

TPO in Football: What it is, how it is developing, and what it should be



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→ **TPO/TPI - Economic rights agreement - FIFA - FIFA RSTP - Player transfer - FIFA Regulations - Intermediaries**

In September 2019, Nick DE MARCO QC¹ and Daniel GEEY² invited to give a speech to the FIFA / Spanish FA 8th International Football Law Congress in Madrid about Third Party Ownership in Football, covering recent developments and future issues. This article is based on Nick's contribution to the Congress.

Defining TPO?

The issue of Third Party Ownership in football remains a live one, despite FIFA's outright prohibition in 2015. Any analysis of the current landscape needs to start with an understanding of what is meant by Third Party Ownership, or TPO for short. A short, precise, definition is that it describes:

"A financial interest in the future transfer of a player's registration."

It reflects the practice, previously widespread in large parts of world football, whereby an investor, the third party, would invest in a player, a club or an academy, usually by way of a loan, in return for a right to a percentage of the future transfer fee or fees that the player who is the subject of the investment attracts. It is special to football because football is one of the only global sports with an open transfer market whereby players are traded between clubs, and because of the substantial sums that can be exchanged in football transfer fees.

For example, in the last summer transfer window (2019) alone, there were 530 transfers to clubs within FIFA's top 5 football nations (England, France, Germany, Italy and Spain) attracting a total of USD 2,689.7 million³ (approx. EUR 2,450 million) - an average of over USD 5 million (approx. EUR 4.55 million) per transfer. A third party that had a 30% interest in the future transfer value of a player might easily receive over USD 1.5 million (approx. EUR 1.36 million) on an average European transfer, and the sums that can be earned on some of the larger transfers, involving tens of millions of dollars, are obviously much higher.

TPO was a common practice in many parts of the world before FIFA banned it - in particular in Latin America and in Spain, Portugal and Italy. It allowed many smaller clubs to compete with bigger clubs by being able to purchase players for less than they would do had there not been third party investors holding some of the rights of the player. Typically, a young promising player from, for example, Latin America could be purchased for a reduced price from a club because a third party with a right to the future transfer value of the player would cover some of the fee to the club or investment in the player. That would allow the player to perform on a bigger stage, provide the club engaging him with a promising player at a reduced price enabling it to compete with bigger clubs, and often lead to the sale of the player to an even bigger club to the benefit of the selling club, the third party and the player. In this model, everybody seems to be a winner.

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³ FIFA "Big 5 Transfer Analysis, Summer 2019", www.fifatms.com.

The main problem with TPO, however, was the risk of Third Party Influence, that is the risk of third party investors influencing the playing or trading policies of the engaging club. Third Party Influence leads to a number of other problems – potentially undermining the integrity of football, especially where a third party has an interest in a number of players in the same competition, and undermining team stability where third parties are incentivised to force multiple transfers for economic and not football reasons. Thus, for many years *Third Party Influence*, as distinct from *Third Party Ownership*, was prohibited by FIFA. Regulation 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides (amongst other things):

“(1) No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, 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.”

The focus of this regulation is influence – the third party being in a position to affect the employment or transfer policies of the club employing the player, or indeed the performance of its teams – for example to influence the selection of players for a match. The prohibition is not only on direct influence itself, but on any contract that enables a party to “acquire” an interest.

FIFA's Ban on TPO

But in 2015 FIFA decided to extend the ban on Third Party Influence to a total worldwide prohibition on TPO. This was a controversial move, not least because TPO was a common means to fund clubs across many regions – before 2015 England, France and Poland were the only three countries in the world that banned the practice.

The material part of Article 18ter, the prohibition on TPO, reads as follows:

“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.”

So, for example, a loan from a bank to a football club securitized against a 20% assignment of the future fee the club might receive from a transfer of its best player

is prohibited. A club's right to a “sell-on fee” from a second club to which it has sold a player (something not prohibited, because the first club is not a “third party”) cannot be assigned to another party. Imagine Club A sells Player X to Club B for GBP 1 million (approx. EUR 1.17 million) and there is a 25% sell-on fee; three years later Player B's value has increased to GBP 4 million (approx. EUR 4.7 million), Club A shall receive GBP 1 million when Club B sells the Player for GBP 4 million to Club C. But Club A cannot assign the right to that future sell-on fee, even though there is little real risk in Club A (as a third party) assigning the right or indeed interfering in the ability of Club B to decide whether or not to sell Player X.

The legality of FIFA's ban

The ban on TPO led to a spate of legal challenges across Europe. The most significant is the case of CAS 2016/A/4490 *RFC Seraing v FIFA*.⁴ The Belgian football club, *RFC Seraing*, had concluded TPO contracts with the company *Doyen Sports* in breach of Article 18ter of the FIFA RSTP. FIFA's Disciplinary Commission imposed a 4-year transfer ban and a substantial fine against the club. The club's appeal to CAS included a claim that FIFA's ban on TPO breached EU Law.

Many previous CAS tribunals have been reluctant to properly scrutinise whether sporting rules are in accordance with EU Law, but in this case, at least, the tribunal found that EU Law was applicable. They went on to hold that Articles 18bis and 18ter of the RSTP constituted a restriction to the free movement of capital in the EU that could be justified by a legitimate aim so long as the restrictive measures constituted a proportionate means to attain that objective. FIFA said the legitimate objectives for the ban were:

- Preservation of contractual stability;
- Preservation of the independence and autonomy of clubs' recruitment policy;
- Securing the integrity of football and preservation of the loyalty and equity of competitions;
- Prevention of conflicts of interests and securing transparency in the transfer market.

The CAS found the measures were proportionate: they did not limit all types of investments in clubs, they followed extensive consultation, and the club had failed to specify less restrictive measures that could achieve the legitimate aim.⁵

⁴ Award in French: <http://jurisprudence.tas-cas.org>.

⁵ For an analysis of the CAS Award, see: “*RFC Seraing at the Court of Arbitration for Sport: How FIFA's TPO ban Survived (Again) EU Law Scrutiny*”, Antoine DUVAL, Asser International Sports Law Blog, 26 April 2017; www.asser.nl.

The CAS decision in *RFC Seraing v. FIFA* was then challenged in the Swiss Federal Tribunal (the SFT) - the main argument being that the arbitration clause providing CAS with jurisdiction to consider the appeal from FIFA was unlawful because (amongst other things) of FIFA's dominant position in CAS. The SFT rejected the challenge, finding the CAS was "a genuine, independent and impartial arbitral tribunal".⁶

RFC Seraing also brought a challenge to the CAS decision in the Belgian courts. The Belgian Court of Appeal decided that the FIFA statute providing that CAS had jurisdiction to determine disputes was not a valid and enforceable arbitration clause as a matter of Belgian Law, as it was too vague and did not concern a "specific legal relationship".⁷

Despite the interesting, and as yet not finally resolved, issues concerning the validity of the CAS arbitration clause, FIFA's ban on TPO has so far resisted legal challenge.⁸ That does not mean it will resist every other legal challenge - not least as the CAS in *RFC Seraing* remarked that the appellants had failed to specify the less restrictive measures that could achieve the legitimate aims pursued by the ban, and thus failed to show it was disproportionate. In another case, on other facts, possibly before a different tribunal, where a party does so specify, the result may be different.

FIFA's 2019 amendment to the rules - Players are not Third parties

In June 2019 FIFA amended the "Definitions" section of the RSTP to clarify that a player was not a Third Party in relation to his own transfer. While this might seem obvious, until the change in definitions the position was uncertain. The previous definition of Third Party under the RSTP was as follows:

"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."

⁶ SFT Judgment 4A_260/2017 of 20 February 2018 par. (3.4.1). For an analysis of the SFT Award, see "SFT Judgment 4A_260/2017 in the TPO case between FC Seraing v. FIFA & the Brussels Court of Appeal Decision: A parallel Universe", Despina MAVROMATI, <http://sportlegis.com>. See also, a case review by Jan KLEINER in Football Legal Database: www.football-legal.com.

⁷ For an analysis of the Decision see "Brussels' Court of Appeal Challenges CAS Jurisdiction Clause in FIFA Statutes", Simon GROSSOBEL, Sports Legal, 17 September 2018: www.sports.legal. See also, a case review by Jan KLEINER in Football Legal Database: www.football-legal.com.

⁸ In addition, on 12 December 2019, the Brussels Court of Appeal finally dismissed the substance of appeal, acknowledging the full effect of *res judicata* (that a final judgement no longer subject to appeal cannot be litigated again in another court) confirming the decision of the CAS and the Swiss Federal Tribunal.

On one (and the literal) reading of the definition the player would be a Third Party: he is not one of the two clubs involved in his transfer. Yet it seems odd that while the two clubs transferring the registration of the player are entitled to have an economic interest in respect of the player's transfer, the player himself cannot. The situation was so uncertain that disciplinary proceedings were brought in four different cases against clubs⁹ who had entered agreements entitling some of their players to receive compensation linked to their future transfer to another club. The FIFA Disciplinary Committee decided that the agreements were part of the remuneration due to the players under their employment relationship so that the players could not be considered a Third Party with respect to their own future transfers.¹⁰

FIFA's new "Definition 14" in the June 2019 edition of the RSTP makes the position certain:

"Third party: a party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered." (emphasis added).

A number of important consequences flow from players having a right to compensation related to their future transfer. There are key new areas for clubs, players, player agents and federations to consider.

Clubs should be able to benefit from including clauses in an employment contract with a player that grants him a percentage of any future transfer fee received for his transfer instead of agreeing to a higher wage demand from the player. This may provide clubs with some of the advantages of TPO - a smaller "cash-strapped" club may be better able to compete for promising players with a richer club that it would be unable to compete with if it was only able to offer salary and not an interest in a future transfer. It costs the smaller club nothing during the employment of the player to agree to assign part of the future transfer fee. Taken with the stringent spending limits on clubs arising from some of the various "financial fair play" rules in operation in football, it may provide a very useful tool for minimising a club's annual expenditure. One can therefore expect clubs to be keen to utilise this contractual mechanism in future negotiations.

The player may also find the promise of a share in a future transfer fee an enticing prospect. A young player, hoping his value may reach a few million after a

⁹ *SV Werder Bremen* (Germany), *Panathinaikos FC* (Greece), *CSD Colo-Colo* (Chile) and *Club Universitario de Deportes* (Peru).

¹⁰ See FIFA Media Release, 26 June 2018: "Latest decisions of the FIFA Disciplinary Committee in relation to third-party rules": www.fifa.com.

couple of years, but having not yet sufficiently proved himself to secure a high salary, is likely to want to secure a percentage of that future fee if he can. A more experienced, highly valued player with confidence a club should be able to transfer him for a significant fee will also be interested in a promise of a future share of that sum to be included in his contract.

Increasingly we see players insisting on “*Release Clauses*” in their employment contracts - clauses that allow the player to insist on a transfer if a minimum fee is offered to the club. These become more significant where the player has an interest in a future transfer fee. The fundamental purpose of a Release Fee is to provide the player with some security that his club shall not be able to tie him to a contract by insisting on too high a fee, when the player could obtain a far better contract from another club if the transfer took place. With the player having an interest in the future transfer fee there is an additional consideration. The player might want a transfer to take place at a certain fee precisely because of the percentage he shall earn from that transfer.

Some of the main objections to TPO may arise - the risks to “*contractual stability*” and the dangers of a party influencing the transfer policies of clubs. Players may have an active interest in forcing a transfer to take place, by triggering a Release Clause, because of their economic interest in the transfer fee. This is not “*Third Party Influence*” however, because the player is not a Third Party under the new definition.

The other issue for players will be what, if anything, they can do with their interest in the future transfer fee. If a player has a right to 20% of a future fee, and he is relatively confident that should mean a few hundred thousand pounds, he may wish to borrow money against that future right, or to use it to pay his agent. But this would likely place the player in breach of 18ter because he may be entering into an agreement with a third party whereby that party becomes entitled to compensation payable in relation to the future transfer of the player. It depends on the agreement, however. If the player believes he should be transferred by September 2022 and would receive at least GBP 200,000 (approx. EUR 235,000) as a result he could not enter an agreement with a third party to borrow GBP 200,000 payable on condition of his transfer for a certain minimum amount, but he would be able to borrow the same sum on condition he pays it back, regardless of any transfer, by the end of September 2022. There are likely to be all sorts of permutations of this as investors and player’s agents think of creative ways to utilise the permitted future financial interest of players - and these are likely to raise some complex regulatory issues.

The new definition is very important for agents. It is almost always the agent (and not the player) who will be involved in contractual negotiations of the player’s contract. An agent negotiating on behalf of a player is obliged to seek the best deal for the player, and usually that means (amongst other things) the highest wages possible. Since the agent’s commission is linked to the player’s salary this creates no conflict. But what about the future transfer interest? This may be a considerable sum in some cases, and the player may want his agent to negotiate the highest percentage possible linked to the future transfer fee. However, this may be at the expense of the player’s basic wage. That puts the agent in a difficult position - an agent is only entitled to be remunerated “*on the basis of the player’s basic gross income for the entire duration of the contract*”.¹¹ That suggests he is not entitled to a percentage of the amount the player can receive from his future transfer (even though the FIFA Disciplinary Committee seem to regard this as remuneration under the employment contract - it is not “*basic gross income*”). The danger here is that FIFA has created a regulation that puts agents in direct conflict with the interests of their clients and this is further compounded by FIFA’s plans to bring in a mandatory cap on agents’ commissions of 3% of the player’s salary.¹² As *Roberto NAJERA REYES* and *Matilde COSTA DIAS* point out in a previous edition of *Football Legal*,¹³ there are risks some player’s agents may seek side agreements with their players entitling them to a share of the future transfer interest, outside of FIFA’s knowledge and control - such schemes raise the real prospect of TPO (and indeed Third Party Influence) being re-introduced by the unregulated “*back door*”, and of players and agents exposing themselves to disciplinary action.

FIFA’s Abdication of Regulation

2015 was the year FIFA decided to walk away from regulating two important sectors of the global transfer market, football agents and TPO.

Before 2015, FIFA operated a worldwide football agents’ licensing system. In 2015, it scrapped agents’

¹¹ See Regulation 7.1 of the FIFA Regulations on Intermediaries (mirrored by e.g. Regulation C.3 of the English FA’s Regulations on Working With Intermediaries).

¹² FIFA’s proposals for a mandatory cap on remuneration payable to player’s agents of 3% of their commission (rising to 6% only if they act for both the engaging club and the player under a dual representation contract) were approved by the FIFA Council in October 2019 and it has been suggested the cap shall be brought in from July 2021. There are likely to be a number of challenges to the legality of the proposed cap throughout Europe, however; the author is acting for a number of English and European agents in respect to such challenges.

¹³ [The new definition of Third-Party in the FIFA RSTP and its potential consequences](#), R. NAJERA REYES & Matilda COSTA, *Football Legal* #11 (June 2019), p. 59-61.

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licensing, effectively removed agents as participants in football, opened up the market and brought in new lighter touch “*Intermediary*” regulations. The name, *Intermediaries*, never really caught on. The de-regulation was, as many of us warned it would be¹⁴, even more of a disaster.

In the same year, FIFA introduced its worldwide ban on TPO. The reason for both decisions were remarkably similar. FIFA decided that effective regulation of these key financial areas of the world transfer market was just too difficult for it to do. The easy way out, it assumed, was not to regulate but, in the case of agents to de-regulate, and in the case of TPO, to simply ban the whole thing. A decision by the regulator to essentially abdicate its regulatory responsibilities was dressed up and sold to the stakeholders, such as FIFPro the players union, the clubs and the national federations, as (with respect to agents): breaking the power of big agents and reducing the amount of money “*going out of the game*”; and (with respect to TPO): ending “*modern slavery*”. Such hyperbolic window dressing may have persuaded FIFA Congress, but has since proven to be empty rhetoric.

“ A properly regulated and transparent system of TPO could be utilised in the interests of clubs and players alike ”

With respect to agents, the numbers involved radically increased, but this time they had no education, no licensing and no quality control. The sums paid to agents increased, as a natural result of player’s wages rising. FIFA has finally come to realise its mistake and are now committed to bringing back a worldwide licensing and regulatory system (though it still mistakenly believes a mandatory cap on agents fees would be lawful and effective).

But TPO remains unregulated. A properly regulated and transparent system of TPO could be utilised in the interests of clubs and players alike - but that would require significant administrative resources to be dedicated and FIFA continue to prove reluctant to do so. The result of the worldwide ban on TPO was as predictable as the result of the deregulation of agents: practices have been driven underground; new, complex and less transparent methods of third party financing in football have been created; other ways of achieving similar advantages, such as multi-ownership of clubs in different jurisdictions, have prospered. These developments risk the same concerns associated with

TPO, in particular the risks of third party influence - but the failure to regulate heightens the risks: unregistered and underground interests, happy to evade and breach rules that do not apply to them, are far more of a risk to the integrity of football than regulated and transparent interests.

Some claim that one result of the ban of TPO is the rise of so called “*bridge transfers*” - where clubs collaborate to transfer players through a “*bridge*” club to a destination club where the player was never fielded by the “*bridge*” club. FIFA’s “*Football Stakeholders Committee*” announced plans to prohibit “*bridge transfers*”, as part of the current reforms to the world transfer market.¹⁵ But precisely how a “*bridge transfer*” is defined by FIFA, and how the regulation will work in practice, remains to be seen.

Towards rational regulation

The real problem with all of the arguments about TPO, and indeed many of those about the regulation of agents, is that they ignore the market reality of football. Unlike most other professional sports, and unlike normal employment relationships, the world football transfer market is a peculiar thing. Despite the enormously significant *BOSMAN* case,¹⁶ there is an unfinished revolution in the football transfer market. It remains the case that footballers are unable to move freely between clubs by giving reasonable notice and/or paying the club a reasonable compensation fee, commensurate, for example, with the outstanding wages due for the unexpired part of the contract. Rather clubs can hold on to and trade footballers for increasingly rising transfer fees. That is why the most trotted out objection to TPO, that it is a type of “*modern slavery*” is so absurd. It is the trade in football players carried out by their employers, the clubs, which is, (if anything is) “*modern slavery*” - all that TPO does is assign a portion of the selling club’s interest to a third party. A slave owner allowing another to use his slave does not create slavery by doing so, rather it is the existence of the relationship of slave ownership in the first place that allows for the arrangement - in a similar way it is the football transfer market that is the cause of players being traded for economic reasons, not the interests of third parties in that trade.¹⁷

¹⁵ Football stakeholders endorse landmark reforms of the transfer system - FIFA Media Release, 25 September 2018: www.fifa.com.

¹⁶ ECJ, 15 December 1995, Case C-415-93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*

¹⁷ FIFPro, the international players’ union, has previously challenged the existence of the world transfer market (see, e.g. “*FIFPro challenge the football transfer system*”, Nick DE MARCO & Dr Alex MILLS, 9 February 2016 (www.sportslawbulletin.org) and may be renewing calls for it, and transfer fees, to be abolished (see: www.smh.com.au).

¹⁴ See, e.g. “*The New FA Football Intermediaries Regulations and the disputes likely to arise*”, Nick DE MARCO, *Blackstone Chambers Sports Bulletin*, April 2015: www.blackstonechambers.com.

Many of the objections to the role of football agents are equally facile - in particular in relation to the complaints about agents taking a share of transfer fees or working for different parties. In a world without the transfer market player's agents could be just that, negotiating wages for players free to move from club to club. FIFA has created the behemoth that is the world transfer system but then decries or tries to prohibit the necessary economic consequences of it.

” **Despite the enormously significant Bosman case, there is an unfinished revolution in the football transfer market** “

There are various rational approaches to regulation of football. FIFA could abolish the transfer system altogether, allowing for greater freedom of movement and competition, getting rid of the need for TPO, limiting the role of agents but inevitably increasing player power which would inevitably be opposed by clubs and national federations. That is one rational approach. Another is a more heavily regulated system, similar to that operated in many North American sports, where there is less competition, salary caps reached by collective bargaining and no transfers of players between teams. That is another rational approach. But FIFA's system is a problematic hybrid. There is in one respect heavy regulation - players being unable to move freely, transfers being permitted only during limited times of the season and so on. On the other hand, player salaries and transfer fees are unregulated, there are no caps. The parties are free to decide. But clubs are not permitted to spend as much as their investors choose, by “*financial fair play*” and are not permitted to borrow money against their most valuable assets (the players). Players are inhibited not only by the transfer system itself but by not being permitted to accept investment from third parties to allow them to develop and move from a smaller club (or footballing nation) to a larger one. Financial fair play creates an artificial obstacle to their wages and the threatened cap on their agents' fees reduces their bargaining position with employer clubs. The result of all these measures is actually to weaken the position of players as against clubs, and increase the power and competitive advantage of the biggest clubs against the smaller clubs. That in turn threatens the integrity and attraction of football itself. Which is why it is a mistake to consider questions such as the prohibition of TPO, the implementation of FFP or the capping of agents fee in isolation as opposed to within the context of the global football transfer market.

In the author's opinion, for so long as the world football transfer market exists, TPO should be permitted but effectively regulated. Its advantages are obvious - in particular for clubs and players. Smaller clubs especially can benefit from being able to acquire the services of promising young players they would be unable to compete for if it were not for the investment of a third party. Financially struggling clubs can borrow money against the future transfer value of their players. Players, especially from poorer countries or lower leagues, can benefit by investment in them or their academies that would not be available if the investor could not see a return; such investment might help the best of those players get on the world stage and start a lucrative professional career.

On the other hand, there are no **necessary** downsides of TPO. The “*modern slavery*” argument is flawed for as long as the transfer market exists. The legitimate concerns about third party influence and the consequential risks to contractual stability, integrity, and corruption can all be best met by effective and transparent regulation. Third Party Interests should be registered and regulated. TPO investors would have to pass similar fit and proper persons tests as may be applied to club owners or agents, and would have to be transparent. The percentage of interests allowed in any player or club should be limited and defined. These sorts of steps would no doubt involve the expenditure of significant resources by FIFA and others, but taxes on transfer fees can always be brought in to pay for such additional resources, as well as to pay for the development of grassroots football.



” **For so long as the world football transfer market exists, TPO should be permitted but effectively regulated** “

The argument is a little like that concerning betting in football. You can ban betting outright, worldwide, and banish it from football. That is one rational approach. Or you can allow betting, but if you do so it must be properly regulated. Of course, rules need to be in place to prevent corruption linked to betting, but there is increasing pressure to introduce regulation to prevent some of the other necessary evils of betting in sport - in particular, the rise of addiction to gambling by those who watch sport. Taxes on betting sponsorship where some of the monies raised is used to combat addiction to gambling is one such reform growing in popularity.¹⁸

The danger of corruption linked to sports betting usually arises where you have criminal gangs operating betting syndicates in countries where betting is unlawful (and therefore by nature those involved in bookmaking are criminals) placing bets on sports where betting is lawful. The prohibition of TPO in a global market where economic interests of players are already bought and sold causes similar problems - third party interests are an inevitable consequence of the global transfer market and if they are prohibited and underground, as opposed to open and regulated, they are far more likely to have a negative and corrupting influence.

¹⁸ See, e.g. "TAX THE BOOKIES: Big five sports to push new government for betting crackdown and demand 'fair return' on profits." By Matt HUGHES, *Daily Mail*, 22 November 2019, reporting on lobbying by the English Premier League, The FA, the ECB, the RFU, the RFL and the LTA for a tax on bookmakers profits to improve grassroots facilities and fund anti-corruption measures: www.dailymail.co.uk.