

# worldsportslawreport

**FEATURED ARTICLE**  
**09/06**



cecile park publishing

Head Office UK: Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

# Premier League transfer rules and EC Law

Ashley Cole's case against the FA Premier League's transfer regulations highlighted that the regulations can place Premier League players at a disadvantage when negotiating a transfer, compared to players from other European Leagues. Alison Green and Graham Shear, partners at Teacher Stern Selby, argue that the case highlights the need for an investigation into whether the Premier League is justified in operating a restraint of trade, to protect the integrity of sport, under EC Law.

The conduct of the Premier League is regulated by The Football Association Premier League (FAPL), which is an association owned by its shareholders, the top twenty professional football clubs in England. Players who are employed by these clubs are required to agree to abide by FAPL Rules, which govern their employment, registration and transfer between clubs.

The rules dealing with the employment, registration and transfer of players are contained within Rules K, L and M of the FAPL Rules. Rule K specifically governs players' contracts and it is with this section that this article is concerned.

Under Rule K1, a club is at liberty to make an approach to a player with a view to negotiating a contract either where the player is out of contract, or if he is in contract, with the prior written consent of his current club. Rule K2 states that a player who is in contract may only be approached by another club during the period between the third Sunday in May and the first of July in the year in which his contract comes to an end. Rule K3 states that any club who approaches a player who is in contract, other than as provided

for in Rules K1 and K2, shall be in breach of the Rules. The FAPL's justification for Rule K3 is that it allegedly prevents the "poaching" of players and any instability that might subsequently arise.

Yet it is not only clubs who are forbidden from making approaches; Rule K5 prohibits Premiership players, either directly or indirectly (e.g. via their agents) from approaching other clubs with a view to negotiating contracts unless they first obtain the permission of their club, or it is after the third Saturday in May in the year in which that player's contract ends. Rule K5 applies to all approaches by players, regardless of whether such an approach relates to current "vacancies" or to enquire about future employment after the player's contract with his current club has quite legitimately come to an end. In other words, a player who is in contract to a club is forbidden from discussing his future employment with another club until the last five weeks of his current contractual term.

Breaches of the Rules are enforceable by the FAPL under its disciplinary procedure, which is set out in Rule R. The procedure provides the FAPL's disciplinary commission with the power to impose an unlimited fine and suspension from playing.

It is interesting to note that the restrictions imposed by Rules K1 to K5 apply only to approaches made by or to players. There is no equivalent restriction placed on clubs wishing to dispose of players. In such circumstances, a club is free to talk to another club about the transfer of one of its players. It may do so regardless of whether the proposed transfer is to take place during the player's current contractual term, or whether the player in question has consented to, or indeed even knows about his

proposed transfer.

Breaches of Rules K3 and K5 are commonly known as "tapping up", a much used phrase in the recent, well-publicised case involving the Arsenal and England player, Ashley Cole, who was the subject of disciplinary proceedings brought by the FAPL (along with Chelsea FC under Rule K3) for a meeting with Chelsea which was alleged to have taken place in January 2005.

Mr Cole at all times denied the charges brought against him. However, he was found guilty of breaching Rule K5 by an FAPL disciplinary tribunal and appeal tribunal. He subsequently sought to take his case further, firstly to the Court of Arbitration for Sport in Lausanne, Switzerland on the grounds that Rule K5 was unlawful as being an unreasonable restraint of trade. When CAS declined jurisdiction, on the basis that the FAPL did not provide an option for recourse to it and did not consent to jurisdiction for CAS, Mr Cole sought to bring his case to the UK Office of Fair Trading on the basis that Rule K5 was incompatible with Section 2 of the Competition Act 1998 ("The Act") and Article s81(1) (ex Article 85 (1)) of the EC Treaty ("The Treaty"). These provisions prohibit agreements between undertakings, decisions by association of undertakings or concerted practices which affect trade within the UK and Member States respectively, or have as their object or effect the prevention, restriction or distortion of competition within the UK and the Common Market respectively.

## Competition Law and the football transfer system

In general, rules of sporting bodies which relate to the participation of the sport itself are subject to a "Sporting Exception" in the context of competition law. However, it is well established law

that competition rules apply to those rules of sports associations which relate to economic activity in the sport. In reality, it may be difficult to differentiate between rules that relate purely to sporting activity and those which have an economic impact on participants. Recent jurisprudence of the ECJ has narrowed the parameters of the sporting exemption, showing the court's recognition that rules which govern sporting activity may also impact on a player's ability to compete and thus his ability to earn a living. In the case of rules which regulate the employment and transfer of players or restrict their freedom to move between different clubs, as in Mr Cole's case, it is well established law that competition rules apply. If the rules in question are found to have a significant effect on competition within the relevant market, and do not fulfil the criteria for exemption under section 9 or Article 81(3), then they are likely to be unlawful.

Numerous cases involving challenges to the rules and regulations of European sporting bodies have found their way to the ECJ. Indeed, Federation Internationale de Football Association's (FIFA) current transfer system was overhauled in 2001 as a result of a spate of complaints, litigation and protracted negotiations with the Commission. The two main points which were in contention were firstly the issue of unilateral termination, whereby a player who breached his contract with a club could not be registered to play for another club, even where he had paid his club damages to compensate the breach and secondly, the system for the payment of fees for agreed transfers, which placed no restriction on the level of transfer fee which a club could levy for a player. The Commission claimed

**Clubs use the FAPL rules in such a way so as to maintain their options**

that both transfer fees, which bore no relation to investment, or training costs, and the system regulating unilateral termination, were anti competitive and liable to prevent the free movement rules of the Treaty.

Perhaps the best known of the litigation to come before the ECJ in relation to FIFA's original transfer system was the case of Union Royale Belge des Societies de Football ASBL v Jean-Marc Bosman (1995) ECR I-4921. Under the regulations then in force, clubs were entitled to retain players after their contracts had expired; releasing them only after a transfer fee had been paid. Jean-Marc Bosman, a Belgian footballer, challenged this rule on the basis that it infringed the free movement and competition rules of the EC Treaty. In 1995, the ECJ upheld Bosman's challenge, holding that this aspect of the FIFA transfer rules infringed Article 39 (ex Article 48) of the EC treaty, concerning the free movement of workers. Although the European court was not required to consider whether or not FIFA transfer rules infringed Article 85 (1), Advocate-General Lenz went on to consider the issue, holding that the Belgian football governing body was an association of undertakings in the context of the EC Treaty. On this basis, it was clear that the transfer rule in issue did indeed contravene Article 85(1), since it clearly restricted competition within the market. The result of Bosman is that players are free to move to alternative clubs following the expiry of their contracts.

The principles agreed between FIFA and the European Commission in 2001 led to a new system for the transfer of players which incorporated two transfer windows in each season, during which players could be transferred between clubs. In addition,

sporting sanctions were introduced for players or clubs who were in breach of contract, and rules were formulated governing the calculation of transfer fees.

### **Ashley Cole's complaint to the OFT**

Like his appeal to the CAS, Mr Cole's complaint to the OFT was never heard. Unfortunately, the OFT declined to conduct a full investigation, largely because of operational constraints. However, the basis upon which Mr Cole sought to bring his case before the OFT was in many ways analogous to the case of Bosman. Like Bosman, Mr Cole contended that member clubs of the FAPL were undertakings, and the FAPL, an association of undertakings. Further, the product market in question was the market for the services of professional footballers, whilst the geographic market was primarily at national level, although to the extent that increasing numbers of established European players from other Member States play in the Premiership, the market was a European one.

To ascertain the effect on competition in the relevant market, it is necessary to look at the restriction imposed by Rule K5. This is the prohibition on players from identifying clubs which might be interested in employing them and ascertaining salary levels which they could expect to receive, thus severely restricting their ability to safeguard their future employment. This restriction applies regardless of whether such enquiries relate to a transfer within the currency of the player's contract (with, of course, the consent of his club, as is required) or the period after the expiry of his current contractual term. Rule K5 leaves the player with only a short period of time between the third

Saturday in May during the year in which his contract ends to secure his future employment. This restriction is particularly harsh in relation to players who are nearing the end of their playing careers, such as was the case with Shaka Hislop, former goalkeeper of Portsmouth FC. Mr Hislop, at the age of thirty seven, gave evidence to the FAPL Disciplinary Tribunal on behalf of Ashley Cole that Portsmouth FC relied upon rule K5 to prevent him from looking for a new job at the end of his contract. This was seemingly solely for the club's benefit and to Mr Hislop's detriment.

Players nearing the end of their playing careers may find that their clubs use the FAPL rules in such a way so as to maintain their options. A club may not wish to commit itself to renewing such players whilst it considers alternative, younger players. This leaves the player in question unable to explore alternative employment opportunities. Mr Hislop found himself in this position, when he was told only a couple of weeks before the end of the season that his contract with Portsmouth would not be renewed.

Importantly, there are no corresponding prohibitions imposed on players by Europe's other main footballing nations: - Italy, Spain, France and Germany do not have restrictions equivalent to Rule K5 in their Rules. Consequently, those players are free to have meaningful contractual discussions not only with their own national clubs, but ironically, with FAPL member clubs. Rule K5 therefore creates a position whereby English Premiership players are prevented from talking to FAPL clubs whilst their European counterparts are free to make approaches and to secure future employment with those very clubs. Similarly, unlike players from

other European countries, English Premiership players are prevented from talking to clubs outside the FAPL. This inevitably puts English Premiership players at a severe disadvantage to other players in Europe, since they are unable to compete fairly in the market for available positions.

Under English domestic laws of employment, restrictions on an employee's freedom to explore alternative employment opportunities following the lawful ending of his current contractual arrangements would almost invariably be held by the Courts to be an unlawful restraint of trade. Such restraint of trade issues formed part of Mr Cole's defence to the original disciplinary proceedings and was the basis of his appeal to CAS. Under English domestic law, the principle in *Nordenselt v. Maxim Nordenselt Guns & Ammunition Co Limited* (1894) AC535 sets out a doctrine of Restraint of Trade in three parts as follows;

- Is there a restraint of trade?
- If so, can the body seeking to rely upon the restraint prove that it is reasonable, proportionate and justified in the interest of the parties?
- If so, can the employee show that the restraint is contrary to public interest?

There can be little dispute that Rule K5 is a restraint of trade and the FAPL does not deny that it is. It argues, however, that the restraint imposed by Rule K5 is necessary to protect the integrity of the sport. This argument was upheld by the FAPL's disciplinary tribunals.

However, on the basis that the FAPL itself accepts that Rule K5 is a restraint of trade, the OFT were asked to find that such an acceptance is, in effect, a conclusion that Rule K5 is restrictive of competition.

In order to make such a finding,

the OFT would have to consider that that the restrictions imposed by Rule K5 have an appreciable effect on competition within the relevant market and do not qualify for exemption under section 9 of the Act or Article 81(3) of the Treaty. These exemptions apply to restrictions which are considered to contribute to or improve the production of goods or to promote technical or economic progress. They also apply to provisions which allow consumers a fair share of the resulting benefit or are indispensable to the attainment of the undertaking's objectives. Whilst the FAPL's arguments in relation to these issues remain to be heard, in the absence of a full investigation by the OFT, it is hard to envisage what might be considered justification for such exemption to apply to Rule K5. Contractual stability can be achieved through less restrictive means, any benefits resulting from the restrictions appear to be confined to the member clubs and it seems highly unlikely that the restrictions could be shown to be indispensable to the attainment of the FAPL's objectives.

In conclusion, we believe that there is a very strong case for a full investigation of these issues and/or a determination by a competent independent body as to whether such restraints are acceptable in all the circumstances of modern sporting and commercial practice.

---

**Alison Green** Partner  
**Graham Shear** Partner  
 Teacher Stern Selby  
[a.green@tsslaw.com](mailto:a.green@tsslaw.com)  
[g.shear@tsslaw.com](mailto:g.shear@tsslaw.com)

---

A further discussion of the arguments put forward by Cole and The FAPL is contained within 'Is the Premier League's Rule K5 an Unlawful Restraint of Trade', featured on [www.tsslaw.com](http://www.tsslaw.com)



# cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

Registered number 2676976 Registered address 141 Wardour Street, London W1F 0UT VAT registration 577806103

## e-commerce law & policy

Many leading companies, including Amazon, BT, eBay, FSA, Orange, Vodafone, Standard Life, and Microsoft have subscribed to ECLP to aid them in solving the business and legal issues they face online.

ECLP, was nominated in 2000 and again in 2004 for the British & Irish Association of Law Librarian's Legal Publication of the Year.

**A twelve month subscription is £390 (overseas £410) for twelve issues and includes single user access to our online database.**

## e-commerce law reports

You can now find in one place all the key cases, with analysis and comment, that affect online, mobile and interactive business. ECLR tracks cases and regulatory adjudications from around the world.

Leading organisations, including Clifford Chance, Herbert Smith, Baker & McKenzie, Hammonds, Coudert Brothers, Orange and Royal Mail are subscribers.

**A twelve month subscription is £380 (overseas £400) for six issues and includes single user access to our online database.**

## data protection law & policy

You can now find in one place the most practical analysis, and advice, on how to address the many problems - and some opportunities - thrown up by data protection and freedom of information legislation.

DPLP's monthly reports update an online archive, which is an invaluable research tool for all those who are involved in data protection. Data acquisition, SMS marketing, subject access, Freedom of Information, data retention, use of CCTV, data sharing and data transfer abroad are all subjects that have featured recently. Leading organisations, including the Office of the Information Commissioner, Allen & Overy, Hammonds, Lovells, BT, Orange, West Berkshire Council, McCann Fitzgerald, Devon County Council and Experian are subscribers.

**A twelve month subscription is £355 (public sector £255, overseas £375) for twelve issues and includes single user access to our online database.**

## world online gambling law report

You can now find in one place analysis of the key legal, financial and regulatory issues facing all those involved in online gambling and practical advice on how to address them. The monthly reports update an online archive, which is an invaluable research tool for all those involved in online gambling.

Poker, payment systems, white labelling, jurisdiction, betting exchanges, regulation, testing, interactive TV and mobile gaming are all subjects that have featured in WOGLR recently.

Leading organisations, including Ladbrokes, William Hill, Coral, Sportingbet, BskyB, DCMS, PMU, Orange and Clifford Chance are subscribers.

**A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.**

## world sports law report

WSLR tracks the latest developments from insolvency rules in football, to EU Competition policy on the sale of media rights, to doping and probity. The monthly reports update an online archive, which is an invaluable research tool for all involved in sport.

Database rights, sponsorship, guerilla marketing, the Court of Arbitration in Sport, sports agents, image rights, jurisdiction, domain names, ticketing and privacy are subjects that have featured in WSLR recently.

Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.

**A twelve month subscription is £485 (overseas £505) for twelve issues and includes single user access to our online database.**

priority order form

FAX +44 (0)20 7729 6093

CALL +44 (0)20 7012 1380

EMAIL [dan.towse@e-comlaw.com](mailto:dan.towse@e-comlaw.com)

ONLINE [www.e-comlaw.com](http://www.e-comlaw.com)

POST Cecile Park Publishing 17 The Timber Yard, Drysdale Street, London N1 6ND

- Please enrol me as a subscriber to **e-commerce law & policy** at £390 (overseas £410)
- Please enrol me as a subscriber to **e-commerce law reports** at £380 (overseas £400)
- Please enrol me as a subscriber to **data protection law & policy** at £355 (public sector £255, overseas £375)
- Please enrol me as a subscriber to **world online gambling law report** at £485 (overseas £505)
- Please enrol me as a subscriber to **world sports law report** at £485 (overseas £505)

**All subscriptions last for one year. You will be contacted at the end of that period to renew your subscription.**

|            |                      |          |                      |
|------------|----------------------|----------|----------------------|
| Name       | <input type="text"/> |          |                      |
| Job Title  | <input type="text"/> |          |                      |
| Department | <input type="text"/> | Company  | <input type="text"/> |
| Address    | <input type="text"/> |          |                      |
| Address    | <input type="text"/> |          |                      |
| City       | <input type="text"/> | State    | <input type="text"/> |
| Country    | <input type="text"/> | Postcode | <input type="text"/> |
| Telephone  | <input type="text"/> | Fax      | <input type="text"/> |
| Email      | <input type="text"/> |          |                      |

**1** Please **invoice me** Purchase order number   
Signature  Date

**2** I enclose a **cheque** for the amount of   
made payable to 'Cecile Park Publishing Limited'

**3** Please debit my **credit card** VISA  MASTERCARD   
Card No.  Expiry Date   
Signature  Date   
VAT No. (if ordering from an EC country)

Periodically we may allow companies, whose products or services might be of interest, to send you information. Please tick here if you would like to hear from other companies about products or services that may add value to your subscription.