and take their place. There will be an effect on competition between leagues that has nothing whatsoever to do with the outcome of sporting fixtures (and, no doubt, would have a discriminatory impact on certain countries).

Enforcement

Enforcement presents a different, but nonetheless formidable array of problems³³. Properly implemented salary caps must not be limited only to pecuniary payments but must extend to expenditure on players of virtually all kinds; their sign-on fees, houses, cars, pensions, disability and relocation allowances etcetera. Of course, there is a myriad different ways in which non-cash benefits can be paid indirectly, many of them virtually undetectable or arguably permissible³⁴. One imagines that the temptation to break the rules about payments to players would be hard to resist for some clubs and in some countries. Surely the temptation, if not the tendency, would be to drive payments under the table, particularly if enforcement is not effective or consistent. Football in England has, unfortunately, already had too many recent scandals of this kind.

While, of course, breaches could be punished by sanctions (see below), there would always be damaging speculation. Further, it seems likely that there would need to be a sort of transnational UEFA police force (no doubt hotly pursued by the tabloid press), charged with inspecting all the

³¹ Of course, the argument can be taken further. Using the same principles as set out above in the text, different caps could be set for different leagues precisely in order to seek to promote competitive balance within the Champion's League. Imagine a meeting of European national football leagues with such a proposal on the agenda!

³² In this simple analysis, I assume that the absolute level of the cap in the country with inflation and a non-euro currency stays the same into the next season (that is, it is not recalculated using a different exchange rate which, no doubt, would take into account, at least in part, the inflation in that country).

³³ The general consensus appears to be that, although there has been a salary cap formally in place in the past few years in the NRL, it is honoured more in the breach than in the observance.

³⁴ What does one do with a player paid to play, but also paid, for example, to attend twice-a-week at the youth training academy to 'assist'? Why should players not be allowed to undertake 'additional' paid duties?

personal arrangements between clubs and players and players' families, friends and business associates³⁵. It is hard to imagine how such a situation could be good for the players and the game³⁶.

Sanctions

A system of salary caps would have to be backed up by a Europe-wide, consistent set of sanctions. Whilst other rules have to be supported by sanctions too, the danger with the salary cap is what happens when there is a minor breach. What if, for example, there is an overspend by £1? Should points be deducted, should the cap be reduced for the next season, or should there be a fine? Then, what if the overspend is £10m?

In any system of graduated sanctions, one could imagine coaches evaluating the sanctions risk of overspending on, say, a key striker or goalkeeper and figuring that it is worth it anyway. Purely as a hypothetical example, Peter Schmeichel might have been so important to Manchester United's Treble winning chances that Manchester United might have considered taking its team over a hypothetical Premier League salary cap to keep him, particularly when (if the sanction was a reduction in next season's cap or a fine) it was Schmeichel's last season with United anyway and the benefit of the Treble far outweighs the fine.

Were options like the hypothetical one given above taken to any significant degree it would make a mockery of the salary cap system. At the edges, though, slipping around the cap could be probably be done with relative ease³⁷.

The lower leagues

Leagues with salary caps, but from which there is no relegation, such as the NBA in the US and the NRL in Australia, do not encounter the problem of how to cope with different levels of salary cap amongst divisions. In England, however, there would doubtless be intense controversy over the levels of salary cap between the Premier League and the First Division of the Football League (and so on down the chain). Since the principal aim of the likes of Manchester City is to get back into the Premier League, and since that is what their fans and players almost live for, it would be unfair to all concerned to handicap their ability to do so by *legally* preventing them from spending them as much on players as the Premier League clubs. The fact that, at present, they may not, *in fact*, be financially able to do so is not relevant. Manchester City may one day have a rich benefactor able to contribute to promotion in the same way as occurred at Newcastle and Blackburn. To find a rich benefactor and then be told that he is not allowed to spend his millions on the team would be the ultimate irony for long-suffering football fans.

The only way around this problem would be for the same level of cap to be set for all leagues (which renders the cap meaningless for the bulk of all professional clubs) or for the Premier League to adopt a no-relegation, no-promotion policy³⁸. Yet, even the most gung-ho, or foolhardy, sports administrator would have to recognise the intense public bitterness that such a move would likely provoke, let alone the negative effect it would likely have on incentives to improve sporting standards in the lower leagues.

³⁵ In the NRL there is a so-called Salary Cap Auditor. He has immense discretion in evaluating player payment arrangements. Not surprisingly, he also has immense power in demanding to see documents and evidence, backed up by sanctions.

³⁶ One must be careful, however, not to take this criticism too far. Other countries do operate salary caps, notwithstanding problems of enforcement.

³⁷ Indeed, the difficulty of being completely precise about the level of expenditure lead to the NRL, at one time, including a margin of error of 2.5% into its cap.

³⁸ Interestingly, it is my understanding that the proposed European SuperLeague would be a closed division of this type - perhaps partly for this reason.

Total club expenditure

If the aim is promotion of the sporting competitive balance, then there is no good reason to limit the salaries of only the players. On the face of it, managers and coaching staffs should also have their remuneration limited, since they directly contribute to the sporting success of the teams that they manage/coach and since rich clubs can, absent a spending cap, simply buy up the best coaches, at least to a degree. On this argument, both the players and the managers are employees of the clubs, all striving towards the same goal of sporting success, albeit in different capacities. As such, they should be treated equally. Funnily enough, though, while we are familiar with the calls of the top Premier League managers for limitations on the salaries of their top players, we do not hear them advocating a limitation on their own earnings. One can imagine their reaction if such a system were to be imposed.

Logically, the cap could be taken further than coaching staff. The whole infrastructure of the big, professional clubs is directed towards, or at least contributes to, on-field sporting success. Should not all club expenditure, therefore, be capped? Thus, one could argue that the directors of Manchester United and AC Milan should have capped salaries and share bonuses, because their management expertise and commercial acumen have a direct effect on the sporting success of their teams by making available resources for player acquisition and training. But how many commercial, institutional investors in Manchester United, Arsenal, Leeds United, Liverpool and Newcastle United³⁹ are going to vote in favour of a measure that is directly, and avowedly, intended to reduce the commercial effectiveness of their companies? Besides, is it not contrary to a director's duty under company law deliberately to act other than in the club's commercial best interests⁴⁰?

Likewise, on this logic, the club's expenditure on youth training should also be capped, because that, too, contributes to on-field success, sometimes very materially. But here the cap would run head long into one of the very objectives that all parties seem to agree is central to the healthy future of the game.

About the only exemption from the cap would be physical infrastructure of the stadium, but even that should, arguably, be included, because of its revenue-raising potential and corresponding effect on team-building abilities.

Taking the argument to this extreme demonstrates the unfairness of the salary cap system to the players, as compared with other areas of expenditure of the clubs. It also demonstrates that, ultimately, the logic of a salary cap suggests a limitation on expenditure, or earnings, of the club as a whole, rather than a limitation on expenditure in specific areas of a club's activities. With a limitation on earnings (or, better still, a redistribution of earnings - see below) the clubs would be entitled to exercise their sporting and commercial expertise in all its glory and using all its own unique talents in their diverse ways, without one area being targeted in a discriminatory manner. Yet, at the same time, other clubs in the same league are able also to benefit from that expertise, so as to keep the sporting competition alive.

Efficacy

The analysis above has been premised on the assumption that salary caps do have an impact on sporting performance. There can be little doubt that, at the extremes (consider, for example, a nil cap and a £10m per season cap), there would be a difference in performance. It is far from clear,

³⁹ One should not forget in this context that, if those 5 or so clubs in the Premier League rejected the cap for reasons such as these, and were joined by similarly disaffected numbers of big clubs from Serie A and from around Europe, then all of a sudden, UEFA would be faced with having created its own nemesis: Silvio Berlusconi's European SuperLeague.

⁴⁰ Of course, there are plenty of arguments either way on this point, particularly if the clubs are bound by UEFA and/or FA rules to accept salary caps or risk expulsion.

however, that where the difference in level of cap is less stark there is a direct correlation between salary level and sporting performance. No doubt there is scope for rigorous, empirical analysis over the course of time at this juncture, but, on a purely illustrative basis, one can have regard to Newcastle United's recent performance in the Premier League. Newcastle United has the second highest turnover in the Premier League, after Manchester United. It has a stadium consistently full to capacity and hordes of other devoted fans. It has had the sixth highest receipt of television revenues over the 5 seasons to 1997/8 and consistently amongst the highest audiences for its live televised games⁴¹. It has a squad packed full of expensive foreign and domestic players (and managers). Yet, in 1997/8 it came 13th (out of 20) in the Premier League and last year it survived relegation by the skin of its teeth. Would capping Manchester United's expenditure and allowing Newcastle United to spend even more make a measurable difference to sporting outcomes? If so, by how much? For how long?

The point is that there are so many other factors that go into making a successful squad than simply salaries. Restricting salaries may simply not have the effect on competitive balance that is desired by its advocates. Importantly in the context of a potential dispute over the imposition of a salary cap, it would very likely fall at the feet of salary cap advocates to prove its efficacy (see below). In a trial situation such a task would involve adducing precisely the sort of detailed empirical evidence that does not yet appear to exist. Such a task would prove onerous at best, impossible at worst.

Restraint of trade

The key legal complaint to be leveled at the salary cap, however, is its unreasonable interference with the individual player's ability to contract. 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..."⁴².

As with most of these cases in which sporting rules designed to promote competitive balance are considered under the restraint of trade doctrine⁴³, it would almost certainly have to be conceded that the salary cap is a restraint. Indeed, hardly any restraint could be clearer than replacing a free market in the provision of sporting services by individuals with a regulated market in which there is a maximum price set for those services.

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

"...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

⁴¹ Source: MMC report into the proposed merger between BSkyB and Manchester United plc, HMSO, Cm 4305, April 1999.

⁴² Per Lord MacNaughten in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535 @ p.565.

⁴³ See for example, Adamson, supra, in relation to the draft procedure in Australian professional rugby league; Eastham, supra, in relation to the retention and transfer system in English professional football; Buckley v. Tutty [1971] 125 CLR 353, in relation to the retention and transfer system in Australian professional rugby league; Rugby Union Players' Association Inc. v. Commerce Commission (No.2) [1997] 3 NZLR 301, in relation to the transfer system in New Zealand professional rugby union.

For similar analysis, but where the restraints were not imposed for reasons of competitive balance, see Barnard v. Australian Soccer Federation (1986) ATPR 40-862, in relation to an exclusion from indoor professional football of an outdoor professional football player; Greig v. Insole [1978] 3AER 449 and Hughes v. Western Australian Cricket Association (1986) ATPR 40-736, in relation to the exclusion of professional cricketers from competition because of their participation in unapproved competitions.

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)

So, as with other restraint of trade cases, the pleadings would set out the interests of the various parties and extensive reference would be made to the perceived public interest by all sides.

This article is not the place to plead a hypothetical case referring to all such interests. Suffice it to say that, in opposition to any cap, one would have some degree of confidence that a case could be attractively framed to highlight the direct, immediate harm to a range of the players' interests, which case could be supported, with relative ease, by compelling direct evidence from the players themselves.

Hand in hand with this approach 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 television revenues. Television revenues are huge and are only likely to get even larger⁴⁴. Television revenues are also principally responsible for the rapid inflation in players' wages and the disparity in clubs' earnings.

Furthermore, and perhaps crucially, it can be argued persuasively both that television revenues belong to the Premier League as a whole⁴⁵ (and ought, therefore, to be distributed amongst the members) and that such distribution of communally generated revenue does not have a direct and discriminatory impact upon individual players. Yet, distribution of income ought to have the same potential ability to even out a competitive imbalance as a salary cap.

Better still, distribution of income can be used to provide developmental support directly to those areas of infrastructure that can be expected to even out competitive imbalance in the longer term, while at the same time raising standards generally. Thus, for example, if the distribution formula of the Premier League's television revenues were to be altered, so as to remove, or further restrict, the bonus accruing to winning and heavily televised teams, it could be made a condition of redistribution that poorly performing teams invest a certain amount in youth and/or local team training and facilities. Such an approach could also be expected to weigh-in in favour of any public interest argument mounted by players.

Particularly while television revenues are on the increase, it is difficult to see how the standard argument that high players' wages could lead to the demise of the league and/or to a break down of the competitive balance, so as to justify the imposition of a salary cap, could succeed. Surely the key is to take advantage of the next round of bidding so as to secure a better redistribution of income, perhaps wary that, if this opportunity is not taken, UEFA and the European Commission will lose patience and do something drastic.

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⁴⁴ Detailed reference to the growth of Premier League television income can be found in the MMC report into the proposed merger between BSkyB and Manchester United plc, HMSO, Cm 4305, April 1999. The next round of bidding for Premier League rights, in 2000/2001, promises to be fearsome, particularly with the introduction into mainstream viewing habits of digital television.

⁴⁵ This argument served the defendants well in the recent case of The Director-General of Fair Trading v. The Premier League et al: see the judgment of the Restrictive Practices Court of 28.7.99.

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