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# Football in Focus

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## Olivier Bernard case: Impact on the English Youth Compensation System

**The European Court (ECJ) recently ruled in *Olympique Lyonnais SASP (“Lyon”) v Olivier Bernard and Newcastle United FC (“Newcastle”) on compensation to be paid for the training of young players. In this article, we consider its impact on the English youth compensation system.***

The French player, Olivier Bernard, (the “Player”) signed a “jouer espoir” amateur contract with Lyon for three seasons in 1997. At the end of a “jouer espoir” contract, the Professional Football Charter of the Fédération Française de Football (the “Charter”) obliged a “jouer espoir” to sign his first professional contract with his training club, if that club requested.

The Player was offered a professional contract by Lyon before his “jouer espoir” expired. The Player chose not to sign it and instead, signed a professional contract with Newcastle.

Lyon sued the Player for damages of approximately €50,000, based on the salary that he would have received as a professional at Lyon. In reply, the Player and Newcastle claimed that the damages were not based on the costs incurred by Lyon in training the Player and were excessive. It was also contended that to calculate damages this way was an illegal restriction

contravening Article 45 of the EU Treaty on free movement.

The ECJ heard the case in March 2010. It decided that Lyon’s calculation of damages constituted an unlawful restriction on free movement and was illegal. Importantly, the ECJ confirmed that “...Article 45 does not preclude a scheme which...to attain the objective of encouraging the recruitment and training of young players guarantees compensation to the club which provided the training..., provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it...”.

Therefore, the Charter was held to be illegal

as it was deemed that “a scheme... under which a “jouer espoir” who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is **unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.**” However, the ECJ failed to specify how the costs of training a player should be calculated in future.

Bernard raises whether the arrangements in place in England for the compensation of young players “...attain the objective of encouraging the recruitment and training of young players...” and do not “...go beyond what is necessary to attain it...”.

The Rules of the Premier League and Football League provide that clubs are entitled to receive compensation for players who move between domestic league clubs who are under 24 and not under contract (provided certain conditions have been satisfied).

The compensation is either a sum agreed between two clubs or, if no agreement is reached, a sum determined by the Professional Football Compensation Committee (“PFCC”), which will hear the arguments and valuations presented by the player’s former and new clubs. The PFCC then make a decision taking into account





those factors which it is empowered to do so as set out in Regulations 3 and 4 of its Regulations (the "PFCC Regulations").

Under Regulation 3, the PFCC may consider certain **criteria**, including: the costs involved in training the player, the status of each of the clubs involved; the player's age; any fee paid by the player's former club when acquiring him; the period the player was trained for; the contractual terms offered to him by both clubs; his domestic / international playing record and the level of substantiated interest shown by other clubs in him.

Regulation 4 provides further detail on the **types of costs** to be taken into account, relating to the costs incurred by either club in operating a Football Academy/Centre of Excellence including (non-exhaustively): living accommodation, training and playing facilities, the costs of scouting, coaching, education and medical facilities as well as "...any other cost incurred by either club directly or indirectly attributable to the training and development of players...".

Therefore, when compensating a club for the loss of a player, the PFCC takes into account the costs incurred when training the player. At first glance, this would appear to be in accordance with the ECJ's rationale in *Bernard* that compensation be based on the training costs of a young player.

However, as PFCC Regulation 3 sets out, the training costs incurred are only one factor considered by the PFCC. The PFCC may also consider factors not related to the costs of training, including the status of the clubs involved, the player's ability and the contractual terms offered to him. It is questioned therefore what the ECJ would make of such criteria: contractual terms having been specifically rejected in *Bernard*.

The application of Regulations 3 and 4 often results in awards of compensation which do not appear referable to the costs of training. There have been compensation awards for 16/17 year olds trained for two or three seasons, of seven figure sums (awards are often structured on the future performance of the player in question). The question therefore is whether the English system is in conflict with EC law as set out in *Bernard*.

However it is important to note that *Bernard* dealt with a player moving **between** two EU member states (i.e. France to the UK) whereas cases determined by the PFCC involve players moving **within** a single member state (i.e. the UK). As such, there is no "movement" in the EU sense. We do not propose to address the issue of applicability of EU law here, but there is a clear factual difference between *Bernard* and cases heard by the PFCC.

In any event, it is clear that the ECJ in *Bernard* did not prescribe a formula to be followed in all cases when determining the compensation based solely on the costs of training. The ECJ stated that any compensation system must "...attain the objective of encouraging the recruitment and training of young players..." and "... not go beyond what is necessary to attain it...". It is envisaged that the governing bodies (The FA, Premier League and Football League) and the PFA, who agreed upon the current system through collective negotiation, would argue that the system does not go beyond what is necessary to encourage the recruitment and training of young players.

Emphasis may be placed by them upon the fact that the PFCC, comprised of employer and employee representatives together with a legally qualified chairman, is able to exercise its discretion and use its knowledge and experience of the game, to arrive at sensible decisions on a case by case basis.

There is however an alternative view that the discretionary element results in uncertainty of outcome. The uncertainty may also serve to discourage clubs from acquiring players under 24 and thus inhibit the movement of young players not under contract.

### **The future of compensation for young players in England.**

Whilst the decision in *Bernard* is unlikely to mean the end of the current domestic compensation system, it adds to the debate as to whether the system needs review.

It needs to be considered whether the more subjective criteria in the PFCC Regulations remain appropriate and/or whether there needs to be greater emphasis on objective criteria or even the setting of predetermined amounts of compensation (i.e. similar to both the FIFA Training Compensation system which operates for international transfers and to the system in Scotland). It will be interesting to see the debate unfold and whether there will be any consensus on changes to the current system.



# Bribery Act 2010: An opportunity for football?

**Innuendo about corruption in football is a favourite of many media organisations. Many in the game are familiar with a supposed 'scoop' being announced with massive publicity and then quietly retracted a few weeks later and buried at the foot of a page at the back of a newspaper.**

All UK businesses will soon be forced to implement anti-corruption programmes as a result of the Bribery Act 2010, which has received Royal Assent and is expected to come into force in April 2011. For the football industry this might well be an unparalleled opportunity to demonstrate 'clean hands' by showing compliance with the Act.

A warning should also be sounded as the Act is extremely broad. It was the intention of the government to capture a very wide range of activities under the Act. It is then a matter for the discretion of the public prosecutors as to whether to take action relating to such activities.

This may be of little comfort to those in the football industry. In simple terms, they may be high profile targets which have the potential to generate publicity that prosecutors can normally only dream of. There are serious penalties attached to a successful prosecution, but even if a prosecution fails the reputational damage could be significant. A well thought through compliance programme will make it harder for prosecutors to bring a case in the first place.

This article will give a brief introduction to



some key aspects of the Act and suggest some practical steps that those in football can take to prepare themselves for it coming into force.

## Scope

The Act potentially applies to virtually all those involved in the football industry in the UK and their activities both in the UK and abroad including:

- Governing Bodies such as the FA, the Premier League, the SFA, the Scottish Premier League and the Football League
- Clubs
- Event bidding organisations such as England 2018 Limited
- Agents
- Senior Officers of the above, including directors, chief executives and club secretaries.

## The Offences

There are four offences under the Act, the latter two of which are new:

1. Offering, promising or giving a bribe to another person
2. Receiving, requesting or agreeing to receive a bribe
3. Bribing a foreign public official and
4. Corporate offence of failure to prevent bribery.

The concept of a 'bribe' is very wide and covers any 'financial or other advantage'. This includes the obvious 'cash in a brown envelope' situation and 'facilitation payments'. It also covers potentially more innocuous items such as the giving or receiving of gifts or corporate hospitality, something which is common in football with match day hospitality etc.



A financial or other advantage can amount to a bribe where a reasonable person would regard giving or receiving the bribe as improper or where the advantage is given or promised as an inducement to or reward for something the reasonable person would regard as improper performance of a function or activity.

## Corporate Offence

A key area for clubs, governing bodies and football agents to consider is the new corporate offence of failing to prevent bribery. In summary, an organisation will be guilty of failing to prevent a bribe where a person associated with that organisation bribes another person with the intention of getting or keeping a business advantage for the organisation.

There does not need to be consent on the part of an organisation to the bribe, or even knowledge that it occurs. The person who committed the bribe only needs to be loosely connected with the organisation. Even without such knowledge, consent or formal association the offence of failing to prevent bribery may still have been committed.

The only defence permitted is that an organisation has in place 'adequate procedures' to prevent bribery. Unfortunately, there is no government guidance yet as to what this means. An initial consultation process on such guidance will begin in September 2010, with final government guidance expected in early 2011.

However, there are a number of things that those in the industry can do to take advantage of the opportunity offered by the Act and to protect themselves. In practice, what is an 'adequate procedure' will likely depend on the context of the particular organisation – what is adequate for a League Two club will not be adequate for a Premier League club. Some key steps that should be considered now are:

1. Reviewing risk within the 'business' – for example does a club have co-operation agreements in place or a connected academy in countries where both covert and overt bribery is a more common business practice? Are there loosely connected individuals whose activities are unclear?
2. Amending contractual documentation (including employment contracts) to show a clear commitment to action against bribery, perhaps by introducing grounds of termination in the event of bribery
3. Performing (and recording) due diligence checks on parties it proposes to do business with
4. Creating and publicising both internally and externally a Statement of Values/ Code expressly prohibiting bribery as well as (in appropriate cases) policies on matters like hospitality and gifts
5. Boards expressly taking responsibility for anti-corruption programmes and a senior officer being given responsibility for on-going oversight of the programme
6. Staff training for both existing staff and staff joining the organisation (which can be targeted to relevant employees only)
7. Ensuring any issues that arise are dealt with effectively
8. Creating and publicising avenues for staff to seek advice on bribery issues and for 'whistleblowing' and
9. Considering methods for checking on-going compliance such as audit checks or departmental self certification.



## Conclusion

The Act is intended to herald a new era of UK government action against corruption. As a high profile target, those in the football industry would be well advised to take steps to protect themselves. However, it is also an opportunity. If an organisation has a robust anti-corruption programme in place it will be a brave journalist who tries to link it with innuendo about corruption.

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