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Debating FIFA's TPO ban

ASSER International Sports Law Blog symposium

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ARTICLE

Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium

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Abstract On 1 May 2015, FIFA introduced Article 18ter in the FIFA Regulations on the Status and Transfer of Players, thereby banning third-party ownership of players' economic rights (TPO) in football. The decision to put a definitive end to the use of TPO in football is highly controversial, especially in countries where TPO is a mainstream financing mechanism for clubs such as Spain, Portugal and countries in South America. In fact, the Portuguese and Spanish football leagues launched a complaint in front of the European Commission, asking it to find the FIFA ban contrary to EU competition law. In order to debate the appropriateness of the TPO debate, the editors of the ASSER International Sports Law Blog organized its first Blog Symposium in April 2015. We received contributions from the complainant (the Spanish football league, LFP) and four renowned experts on TPO matters (Daniel Geey, Ariel Reck, Rafaelle Poli and Christian Duve). The contributions focused on different aspects of the functioning of TPO and on the impact and consequences of the ban.

Keywords TPO · TPE · FIFA · European competition law

1 FIFA's TPO ban: introduction

Oskar van Maren and Antoine Duval

On 1 May 2015, FIFA introduced Article 18ter in the FIFA Regulations on the Status and Transfer of Players, thereby banning third-party ownership of players'

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economic rights (TPO) in football.[1] The decision to put a definitive end to the use of TPO in football is highly controversial, especially in countries where TPO is a mainstream financing mechanism for clubs such as Spain, Portugal and countries in South America. In fact, the Portuguese and Spanish football leagues launched a complaint in front of the European Commission, asking it to find the FIFA ban contrary to EU competition law.[2]

In order to debate the appropriateness of the TPO debate, the editors of the ASSER International Sports Law Blog organised its first Blog Symposium in April 2015. We received contributions from the complainant (the Spanish football league, LFP) and four renowned experts on TPO matters (Daniel Geey, Ariel Reck, Rafaelle Poli and Christian Duve). The contributions focused on different aspects of the functioning of TPO and on the impact and consequences of the ban.

1.1 What is TPO?

The use of the notion of TPO is often criticized because it would misrepresent the situation it purposes to qualify. Indeed, no third-party owns a player, but only a share of the "economic right" attached to the player. This is why, as you will see in the different contributions, some of the authors refused to use the term and have opted for alternative concepts, such as TPE (third-party entitlements).

Beyond this semantic debate, various types of contractual situations are included under the umbrella term TPO. What is common to all cases is that a company or an individual provides a football club or a player with money in return for being entitled to a share of a player's future transfer value. Thus, TPO is enshrined in a separate private law contract between a third-party and a club or a player. The plurality of TPO situations derives from this contractual basis. The parties are free under national private law to creatively draft those contracts as they see fit, each one of them being a specific type of TPO in itself.

The main aim of the practice is to finance clubs. Often TPO is used to externalize the costs of recruiting a player, sometimes it is used to finance the general functioning of a club. However, the use of TPO is always intimately connected to the drive of professional clubs to diversify their funding sources in order to leverage their competitiveness in national and international competitions. Nowadays, a club like Atlético Madrid would probably not have been able to reach the final of the Champions League or win La Liga without having widespread recourse to it.

1.2 What are the problems with TPO?

TPO is first and foremost seen as an intrusion of a third-party in the life of a football club and a player with the potential for an illegitimate influence on the management of the team and the player's career. The many conflicts of interest that might arise in the shadow of multiple, sometimes contradictory, investments are particularly feared. TPO is also seen as a dubious financing technique used to circumvent the new UEFA Financial Fair Play regulations and to prop up clubs that are chronically in financial troubles. Finally, there is a moral dimension. For example, UEFA president Michel Platini likened TPO to a type of modern "slavery".[3] In short, should it be acceptable for someone to own a share of an economic right personally attached to a player? Can a player be forced-sold on the basis of a TPO agreement? All these issues are discussed extensively in this symposium. They are central to the evaluation of the ban's compatibility with EU competition law.

1.3 Regulating TPO or banning it? That is the question!

TPO has been banned for some time in England, France and Poland, while it was authorized in the rest of the world. The English FA, profoundly upset by the Carlos Tévez affair, decided to ban the practice as early as 2008. In other countries, particularly Spain, Portugal and South American nations, TPO has been part of the "football culture". For example, it is estimated that in Brazil's top division 90 % of the players were subjected to a TPO agreement at the moment FIFA decided to ban the practice.[4] In these

[1] FIFA Regulations on the Status and Transfer of Players (2015), Article 18ter:

1. "*No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*

2. *The interdiction as per paragraph 1 comes into force on 1 May 2015.*

3. *Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.*

4. *The validity of any agreement covered by paragraph 1 signed between 1 January 2015 and 30 April 2015 may not have a contractual duration of more than 1 year beyond the effective date.*

5. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload *them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.*

6. *The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article.*"

[2] La Liga (2015).

[3] Reuters (2015).

[4] Majithia (2014).

countries TPO is seen as a necessity for national football clubs—not only to compete with clubs in richer countries, but also for professional football to be financially viable. It was no surprise that the leagues and clubs of the above-mentioned countries were against a blanket ban of TPO and would rather see it being regulated.[5] They consistently expressed their views during the FIFA Congress in June 2014 and the working groups created by FIFA in September 2014 with the aim of tackling the issue.[6] Nonetheless, on 26 September the FIFA executive committee took the decision to ban third-party ownership of players' economic rights (TPO) with a short transitional period.[7] Following this announcement, the FIFA circular fleshing out the legal details of the ban was published on 22 December.[8] Article 18bis of the Regulations on the Status and Transfers of Players were amended and, finally, the new Article 18ter came into force on 1 May 2015. This total ban raises many practical and legal questions. What is to become of the already signed TPO agreements? Will the ban be fully enforced? Or, will creative schemes arise to circumvent it? Was there a less restricting alternative to attain its objective? Etc.

The following contributions attempt to answer all of these questions and more. The kick-off is made with a critical note by the Spanish Football League (*La Liga*), which would much rather see a regulation of the practice rather than a complete ban. Subsequently Raffael Poli shares the findings of yearlong research by the CIES Football Observatory on what he prefers to call third-party entitlements. This is followed by Ariel Reck's contribution, which outlines the situation in South America and the consequences the ban will have for the football-loving continent. Then, the English football law expert Daniel Geey provides an overview of the role of TPO in the Premier League and analyses its decision to ban TPO before anyone else in 2008. Last but not least, Prof. Dr. Christian Duve and Florian Loibl defend the appropriateness of the TPO ban.

2 FIFA must regulate TPO, not ban it

La Liga

2.1 Introduction

The Spanish Football League (*La Liga*) has argued for months that the funding of clubs through the conveyance of part of players' economic rights (TPO) is a useful practice for clubs. However, it also recognized that the practice must be strictly regulated. In July 2014, *La Liga* approved a provisional regulation that was sent to many of the relevant stakeholders, including FIFA's Legal Affairs Department.

Although initially we felt that FIFA would focus on strict regulation, FIFA finally tilted the balance towards the idea of an absolute ban. FIFA even put an end to the working parties it had put in place to regulate this issue.[9] After verbal and written notices, *La Liga* has filed a complaint with the Competition Authorities of the European Union, since the prohibition of TPO violates the EU competition rules.[10] In our view, apart from breaching the Treaty on the Functioning of the European Union, it also violates the rules on competition in place in other countries, such as Argentina and Brazil.

La Liga has raised the following arguments to show the disproportionality of the absolute prohibition of TPO:

- FIFA now prohibits undue third-party influence on a team and on players' agents' economic rights.
- The UEFA now regulates the financial aspects of TPO in its Financial Fair Play Regulations.
- Only three professional leagues worldwide have banned TPO.
- The two independent studies commissioned by FIFA do not support the prohibition of TPO.
- The General Assembly of FIFA concluded that TPO is a complex issue that must continue to be studied in detail.
- The FIFA Working Party on TPO held only one meeting before it was banned and adapted no specific recommendations.
- The FIFA Executive Committee agreed to ban TPO with no supporting report or internal proposal.
- FIFA has not consulted governments, authorities or, in particular, the European Commission before adopting the ban.
- The arguments used to ban TPO reveal the lack of proportionality of the measure.
- Independent experts have denounced the lack of proportionality of a TPO ban.

2.2 The lack of proportionality of the measure

FIFA's main argument is that TPO threatens the integrity of sporting competitions. In *La Liga's* view, both the integrity of the competition and, where appropriate, footballers'

[5] Villas-Boas Pires (2013).

[6] FIFA (2014b, c).

[7] FIFA (2014d).

[8] FIFA (2014f).

[9] FIFA (2014c).

[10] La Liga (2015).

independence could be protected by measures that do not require the full prohibition of TPO. For example, it could limit third-party economic rights to a minority percentage (>50 %) together with other measures, such as limiting the number of players from the same club in which a third party has minority economic rights.[11] Indeed, in its ENIC/UEFA decision[12] the European Commission took into account that the UEFA rule only prohibits the control of multiple clubs, but not the acquisition of minority stakes in them ("*(T)he UEFA rule does not limit the freedom of action of investors that have shares in clubs below the level that gives them control over the club, because clubs with such ownership structure remain free to play in the same UEFA competition*").

Consideration must also be given to the fact that the risk to the integrity of competitions is much greater when two teams controlled by the same investor play against each other compared to when a certain number of players over whom a third party holds economic rights play each other. In the former case, the owner or investor of the clubs may want a team to lose if they can avoid relegation, win the championship or qualify for an international competition. In the latter case, a third-party investor's interest is for players to play as well as possible to increase their economic value, regardless of the result of the match. In fact, there is an increased risk of conflict of interest if a player has been loaned by one club to another and has to play against the club that holds the economic rights. It should be highlighted that neither FIFA nor UEFA have taken steps to regulate loans of players between clubs, despite the fact that loans account for a significant part of player transfer[13] and that independent experts recommend more restrictive regulations for loans.[14] Similarly, we fail to understand why FIFA prohibits TPO when it is considering deregulating the profession of player agent and accepts that only a few agents represent and share economic interests with star football players.[15]

FIFA further argues that banning TPO will avoid speculation and inflation of transfer costs, preserve economic flows within football clubs, protect players' human dignity, combat economic crime, etc. *La Liga* is of the opinion that these arguments violate even further the principle of proportionality and are of questionable legitimacy. Therefore, they should be rejected from the outset.

2.3 Political aspects

As the Association of Spanish Football Clubs, we first and foremost defend a regulation of TPO. Banning it would mean denying a fundamental tool for our clubs' funding and competitiveness.

Based on the current socio-economic context of the football sector and its practical reality, it seems particularly inappropriate to reject a source of external funding used in every sector of the economy and which, when appropriately regulated, could create greater legal certainty for all concerned.

More specifically, from a political point of view, it is essential to design the regulation of TPO so that *La Liga* and its clubs maintain or even increase their current competitiveness.

Indeed, there is no doubt about the benefits provided by TPO/TPI since many clubs are in the position to sign players who they otherwise could not afford. Moreover, clubs also profit from the ability to anticipate revenue by selling the rights of the squad players in their team. Thus, in terms of the competitive balance, the use of TPO enables

[11] See, for example, Villas-Boas Pires (2013).

[12] European Commission (2002b).

[13] KEA-CDES (2013), page 193: "*These operations involve a large number of transfers in Europe – 21 % i.e. 1333 in 2011, according to TMS*".

[14] *Ibid,* pages 253–254*: "Proposal 4:Regulate the loan transfer.*

Abusive loan transfer practices contribute to competitive imbalance and unfairness of the competitions. We suggest regulation to limit or prevent such abusive practices. This could encompass:

- *Limiting the number of loans by the lending clubs*
- *Limiting to xx the number of loans to the beneficiary clubs*
- *Regulating loan contracts between clubs which pose a risk to the integrity of competition (for instance: a contractual clause that prevents a player from participating in a certain competition or a given match). Main stakeholders: International federations, national federations and leagues."*

[15] *Ibid*, pages 128–129: "*The second feature of the upper primary segment is the concentration of superstars in the hands of a few agents (individual or agencies). It is a question of knowing what the actual market power of these agents is and what can be done to regulate their actions. For example, let us note that Gestifute, the Portuguese agency led by Jorge Mendes, has in its portfolio José Mourinho, Cristiano Ronaldo, Nani, Anderson, Pepe, Ricardo Carvalho, Raul Meireles and Miguel Veloso. This agency has generated €369.85 m in transfer rights (Poli and Rossi 2002). The role of the major sporting agents should be better known, in order to assess whether they are responsible for an increase in the dualisation of the labour market and, therefore, for a deterioration in competitive balance. Small championships can no longer hang on to their stars and the major championships are competing to attract them, thus contributing to the inflation of speculative bubbles regarding the salaries and transfer fees of these stars.*

In the lower primary market, as in the higher primary market, the role of agents is decisive in transactions and we once more find the same recommendations:

An analysis of the concentration of wage

- *bills.*
- *An analysis of the concentration of transactions at the agent level".*

small/medium-sized clubs to maintain their competitiveness against their "bigger" rivals. For example, winning the Spanish league and reaching the Champions League final in the 2013/2014 season is an achievement Atlético Madrid would probably not have reached without having recourse to TPO. Furthermore, it makes it possible to increase investment in sports facilities for better training and the development of young players.

The above shows that the private investor also "shares" a risk with the club: when investing in a specific player, the investor also assumes the negative results of the potential investment, which is then shared between the club and the investor, greatly reducing the negative impact on the accounts of the club in question.

And finally, taking into account the economic and financial difficulties currently affecting football clubs, it is necessary to support appropriate financing mechanisms in football to foster investment in the sector, since, at present, most clubs would not be able to survive on their current sources of income.

Should the absolute prohibition of TPO/TPI be maintained, as intended by FIFA and UEFA, it will be very difficult to keep the constellation of star players in our affiliated clubs. They will most certainly leave their respective clubs for other competitions and clubs that have greater financial resources. It is clear that a large number of Spanish teams will see their competitiveness reduced and, at the same time, the competitiveness of and interest in our competition will plummet.

In addition, proper regulation of this issue would avoid the risk of compromising the integrity of competitions, since it would provide greater legal certainty for all the involved parties. Instead, the absolute ban imposed by FIFA will lead to the creation of a "black market" that would be out of regulatory control and would, therefore, endanger the very integrity of the competitions. Thus, it is absolutely necessary to regulate the matter appropriately.

2.4 Legal aspects

In line with the aforementioned political aspects, from a strictly legal perspective, regulating TPO is particularly advisable since:

(a) It is common practice in the football sector and it is a source of funding that promotes the competitiveness of clubs. Moreover, it stimulates competition and allows clubs to attract and retain top-level players.

In recent years, the number of investments in football players has increased. These investments were sought by Spanish clubs in order to finance the registration of the players' federative rights. Furthermore, the investor's remuneration is (wholly or partially) calculated depending on the positive economic results that may be obtained through future transfers of the player's federative rights by the club that received the investment money.

The *La Liga* believes that investments of this nature can constitute a useful alternative source of financing for clubs and investment for funds, especially now that the Spanish financial sector and the Spanish professional football sector are undergoing a profound financial crisis. Accordingly, these investments may foster the competitiveness of Spanish professional football clubs in Spain and outside. Indeed, the signing and retention of players' federative rights cannot be secured without third-party investments.

(b) TPO requires an adequate regulatory framework to ensure legal certainty and promote the integrity of professional football competitions.

Based on the widespread use of TPO in practice, *La Liga* considers it appropriate to introduce certain rules and provide legal certainty to both the clubs as well as the investors. This would require imposing reasonable limitations and duties, and providing for the transparency of the TPO transactions, to protect good sportsmanship and the integrity of competitions.

La Liga's proposal for a regulatory framework is based on the following basic principle:

Compliance with FIFA's rules on the influence of third parties in clubs, according to which no club may enter into a contract whereby any party to said contract or third party may assume a position that could influence labour issues and transfers in relation to the independence, policies or actions taken by the teams of any club.

Based on this principle, the following regulatory measures are suggested:

- prohibition of certain transactions based on the player's age;
- maximum percentage of participation in the "economic rights";
- quantitative limitations on the maximum number of players per club;
- maximum remuneration for the investor;
- prohibition of certain clauses that may limit the independence and autonomy of the clubs; and
- prohibition of transactions depending on the investor's particular status or business (or participation in the same) such as shareholders, directors and managers of the clubs.

This regulatory framework would provide transparency through duties of information and registration of the investors (including full identification of the real owners) and the financial transactions themselves.

2.5 Report by the Spanish Competition Authority on the prohibition of TPO

On 2 July 2105, the Spanish Competition Authority, *Comisión Nacional de los Mercados y la Competencia*, (CNMC) issued a report on the prohibition of third party ownership of economic rights of football players.[16] This report consolidates *La Liga's* position, since the CNMC determined that the prohibition of TPO "violates basic legal principles covered by the highest institutions on a national level and in the European Union".[17] The report further held that "the prohibition of TPO is damaging for the football industry, both for the competition itself and for its clubs and professionals. Lower remuneration and generation of talent shall bring less competitiveness and quality to the industry which, ultimately, shall impact the wellbeing of consumers".[18]

2.6 Conclusion

There is no doubt that the use of TPO/TPI needs to be regulated in Spanish professional football. However, it is also necessary to acknowledge that the full prohibition of TPO by FIFA will only trigger a search for "creative" alternatives to fulfil the same purpose, using fraud and/or other contractual fictions. Furthermore, the prohibition of TPO will be very difficult to enforce and it will generate a great deal of conflicts, which is obviously not a desirable outcome. This is also without prejudice to the considerable loss of competitiveness and footballing talent for our clubs and our competitions.

Thus, it is necessary to devise an alternative approach to the issue by means of a specific regulation. Indeed, we consider that third-party investment in football is a legitimate financing vehicle for clubs, based on risk-sharing and productive investments through private funds. However, there are also obvious threats that need to be tackled. Therefore, in the view of *La Liga*, it is necessary to establish a sustainable, secure and transparent regulatory system that encourages sound investment in the sector and provides for a better control of the investors.

The benefits to be gained from regulating TPO/TPI are more than evident and would be shared by all the stakeholders that make up the 'football family'. We believe that an adequate regulation in this area would pave the way for a secure, reliable and transparent system, allowing the 'football family' to safely enjoy the benefits TPO can provide.

[16] CNMC (2015).

[17] *Ibid*, p. 7.

[18] *Ibid*, p. 13.

3 Third-party entitlement to shares of transfer fees: problems and solutions

Raffaele Poli

3.1 Introduction

This paper reviews the main challenges to the smooth development of football when considering the repercussions of third party entitlement to shares of transfer fees (Sects. 3.2, 3.3, 3.4, 3.5), highlights the main obstacles hindering the enforcement of a total ban (Sect. 3.6) and formulates a non-partisan proposal to reform the transfer system as a whole (Sect. 3.7).

Third parties define all other parties than the teams transferring the registration of a player: companies, holdings, investments funds, agents, club shareholders and employees, footballers and relatives, other football clubs, football academies, etc.

In the interests of accuracy and avoidance of doubt, the common terms of third-party ownership and players' economic rights are not used in this paper. Literally speaking, the business area considered is indeed based on options rather than ownership.

Moreover, the term ownership suggests that third-party investors "own" players as for a master with respect to a slave. TPE arrangements also raise crucial issues in terms of power between third-party investors and players. However, the stakes are hardly comparable with those in the master/slave relationship. It is thus more accurate to refer to entitlement instead of ownership.

With regard to economic rights, they are nothing more than transfer compensation as stipulated by FIFA regulations. The notion of economic rights is thus also misleading as it suggests the existence of specific rights beyond those deriving from regulations set up by football authorities. The unreflective use of this concept only adds confusion to the debate.

The common goal of actors participating in the business of third-party entitlement (hereafter TPE) is to make a financial profit through the transfer of players, or, for individuals involved in the financing of clubs, to be able to secure their investments.

3.2 TPE and the sustainability of football clubs

The growth of TPE deals raises crucial issues for the sustainable development of clubs. This is especially true for teams that view regular investment from third parties as a key income source in their business model.

While TPE investments might initially be welcomed by clubs facing economic problems, over time, such

agreements have the potential to provoke a loss of control over transfer operations and durably compromise the financial situation of teams.

Within the context of economic polarisation,[19] TPE deals do not have the power to solve financial issues arising from an unfavourable position in the market. On the contrary, a difficult situation from an economic standpoint reduces considerably the bargaining power of clubs with respect to third parties.

Third-party investors promoting TPE arrangements are thus often able to acquire a favourable position within a club to minimise their risks and maximise profits over the longer term. This reinforces the dependency of clubs vis-à-vis third parties and affects their financial stability.

The TPE business model develops in parallel with the progressive takeover of clubs by groups or individuals motivated by the possibility to speculate on the transfer market. The tendency to consider teams as a launching-pad to generate profits through the transfer of players increases.

Club employees in charge of transfers also contribute to this process by using their strategic position for personal profit. Within this framework, economic stakes tend to overcome sporting objectives. This runs in the vast majority of cases contrary to the long-standing interests of clubs.

Indeed, the greed of third-party investors, the high mobility of players and the chronic financial instability of clubs engaging in TPE practices tend to have a negative impact on results. Several studies by the CIES Football Observatory have provided evidence that over-activity in the transfer market is counterproductive in the long run.[20]

In turn, poor performance levels have a negative effect on the ability to generate revenues in the transfer market and can lead to bankruptcies. It is indeed harder to find potential buyers interested in taking over a club when the latter is not entitled to potential transfer fees for players under contract.

3.3 TPE and the development of the game

The logic of short-term profit maximisation underlying TPE practices is often not appropriate for the sporting development of players. This is above all valid for young talents transferred abroad before the acquisition of a solid experience in their home country.

The numerous transfers that many footballers at the heart of the TPE business model will be confronted with to develop or restart their career only add to the pressure which makes fulfilling their potential more difficult. In many cases, this aspect is not sufficiently taken into account by third-party investors primarily attracted by the lure of money.

The monetisation of players' mobility within the framework of the TPE business model tends thus to have a negative effect not only for footballers, but also on football in general. Short-termism and speculation often run contrary to the personal development of players and entail greater risks of breaking careers.

Furthermore, there are serious concerns with regard to influence and bias in player selection. Indeed, the speculative nature of TPE and vested interests between the various actors involved promote favouritism.

High risks of favouritisms and insider trading also exist with regard to national team selection both at adult and youth level. Indeed, international caps can significantly increase the market value of a player and guarantee higher profits.

In addition, as the ability to produce high-quality matches is strongly linked to team cohesion, the increase in player turnover within the framework of the development of the TPE business model is damaging to football as a spectacle.

While some well-connected clubs are able to take advantage of their privileged access to the best talent by means of TPE deals, this always takes place to the detriment of other teams within the context of a zero-sum game.

Consequently, the TPE business model prevents leagues from increasing the competitive balance between clubs and the overall performance of the league. The same holds true at international level for football as a whole.

3.4 TPE and the transfer system

An additional concern with regard to the TPE business model relates to two founding principles underlying the transfer system of football players as agreed in 2001 by the EU, FIFA, and UEFA: contractual stability and the promotion of training.[21]

Contrary to the principle of contractual stability, the TPE business model promotes the use of the transfer system for the purpose of financial speculation. Within this framework, the trend of transferring players before the end of their contract increases.

The speculative nature of the TPE business model also has a negative impact on the promotion of training. Firstly, TPE deals are concluded without the payment of training indemnities and solidarity contributions as stipulated in FIFA regulations. Secondly, footballers having already been the subject of investment tend to be favoured over players who are locally trained.

[19] UEFA (2012).

[20] Poli et al. (2015a).

[21] European Commission (2002a).

With this in mind, it is not surprising to observe that the number of players transferred by top division clubs in 31 UEFA member associations has reached an all-time high in 2014/15. In parallel, a record low was recorded in the percentage of club-trained footballers.[22] In the long term, these developments weaken clubs both sportingly and economically.

In addition, the TPE business model amplifies the conflicts of interest between intermediaries, fund or investment company managers and club shareholders or employees in charge of transfers. The TPE arrangements between these actors lead to the institutionalisation of conflicts of interest as the modus operandi of the transfer market.

In parallel, a process of "cartelisation" based on privileged relations develops. Established intermediaries play a crucial role in this process. The direct involvement of the most influential agents in the TPE business sphere reinforces their dominant position.[23] This further limits the competitiveness of the player representation market and the transfer market in general.

As a consequence, a few investment funds and companies collaborate on a regular basis with a close-knit group of intermediaries holding strong ties with team shareholders and managers. The key actors in these dominant networks are thus more than ever able to exercise a lasting control over more footballers and clubs.[24]

This gives them even more leverage over actors who are not part of their network. As in all economic sectors, enjoying an oligopolistic position is indeed particularly useful. Specifically in football, this drives up transfer costs for players controlled, generates ever-greater profits and consolidates the control on the market.

In addition, when TPE investors want to maintain a percentage on future transfers with the aim of maximising profits, clubs from national associations where such practices are forbidden (i.e. England) have much less bargaining power. This also leads to rising recruitment costs. From this perspective, the TPE business model is a source of inequalities between countries.

A further negative consequence of the development of the TPE business model is the creation of parallel transfer markets which are, for the most part, outside the scope and control of the football authorities (FIFA, Confederations and national associations), as well as the Court of Arbitration for Sport (CAS).

Contrary to club officials, third-party investors do not have to respect the normal transfer windows. This gives third parties a competitive advantage over clubs. Moreover, as already mentioned, TPE agreements do not provide for the payment of solidarity or training contributions.

By sidestepping sporting regulations, the spread of the TPE business model undermines the authority of football governing bodies and the CAS. This jeopardises the regulatory mechanisms agreed with public authorities to protect the interests of clubs, players and the agents wishing to operate in compliance with the existing legal framework.

3.5 TPE and the rights of workers

By widening the number and variety of actors entitled to shares in transfer fees, TPE practices can restrict the freedom of movement of players in several ways. This situation raises important issues with regard to workers' rights.

The existence of TPE deals generally makes negotiations more complicated. Transfers can collapse even though the clubs and the player concerned had reached an agreement. Moreover, as mentioned above, the multiplication of actors involved in transactions is likely to hinder the free movement of players by increasing transfer costs to the satisfaction of all parties involved.

From an ethical point of view, the fact that many players are kept in the dark regarding arrangements for the share of potential fees for their transfer is also problematic. Insofar as these agreements often have an impact on the rest of their career, players should at least be informed as to the identity of the actors involved, as well as to the terms of the deals.

Morally speaking, the written consent of players should also be compulsory to validate the contractual details agreed between the different parties involved. This is currently not the case. As a matter of fact, many TPE arrangements run contrary to the fundamental right of players to decide where they want to play.

TPE practices thus contribute to reducing the decision-making powers of footballers to the profit of third parties. In the least favourable scenarios, players find themselves in a situation of dependence towards third-party investors and intermediaries with little or no room to manoeuvre.

Young players from poor family backgrounds with little knowledge on the functioning of the transfer system are particularly vulnerable with respect to arrangements promoted within the context of the TPE business model.

This was notably raised by Marcelo Estigarribia in a recent interview published by an Italian magazine.[25] The Paraguayan footballer complained about the numerous transfers he had to face up (six over the last 7 years) after that an investment company acquired the control of his career through TPE arrangements.

[22] CIES Football Observatory (2015).

[23] Poli and Rossi (2002).

[24] Russo (2014).

[25] Salvio (2014) p. 34–38.

Of course, successful footballers can also take advantage of the networks set up by dominant actors through TPE arrangements. However, the opposite holds often true for the majority of less successful players who would have needed a more stable context to develop their skills or would have liked to have a greater control on their career path.

3.6 Comments on the total ban

The practical functioning of the transfer market of football players and the development of the TPE business model threaten the integrity of football. The decision of football governing bodies to tackle the issue is thus of crucial importance. However, focusing only on TPE issues is arguably not the best possible approach.

Within the existing framework of economic polarisation both between countries and within national associations, a total ban, as introduced by FIFA, is hardly enforceable. The clubs most heavily involved in TPE business practices are unlikely to respect any such ban for two main reasons.

Firstly, from an economic point of view, for the time being, the vast majority of clubs around the world face recurrent financial problems. The concentration of wealth in a handful of leagues and clubs on a worldwide scale pushes many teams to take financial risks in the hope of staying competitive or just simply surviving.

From a short-term perspective, TPE arrangements are often considered as a viable solution to reach these goals. Without a better redistribution of income, there is no incentive for club officials to respect the ban. TPE agreements will increasingly be managed internally through shareholders' agreements and private deals.

Moreover, a total ban allows third parties to impose even more drastic conditions when lending capital in exchange for the estimated value of squad members and other assets. It also prevents clubs from securing legal protection against possible abuses. This will put under even more stress the independence or very existence of numerous clubs.

Any ban will also be difficult to enforce from a sociological point of view. Club officials and shareholders tend indeed to be directly involved in TPE practices. Consequently, their willingness to respect the ban will be limited. New solutions are already being conceived to circumvent the ban.

This will oblige governing bodies to impose stricter controls, which in turn will be difficult to implement. This has already been demonstrated by the negative reaction the ban decision had in the media and the court cases initiated by several football stakeholders.

In addition, a total ban does not make any difference between the different forms of TPE arrangements. From the standpoint of the objectives pursued by the transfer system, for example, the negotiation of shares on a future fee by a club that trained the player transferred cannot be put on the same level that the purely speculative approach of investment funds or companies.

The same holds true with respect to players negotiating a percentage on the fee to be eventually paid for their own transfer or to club shareholders, executives or wealthy fans entitled to shares on future transfer compensations in exchange for their structural investment in clubs.

From this perspective, instead of banning all TPE practices, regulations should be introduced to limit the worst pitfalls of the business and reduce its profitability for third parties who do not act in the long-standing interests of clubs and of football in general.

3.7 Plea for a more holistic approach

When tackling the TPE issue from the standpoint of regulatory mechanisms designed to prevent the worst problems which can occur in this area, a more holistic approach is needed. This will involve reforming the existing transfer system and making it better suited to fulfil the purpose for which it was first implemented and has since been adapted.

An efficient measure would be to entitle each team in which a player has passed through to a compensation for each fee paying transfer taking place over the course of the player's professional career on a pro rata basis to the number of official matches played at the club.

For example, if footballer X begins as a professional in club X and plays 75 matches there before being transferred to club Y, in the event of a paying fee transfer to club Z after 25 official games played for club Y, club X is entitled to 75 % of the transfer fee. And this even though club Y already paid a fee to sign the player from club X.

This reform would re-focus the transfer system back on the objectives for which it was conceived, notably with regard to contractual stability and the promotion of training. It would also have a positive impact in terms of income redistribution, a key issue in today's football.[26]

At contractual stability level, the reform would ensure that clubs are rewarded with a substantial compensation at a later stage even if the player leaves at the end of his contract. Consequently, teams could more easily afford keeping the best talents for a longer period. This would also help tame salary inflation.

With regard to the promotion of training, such a reform would make sustainable investments in clubs or youth academies for the training of the next generation of players more interesting from a financial standpoint.

[26] Poli et al. (2015b).

Training clubs would indeed be better compensated economically in that they would receive substantial money also in the event of a second, third or further paying fee transfer, which are generally the most profitable.

In the meantime, this would reduce the attractiveness of speculating on specific talents to obtain short-term profits with no real contribution to the smooth development of football, as it is the case with the current TPE business model.

Of course, this reform is no golden bullet. It would not solve all the problems related to corporate governance issues at club level. It would also not be able to tackle all the concerns arising from the practical functioning of the transfer market of football players as highlighted above.

However, it would have the merit to re-direct the transfer system towards the key principles underlying its creation and existence. It would also allow football governing bodies to gain better control over its operation.

Beyond the TPE issue, all stakeholders concerned about the integrity of football should have an interest in updating the transfer system to protect the smooth development of the game. The proposed reform moves in that direction.

4 The impact of the TPO ban on South American football

Ariel N. Reck

4.1 Introduction

Before discussing the impact of the TPO ban, it is important to highlight that the purposes of TPO in South America are somehow different than in Europe. Here "economic rights" (that's how we call it) are basically assigned in four different moments and/or situations:

First, when a youth player is first registered for the club at amateur level. This is a recognition to the person or entity that brings the player to the club and is usually between 10 and 20 % of a future transfer. This practice widens the club's scouting net and attracts promising young players from the small clubs to the big ones. The percentage can be assigned to the former club of the player, a third person who brings the player (a scout/intermediary) or to the player's family if he comes as a free or unregistered player. In these cases the position of the beneficiary is really passive and the assigned rights are fragile and dependent of many factors (the player is not even a professional yet).

A second stage in which rights are assigned to third parties is when the club needs money to cover other obligations, unrelated to that particular player. Every club has one or more starlets and investors are willing to take the risk and acquire a percentage of the player's economic rights. For the club, the sale of portions of the economic rights helps to balance its books and provides an alternative source of credit. In this case there's no "standard" percentage, it depends on the money the investor is willing to pay, the potential value of the player and the needs of the club. The influence, meaning the ability to "force" a transfer of the player, of the third party is also subject to each particular agreement, with a direct correlation between percentage owned and influence.[27]

The third situation is when a club wants to hire a player, but does not have the financial resources to do it. The rights of such a player might be owned by a company or a company might be willing to acquire the player's rights from the former club and bring him to the new club. Consequently, the new club is used as showcase only. Under this situation, the player is usually hired for a single season with an option for the purchase of a percentage in favor of the new club, triggering—if executed—a long-term employment contract. Sometimes, even if the option is not executed the TP owner provides the club a small percentage (around 10 %) as "showcase rights" in case the player is immediately hired with a long-term contract by another club after the termination of his one season contract. Under these circumstances, the influence of the TP owner is clearly strong, irrespective of how the relevant documents are drafted.

Clubs could also turn to selling economic rights to third parties in order to cancel debts or to seduce a player for a contractual renewal. A club accepts to assign a share to the player against previous salary debts or in order to convince him to renew the contract without a major salary raise. If the club cannot pay the amounts wanted by the player to renew, it offers to assign the player a percentage of his own transfer. In most South American countries, the law or a collective bargaining agreement grants players a minimum percentage of the proceeds of his own transfer (between 10 and 20 % depending the country),[28] but this additional

[27] Reck (2014a, b).

[28] Brazil, Peru and Bolivia are exceptions to this rule; no such right is established in their regulations. In Argentina the minimum percentage is 15 % according to art. 8 of the CBA 557/2009 (http://infoleg.mecon.gov.ar/infolegInternet/anexos/155000-159999/158453/norma.htm), in Paraguay 20 % for international transfers, art. 12 law 5322 from 29 October 2014 (http://www.escritosdederecho.com/2014/11/ley-5322-del-29-10-2014-estatuto-del-futbolista-profesional.html), in Uruguay 20 %, art. 34 of the Professional Footballers Statute (http://www.mutual.com.uy/index.php?option=com_content&view=article&id=49&Itemid=83) in Ecuador 15 %, Chile 10 % law 20.178 (http://www.sifup.cl/wp-content/uploads/2014/12/Ley-20178-Estatuto-Laboral-del-Futbolista-Profesional-Chileno.pdf), and Colombia 8 % art. 14 Colombian Players Status Regulations (http://fcf.com.co/index.php/la-federacion-inferior/normatividad-y-reglamento/158-estatuto-del-jugador).

assignment is heavily used to satisfy a player's demands at a renewal of the employment contract.

With so many purposes, and taking into account the financial needs of clubs, the lack of alternative sources of financing and the number of South American players transferred each year, it is obvious that the use of TPO in South America is definitively widespread. Therefore, the impact of the ban will be certainly important, especially in the first years when clubs have not yet found alternative forms of financing.

4.2 The impact of the FIFA ban

The situation is aggravated by the short transitional period established by FIFA. While previous statements of FIFA officials suggested a period of 3–4 seasons,[29] the FIFA Circular letter 1264 reduced it to just 4 months.

It is hard to predict the effectiveness of the prohibition. The current scenario shows many parties looking for forms or mechanisms to circumvent the prohibition, while others are trying to challenge it before the courts. If we consider the experience of art. 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) (an article included in the FIFA rules right after the Tévez affair as an attempt to protect the independence of clubs in its transfers decisions limiting the power to force a transfer, third parties usually had in TPO agreements), the forecast for the effectiveness of art. 18ter is not good. But, as we will show, in the case of art. 18ter there's a clear new impulse and moreover, UEFA stands strongly behind the prohibition. Therefore, in my opinion, we can expect a different outcome. I think the ban will be especially effective in cases of players involved in transfers from South America to the European leagues. Transfers to Portugal, Spain or Greece (countries that relied on TPO in the recent past) will be heavily scrutinized. Nonetheless, it is unclear whether at domestic level, especially in South America, the practice will be banned with similar efficiency or if it will continue secretly with limited or no control by the national associations. Some federations already implemented their own form of TPO ban (even when art. 18ter RSTP is mandatory at national level). Brazil was one of the pioneers[30] and in Argentina, the fiscal authorities, passed a regulation banning TPO agreements.[31]

As to the ways to try to circumvent the TPO ban, I think we will see a raise in the use of "bridge transfers", which is basically the registration of a player in a club just to cover the TPO with a federative "shell". With this maneuver, the TP owner artificially enjoys all the benefits of being a club, like retaining a percentage of the player's future transfer or controlling the player's career by signing a long-term contract with a huge buyout clause loaning the player to different clubs each year.[32] According to the FIFA regulations any club that had ever registered the player is not a "third party" (see definition 14[33]). There is no further requirement, no "sporting interest" in the registration or playing time, the simple act of registration allows a club to have a share of the player's future transfers. To this regard, while it is true that FIFA already sanctioned clubs for "bridge transfers",[34] it was only an isolated case (still pending at CAS) and we can see examples of patent "bridge transfers" in every transfer window and in the top-5 leagues, not just in minor competitions.

Another way to deceive TPO is to assign a share to the player and a further (hidden) assignment from the player to a third party. At this point, a big question arises: is the player a third party according to the FIFA regulations? Can a club assign a percentage of the player's future transfers to the player himself?

As said, the opportunity for a player to profit from his own transfer is a labor right in many South American countries. While South American employment laws, statutes and/or CBAs tend to fix a minimum percentage of the transfer fee for the player, there is no cap and in theory a player can receive up to 100 % of the transfer price.

The FIFA regulations only exclude the two clubs involved in a transfer and the previous clubs where the player was registered from being a third party. Hence, in principle, the player seems to be a "third party" too.

But art. 18ter provides that "*no club or player shall enter into an agreement with a third party*", based on the wording of this provision it is clear that a player should not be considered a "third party". Moreover, the player is a necessary party in every transfer agreement and he is also subject to sanctions if he violates the aforementioned FIFA prohibition on TPO according to paragraph 6 of art. 18ter.

In addition, the fact that in many South American countries the player's entitlement to a share of his own transfer is a labor right, a systematic interpretation of art. 18ter makes it plausible to sustain the validity of the assignment of a percentage of the transfer fee to the player. In that regard, it is important to recall that FIFA's prohibition has in principle effect only at federative level. This

[29] FIFA (2014e).

[30] Warshaw (2015).

[31] General Resolution 3740/2015 (http://eco-nomicas.com.ar/7183-rg-3740-afip-ganancias-transferencia-de-jugadores).

[32] Reck (2014a, b).

[33] FIFA, 'Regulations on the Status and Transfer of Players' (2015) Definition 14: *"Third party: a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered"*.

[34] FIFA (2015).

means that at civil level, any assignment will still be valid and enforceable.

Furthermore, the jurisprudence of the majority of South American countries holds that federative rules have only effect within the framework of the federation and cannot contradict the civil legislation, of a higher hierarchy.

Argentina is an exception in South America. Ordinary Argentine courts settled that Federative rules are the "*lex specialis*" in relation to the general rules of the civil code. Therefore, if the regulations of FIFA and/or the Argentine Federation prohibit TPO, any contract in that sense will be null and void, even when under our civil code the assignment of a future transfer is perfectly valid.

Save for this exception, the result of this is that FIFA's remedy might be worse than the disease. Since FIFA can only sanction its own members (meaning clubs and players), if a club or a player enters into a TPO agreement, such player or club might be subject to disciplinary sanctions and the contract will still be valid and enforceable.

It is not unthinkable that a player or a club surrendering to the need of funds and signing a TPO agreement despite FIFA's ban, thereby placing himself in a difficult position. The counterpart (the third party) might force the compliance of the agreement by threatening with reporting the deal to FIFA. In the end, the ban will have the opposite effect to what was sought: players and clubs will be more vulnerable in their relationship with the third-party than before the introduction of art. 18ter RSTP.

As said, it is hard to think that clubs will immediately find an alternative source of funding or will be able to live within their own means. Therefore, it is probable that clubs will try to circumvent or challenge the rule.

Again, the final consequences are hard to predict, but will of an important magnitude. TPO is not just a financing method to bring players to clubs, sharing the risk with the investor, it is also a way to get cash-flow without the need to transfer the player to another club. Furthermore, it is an essential part of the scouting method that widens the club's network, attracts young talents to the clubs and is also a way to cancel debts towards the player or to achieve a renewal of his contract.

4.3 Conclusion

To conclude, I don't think the TPO ban is the best way to achieve the—alleged—objectives declared by FIFA. Obligation to disclose controlled payments (via TMS for example) and other regulatory approaches would have been better options. The pressure from an investor could have been diluted by setting a limit (maximum percentage or maximum number of players under TPO) and the reality is that the pressure to "force" a transfer comes in general from other actors, mainly the player and/or his agent.

Now the new "pushers" will be the European clubs. How will it be possible for an Argentine club to refuse a—say—€5 million transfer for a 19-year-old player even if the club knows his value will double or triple if he stays at the club? With the TPO ban the club cannot rely on an investor paying, for example, €3 million for 50 % of the player's economic rights to "hold on" a few years. It is worth remembering that Chelsea tried to seal the transfer of Neymar for €20 million when he was 18. However, Santos managed to reject such offer relying on TPO.

South American players account already for approximately 25 % of all the international transfers worldwide,[35] after the TPO ban this percentage will certainly raise.

As to the "moral" arguments, recently reiterated by UEFA's president Platini who said TPO is "a form of slavery",[36] I believe they are just a fallacy. Every transfer needs the player's consent and the investor owns a share of the profit of a potential future transfer, not a part of the human being. Otherwise, for clubs, owning 100 % of a human being would be equally immoral.

Moreover, other types of assignments, like third-party litigation funding, are legal in many countries, including the UK and France. The similarities and analogies that can be made with TPO are immense and nobody is claiming third-party litigation funding is a way of "*owning a person's justice*".

With the introduction of the Financial Fair Play Regulations European clubs and federations are looking into ways to reduce expenditures and also scrutinizing what the "neighbors" are doing. Clubs want cheaper players and clubs from countries were TPO was long ago banned had a handicap for UEFA spots against clubs from countries were TPO was allowed and relied on TPO to acquire players.[37] The TPO ban serves two objectives: A reduction in the player's transfer price and an end to the Spanish and Portuguese transfer "tactics" that relied heavily on TPO.

Also, the inclusion or exclusion of the player in the definition of "third party" triggers conflictive issues. In most South American countries national labor laws or CBAs allow the player to obtain a percentage of the proceeds of his own transfer. If FIFA tries to extend the definition of "third party" to include players, this might certainly prevent a complete implementation of FIFÁs TPO ban in South America.

As a conclusion I can say that, for South American clubs, the TPO ban just changed the "predator" in the transfer market. Our clubs can now stand stronger against

[35] FIFA/TMS, 'Global Transfer Market Report 2015' (2015), p. 78.

[36] Reuters (2015).

[37] World Sports Law Report (2011).

investors, but as counter-effect they are in a much weaker position against European clubs.

5 Third party investment from a UK perspective

Daniel Geey

5.1 What is third party investment?

In brief, Third Party Investment (TPI) in the football industry, is where a football club does not own, or is not entitled to, 100 % of the future transfer value of a player that is registered to play for that team. There are numerous models for third party player agreements, but the basic premise is that companies, businesses and/or individuals provide football clubs or players with money in return for owning a percentage of a player's future transfer value. This transfer value is also commonly referred to as a player's economic rights. There are instances where entities will act as speculators by purchasing a percentage share in a player directly from a club in return for a lump sum that the club can then use as it wishes.

5.2 Why did the Premier League ban the practice?

The Premier League, Football League, Football Association, the Polish and French leagues have all brought in TPI bans. The original ban in the Premier League came as a result of the Tévez affair where a third party owner had the contractual right to force West Ham to sell the player if a suitable bid was received. This was against the 'material influence' regulations that were in place at the time. Previously, there was no express clause prohibiting TPI; only the act of influencing a club's policies or performance was forbidden. Tévez's third party contract contained a clause giving exclusive power to the third party owners, MSI and Just Sports, to facilitate the transfer of the player. West Ham did not have a veto over this right and such a stipulation breached the above Premier League rule as it meant that outside parties had material influence over the decision making of West Ham.

A common misconception throughout and after the Tévez case was that any third party player owner would have been in breach of the Premier League rules. This was not the case. It was the clause giving the owners of Tévez influence over West Ham which incurred the Premier League's wrath (plus the non-disclosure of the agreement itself). It was for this reason that West Ham was judged to have breached the old Premier League rule Rule U18 and fined £5.5 million by the Premier League.

Subsequently, the Premier League significantly strengthened its regulations to prohibit any type of TPI. Other leagues followed as a result. The Premier League decided that from the beginning of the 2008/2009 season an absolute ban on TPI was required. A spokesman stated:

> "*The clubs decided that third-party ownership was something they did not want to see. It raises too many issues over the integrity of competition, the development of young players and the potential impact on the football pyramid. It was felt the Premier League was in a position to take a stand on this. No one wants to see what has happened to club football in South America repeated over here.*"[38]

There are also Football League and Football Association rules prohibiting TPI but the below analysis takes the Premier League rules by way of example. Current Premier League Rules U39-40 (which at the time were rules L34-35) govern the actual prohibition and buy-out mechanism.[39]

Premier League Rule U39 is the exemption rule which covers scenarios where clubs are allowed to receive money or incur a liability, for example, for the player registration or transfer of a player registration. Such instances include payments or receipts of transfer fees, loan fees and sell-on fees, payments for image rights contracts, payments for agency/intermediary work and payment of training compensation and solidarity contributions as set out in the FIFA regulations.

Premier League rule U40 is the mechanism to enable a third party owned player to transfer to a Premier League club. This can occur so long as the Premier League club purchases the third party's economic interest in the player. It states:

> "*In respect of a player whom it applies to register as a Contract Player, a Club is permitted to make a payment to buy out the interest of a person or entity who, not being a Club or club, nevertheless has an agreement either with the club with which the player is registered, or with the player, granting it the right to receive money from a new Club or club for which that player becomes registered. Any such payment which is not dependent on the happening of a contingent event may be made either in one lump sum or in instalments provided that all such instalments are paid on or before the expiry date of the initial contract between the Club and the player. Any such payment which is payable upon the happening of a contingent event shall be payable within 7 days of the happening of that event.*"

[38] Sinnott (2011).

[39] Premier League Handbook Season 20014/15 (2001).

This ensures that any future transfer sums, should the player be subsequently sold, would be kept by the selling Premier League club and eliminates any third party element to any future sale transaction. Interestingly, the Premier League club who 'buys-out' the third party interest may still be paying the third party investor through installments during the period that the player is playing for his new Premier League club. Whilst the player is owned by the club and no third party interest is possible, there is still the eventuality that a club could default on the installment plan and then the third party investor could sue based on the buy-out obligations in the contract. It would be unlikely yet is unclear from the regulations whether the investment stake could be transferred back to third party investor if default occurred or what other alternative recourse that an investor may have.

Nonetheless, any player registered to play in the Premier League cannot be third party owned by a TPI company. It means that the buying Premier League club has to satisfy the football authorities that all other economic interests have been extinguished. This occurred over the summer when TPI players Markovic and Mangala were transferred to Liverpool and Manchester City, respectively. Premier League clubs undertake to the football authorities that it is the only entity that owns the player's economic rights and only then can the transfer can be completed. It is likely that Falcao had a TPI contract whilst he was at Porto but as the French league also prohibits TPI, when Monaco bought him, there may well have been a requirement in place to extinguish any third party rights. As such, when he was then loaned to Manchester United this summer, his TPI rights would certainly have been extinguished to ensure there were no major complications with his Premier League registration.

5.3 Why is it such a problem?

As the Premier League spokesman explained above, their major concerns related to integrity, youth player development and money flowing out of the game. An internal FIFA report recently concluded that TPI trapped clubs in a "vicious cycle of debt and dependence" and "posed risks to players and to the integrity of the game".[40]

The main concerns about TPI include:

1. Conflicts of interests can potentially occur between investors, club owners, agents and coaches. For example, what if the owner of Club A also owns an economic stake in Player B playing against his club? What if an agent of a manager who buys TPI players is also an advisor of a TPI fund? Regardless of any actual conflict, there is certainly a perceived conflict which may damage the image of the game, public confidence in integrity of competitions and even lead to potential match-fixing or insider trading concerns. Questions continue to be asked over the transparency of the TPI funds and what role they have, if any, in influencing clubs.

2. Clubs become reliant on such funding which in turn leads to dependence on external owners to continue to assist in such financing arrangements. As such, TPI encourages short-term profit making with economic owners looking to the club to sell its players to realise their 'asset' ahead of purely on-field sporting concerns. The consequence is that the rapid turnover of TPI players at certain clubs means fans become less loyal to the players who know they will be transferred when the right offer is received. Clubs are seen as a short-term 'speculation tools' with the result that money leaves the football family.

5.4 Why is the practice necessary?

To counter the arguments set out above, the following points demonstrate are why TPI is so vital for many clubs around the world.

1. A growing number of clubs cannot compete with the larger commercial and broadcasting deals of the bigger European leagues. Clubs in so-called smaller European leagues, for example, need to leverage their assets and find innovative ways to find competitive advantage for playing against teams in the Champions League.

2. Purchasing players is an inherently risky business. Clubs with less money to spend would therefore usually be more risk-averse when having to invest heavily in transfers. One way of limiting such risk, is to share the financial burden. Therefore, contracts are entered into between economic owners and clubs to either help the club with the purchase price for a talented individual or free up capital and 'monetise' a current players value whilst he still remains at the club. In either event, the club benefits from external finance that cushions the club's position if the player is not a world beater. Both the club and the fund then benefit if the player is a success through a large transfer fee received that is shared according to the contract.

3. There are various ways to alleviate conflict of interest, integrity and transparency issues. Instead of banning TPI, many believe regulation through a transparent approach to TPI by disclosing a register of interests would alleviate a number of concerns as well as making TPI contracts available to FIFA/UEFA to ensure 'material influence' issues are correctly dealt with in the TPI contracts.

With FIFA regulating to ban players who are third party owned, many are questioning whether regulation of the practice rather than an outright ban would be preferable. In addition, some believe that it is not a ban but total

[40] Gibson and Conn (2014).

transparency of the arrangements that is required. This could even be expanded to include a list of the owners of such transfer rights. Such transparency could allow the football family to scrutinise any potential conflicts of interest between, for example, those who own the economic rights of a player and those who also own a stake in a football club. With FIFA's regulation governing the TPI prohibition, UEFA and FIFPro have backed such a position too.

5.5 What is the current state of play?

The current FIFA Rule Article 18bis of FIFA's Rules on the Status and Transfer of Players states that:

> "*No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer related matters its independence, its policies or the performance of its teams.*"

This was not a specific ban on TPI but a ban on a third party owner from influencing a club's employment or transfer-related matters.

Throughout 2014, UEFA and FIFA made a number of public statements concerning their aim to outlaw TPI. In September FIFA's President Sepp Blatter explained that:

> "*We took a firm decision that [TPI] should be banned but it cannot be banned immediately there will be a transitional period*".[41]

FIFA then set up a working group to address the topic of TPI. At the time, in their press release there was no explicit mention of a ban but "*to analyse all possible regulatory options in relation to this complex practice and to make preliminary suggestions*".[42] It was to the surprise of many that in late December, whilst the working group was still debating several possibilities that FIFA announced that they were to ban TPI globally. It is important to set out the exact wording of the FIFA circular to grasp the wide scope of the prohibition. Specifically, a third party is defined as "*a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered*".[43]

> "*Article 18ter Third-party ownership of players' economic rights*
> 1. *No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*
> 2. *The interdiction as per paragraph 1 comes into force on 1 May 2015.*
> 3. *Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.*
> 4. *The validity of any agreement covered by paragraph 1 signed between 1 January 2015 and 30 April 2015 may not have a contractual duration of more than 1 year beyond the effective date.*
> 5. *By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.*
> 6. *The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article*".

Article 18ter imposes a blanket global ban for TPI specifically forbidding any entity that is not a club from being entitled to future economic rights and/or transfer compensation. Whilst it has been explicitly considered that the prohibition only comes into force in May 2015, agreements entered into from 1 January can only be 1 year in length. This effectively reduces the possibility of new TPI contracts being entered into. Interestingly, Sporting Lisbon for example, recently announced that they had bought back a number of economic rights contracts from third party investors. They presumably considered that their position may well have been strengthened as a result of the new regulations.

Nonetheless, existing third party contracts will continue until expiry meaning that some players may still be subject to third party investment contracts for a number of seasons to come. Such contracts will, however, be monitored through FIFA's TMS system as any club will be required to disclose a valid third party contract due to the mandatory disclosure obligations set out in paragraph 5 above. Such obligations are required to be adhered to in a relatively short time period (by the end of April 2015). The result of such disclosure may be that the contracts submitted to FIFA may themselves breach Article 18bis, for example, regarding TPI material influence clauses. Clubs will be faced with the obligation to provide all continuing TPI contracts to FIFA and will be subject to disciplinary

[41] Wilson (2014).

[42] FIFA (2014c).

[43] FIFA (2014f).

measures if they do not. There is now an added compliance factor for clubs to adhere to under the new regulations and a variety of disciplinary cases against clubs should not be ruled out.

Lastly, the Portuguese and Spanish leagues are reported to have made a formal complaint to the European Commission, presumably assessing that Article 18ter is contrary to the free movement and competition rules. They will no doubt be arguing that the absolute ban that FIFA has imposed, is disproportionate, i.e. that there are less restrictive ways of achieving the same objective. Many have suggested that regulating TPI through transparency and disclosure obligations is a better alternative than an outright ban. It will be for the European Commission to decide whether to take the complaint forward and make a more substantive assessment or to reject the complaint. It should be noted that when the Premier League banned TPI, although there were some that argued that the prohibition breached competition law, no one actually came forward to challenge the regulation. A mere 2 months after FIFA announced the ban did the two Iberian associations challenge Article 18ter. That suggests, as many believe, that TPI has played an integral part in the way that clubs in those leagues use finance to 'de-risk' transfers and compete against clubs in associations with higher revenue-generating capabilities. TPI has been an essential financing option.

5.6 Conclusion

Whilst the Premier League, as a reaction to the Tévez affair, made a strong policy decision to ban the practice in its league, a more fundamental shift is occurring on the global stage. Football specifically is very much in the European Commission's view with current Intermediary and TPI complaints and a previous Financial Fair Play complaint that was rejected but is now before the Belgian national courts. The TPI complaint will not be a quick process and in the meantime, unless interim relief is sought, existing TPI contracts will soon have to be lodged with FIFA and from 1 May, no new contracts can be entered into. Whether the practice is banned for good is now in the hands of the European Commission.

6 Why FIFA's TPO ban is justified

Christian Duve and Florian Loibl

This article outlines FIFA's reasons to introduce Art. 18*ter* FIFA Regulations on the Status and Transfer of Players (RSTP) which bans third-party ownership of players' economic rights (TPO). In recent years, TPO was perceived as a threat to the integrity of football competitions within the international football community[44] and has become an area of concern for FIFA. Nevertheless, Art. 18*ter* RSTP has been heavily criticized mainly by the proponents of TPO and a complaint has been filed with the European Commission by the Spanish and the Portuguese Leagues for an alleged violation of EU competition law. In the following, it will be shown that such criticism does not sufficiently take into consideration the specific characteristics of the practice of TPO as well as football in general. It explains the rationale behind Art. 18*ter* RSTP which

- fosters the integrity of competition which is a priority for FIFA,
- promotes the independence of clubs by preventing third parties' influence in sporting decisions,
- leads to stable squads,
- provides an opportunity for investors to invest in the clubs rather than in single players,
- leads to financially healthier clubs.

Hence, with the introduction of Art. 18*ter* RSTP, FIFA pursues legitimate aims which justify the ban of the TPO practice.

6.1 FIFA's way to art. 18*ter* RSTP

TPO covers various situations in which a third party invests in the economic rights of a player in order to receive a compensation with regard to a future transfer. Whilst it is widely used in South America and in Southern Europe as an alternative funding possibility, especially to finance investments in sporting talent,[45] TPO is explicitly prohibited in England, France and Colombia.[46] The English ban on TPO was introduced in 2008 after the commotion caused by the Tévez case in 2006 where the contract between Tévez and West Ham United contained a provision giving a third party owner the right to decide on the transfer and the transfer fee of the player without any right to veto by the club.

FIFA has introduced a new rule, Art. 18*bis* RSTP, which prohibits clubs to enter into contracts that are likely to jeopardize the club's independence, its policies or the performance of its teams and freedom of decision-making in employment and transfer-related matters and came into

[44] FIFA (2014a).

[45] CDES-CIES (2014), p. 3 (report is confidential).

[46] Moreover, Poland has a rule which is interpreted by its football association as prohibiting third parties to hold a player's economic rights with an exception for former clubs, see Third-party ownership of players' economic rights, Part I, p. 3, 17 et. seq.

force on 1 January 2008.[47] However, after having mandated two studies providing data and information on TPO in several countries in 2013 and 2014, FIFA considered that Art. 18*bis* RSTP did not address this subject appropriately. Therefore, FIFA decided to introduce a new Art. 18*ter* RSTP as of 1 May 2015.

The main provision of Art. 18*ter* RSTP reads:

> "*1. No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.*"

It has been criticized that Art. 18*ter* RSTP prevents and restricts competition in the market for capital investment in football in a way that is not proportionate to attaining its legitimate objective and that Art. 18*ter* RSTP is, therefore, incompatible with EU Competition law. However, such criticism does not sufficiently take into consideration the specific characteristics of football as will be shown in this article.

6.2 The rationale of art. 18*ter* RSTP

First and foremost, Art. 18*ter* RSTP protects the integrity of the game itself by allowing for the necessary freedom in the contractual relationship between a club and a player, to determine whether and when the player is fielded as well as to decide independently and for sporting reasons only whether and when players are transferred.

Second, with regard to the financial situation of the clubs, critics undervalue that Art. 18*ter* RSTP is limited to a prohibition of an investment in a club's players and does not in any way limit an investment in the clubs themselves, benefiting the financial health of the clubs.

6.2.1 Art. 18ter RSTP fosters the integrity of football

Art. 18*ter* RSTP pursues several legitimate aims, inter alia, the integrity of competition (Sect. 6.2.1.1), the independence of clubs (Sect. 6.2.1.2) and the stability of squads (Sect. 6.2.1.3).

6.2.1.1 Integrity of competition The protection of the integrity of the game is not only one of FIFA's main objectives according to Art. 2 e) of the FIFA Statutes. It was also recognized by the European Commission as a legitimate aim justifying limitations on competition.

With regard to the UEFA rule on the "Integrity of the UEFA Club competitions: Independence of clubs" establishing a ban on the ownership of several clubs participating in the same competition by the same person or company, the European Commission held that the ban was in any case a necessary rule to ensure its legitimate aim of protecting the integrity of sporting competitions by "*protecting the uncertainty of the results and giving the public the right perception as to the integrity of the* […] *competitions with a view to ensure their proper functioning*".[48] Previously, a Court of Arbitration for Sport (CAS) decision has also confirmed the validity of this limitation and found that "*when commonly controlled clubs participate in the same competition, the* "*public's perception will be that there is a conflict of interest potentially affecting the authenticity of results*" and that "*that ownership of multiple clubs competing in the same competition represents a justified concern for a sports regulator and organizer*".[49]

The danger of such conflicts of interests would, however, not be limited to club owners. It may extend to investors, agents and coaches. If one adopts the view that the situation in which a third party has interests in several clubs participating in the same competition creates conflicts of interests, such conflicts can also arise in cases where third parties own shares in economic rights of several players. Following such view, this danger might arise, in particular, if different teams are competing against each other.[50] Especially, if a player, in which a third party has an economic interest, competes against a club that is owned by the same investor, there might be a significant potential for such conflicts. Even within the same team, it might present a competitive integrity risk if the same owner had rights pertaining to the transfer of a number of players.[51]

In any case and irrespective of an actual conflict, a conflict may at least be perceived by the public in connection with TPO. Such perception leads to a loss of confidence in the integrity of the competition and damages the image of the sport. In the light of the increasing threat of match manipulation, the involvement of third-party owners may create a danger to the reputation of the competition that could weaken the football world. The integrity

[47] FIFA, 'Regulations on the Status and Transfer of Players' (2008) article 18bis:

"1. *No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*

2. *The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article*".

[48] European Commission (2002b), para 47.

[49] CAS 98/200 AEK Athens and SK Slavia Prague/Union of European Football Associations (UEFA), award of 20 August 1999, para. 48.

[50] CDES-CIES (2014), p. 9 and 81.

[51] *Ibid,* p. 33.

of the game is, therefore, significantly enhanced if players and clubs are not influenced by third parties owning the players' economic rights with the aim to maximize their investment.[52]

6.2.1.2 Independence of clubs To ensure the independence of its Members' affiliated clubs is one of FIFA's objectives pursuant to Art. 18 para. 2 of the FIFA Statutes. The second TPO study found that "*the spread of TPO in the majority of the cases may be closely related to a partial takeover of the clubs' control by actors seeking primarily short-term profit and speculating on the purchase and sale of economic rights, regardless of sporting concerns*".[53] TPO potentially has an impact on player selection; the field of play may create complications for transfer negotiations as the clubs' sporting interests (e.g. of holding a player despite a lucrative offer or of letting a player go without being offered a lucrative transfer fee) may conflict with investors seeking a profitable return on their investment.

Interests may coincide if the investor bets on a rise in the player's market value (e.g. Santos FC refusing Chelsea FC's offer for Neymar). One prominent example of conflicting interests is the Tévez case in which West Ham United was deprived of any rights with regard to a future transfer of the player. More recently, ultimately successful contract renewal negotiations with Zambrano, a key player of Eintracht Frankfurt, have been jeopardized by a third party whose entitlement to future transfer compensation for Zambrano needed to be addressed first by Eintracht.[54]

Overall, the more clubs are depending on TPO financing, the more negotiating power third party investors have. The second TPO study mentions the purchase of economic rights at preferential prices, pre-emptive rights on new players or even greater influence on transfer policy.[55] Moreover, with players' economic rights in the hands of various investors, the fragmentation of interests within a club increases. In order to protect the independence of clubs, a (partial) takeover of the clubs' control by third parties, especially with regard to transfers, needs to be prevented.

6.2.1.3 Stability of squads The aforementioned clash of interests between investors speculating on the purchase and the sale of players' economic rights and clubs reoccurs when it comes to the frequency of transfers. Whereas an investor makes money out of transfers, a club may be more interested in building a stable team and team cohesion for sporting reasons. The Demographic Study of CIES in 2014 found that "*in general, the number of transfers carried out by teams during the current season is at an all-time high*" and stated that "*the increasing speculation surrounding players' transfers is also visible through the progressive drop in the number of club-trained players, which has attained its lowest level since 2009*".[56] Pursuant to the same study, players recruited from January 2013 onwards represented 41.3 % of squads on average (10.2 signings per club). At the same time, the best performing clubs generally have the most stable squads. For instance, FC Barcelona has the most stable squad among European top division teams. Its players have been for 5.5 years in the first team squad on average pursuant to the Demographic Study of CIES in 2014.[57]

Leagues and club representatives stressed in the Second TPO study that the increasing gaps between clubs in terms of stability contribute to the general decline in the competitive balance, both at national and international level.[58] FIFA's overall objective to promote football, laid down in Art. 2 a) of the FIFA Statutes, is endangered by such contractual instability caused by TPO.

6.2.2 Art. 18ter RSTP provides an incentive for investment in clubs

Football clubs are central to the protection of the integrity of the competition. In order to achieve this objective, appropriate financing mechanisms for football clubs are fundamental. Clubs certainly need external resources. A solution that takes the role of the clubs and their needs sufficiently into account can only be to finance clubs directly. By prohibiting the TPO of single players' economic rights, Art. 18*ter* RSTP creates an incentive for investors to invest in the clubs themselves.

Admittedly, some football clubs have been affected by financial difficulties and, thus, do not seem to be attractive for investors at first sight. In this context, however, it must be taken into account that clubs that seek regular access to talent by means of TPO are becoming even more and more dependent on the regular injection of funds from external investors which may lead to a "*vicious circle of debt and dependence*".[59] With a club selling its players' economic rights to third parties, the value of the respective club's assets decreases. As a result, it is even harder to find potential investors interested in financing the club.[60] Therefore, TPO cannot be a sustainable financing option. Improving the overall financial health of club football is a

[52] *Ibid,* p. 81 et. seq.

[53] *Ibid,* p. 8.

[54] Palmert and Sickenberger (2015).

[55] CDES-CIES (2014), p. 88.

[56] CIES Football Observatory (2014).

[57] *Ibid.*

[58] CDES-CIES (2014), p. 78.

[59] *Ibid,* p. 9.

[60] *Ibid*, p. 88.

major concern for football associations. Therefore, for example, the UEFA established its Financial Fair Play Regulations (FFP) to prevent professional football clubs from excessive spending. Although the regulations only contain disclosure requirements with regard to TPO, they were released in view of a TPO ban.[61]

Overall, critics, therefore, have to take into account that Art. 18*ter* RSTP only limits one single form of investment whilst it promotes, at the same time, investment in the clubs specifically tailored to the overarching aim of fostering the integrity of the game.

6.3 Conclusion

Art. 18*bis* RSTP has already targeted the aforementioned legitimate aims. However, this provision may be easily circumvented by inserting a clause into the TPO agreement stating that it does not permit any exercise of influence by the third party within the club's employment and transfer-related matters, policies or performance of its team. In practice, the engaged third parties will interfere with a club's sporting decisions in many cases despite such a contractual clause. Interviewees in the second TPO study reported that in practical terms, many third-party investors do influence the transfer of players.[62] Therefore, there is a consensus among football stakeholders that TPO should be restricted. The legitimate aims underlying Art. 18*ter* RSTP can be achieved most effectively by a total ban of the TPO practice. Whereas critics point to the lack of financing options caused by the prohibition of TPO, this article has argued that in the specific context of football competitions the integrity of the game benefits from direct investments in the clubs.

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