Third-party ownership of players’ economic Rights

Regulations, Practices and Impact on club’s Governance

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Some funding ways in football raise questions on their legality. One of them is Third-party ownership (hereinafter referred as “TPO”). Mostly considering its singularities and parties involved, this sort of investment requires a regulation, which makes clear the nature of the parties, their rights and obligations and mostly, oversight over them in order to enhance transparency. This is a practice “whose origins go back to South America, but that, in the last few years, have undergone strong expansion within the European football scenario”. It consists of an investment in the professional players’ economic rights by third-party sources others than clubs such as football agents, sports-management agencies and mostly funds potentially in order to receive a share of the value of any future transfers of those players.

The biggest difficulty arisen is the dissociation on football players’ rights: economic rights are purchased and then owned by these funds, whereas clubs can only own the sporting and federative rights (which permit players’ enrolment on competition). On the one hand, it is believed they are alternatives to traditional sources (especially in the aftermath of the economic and financial crisis of 2008-2009 which led to restrictions of credit) and a means to boost competition among Football Clubs as medium and small-size clubs, sometimes wrecked, insolvent and struggling to survive, can use footballers they couldn’t afford anyway else and this would also mitigate the clubs’ risk of purchasing the wrong player by sharing it with the fund. On the other hand, others state that these vehicles achieve quite the opposite as some Leagues oblige Football Clubs to acquire 100% of the registration of the players unlike others where clubs may just acquire minimum percentage (e.g. Portugal, Brazil). The supporters on this side of the barricade also criticise the way these deals

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1 Third party is “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”, according to definition 14 of the FIFA’s Regulations on the Status and Transfer of Players (October 2015).


are structured comparing the players to assets or even to humans being trades and emphasising the weak position in terms of contracts of clubs and eventually players.

On 19 December 2014 new provisions were included in the RSTP\(^4\) which came into force on 1 January 2015 (Article 18ter).\(^5\) Regardless of that, the agreements who fall in 18ter paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration, although their duration may not be extended (paragraph 3).

Further, it is also dubious whether these new provisions will bring more transparency or ironically the contrary. Hence, in my opinion the prohibition, in lieu of a strict regulation, was a wrong step which can bring more evil than good. In fact, TPO was innovative and boost some competitions and clubs. Nonetheless, the previous regulation (or the shortage of it) was also poor to the extent it didn’t oversee TPO flows, while allowing it.

By this thesis, my goal is to address these problems by analysing the relevant regulations (especially the latter version of the RSTP) as well as outlining all interests at stake and most of all find common interests, which could bring a better and ideal regulation than the current one. Lastly, the aim is to assess critically third-party ownership gathering all the pros and cons from the trends analysed (mostly the countries in Europe where this practice is recurrent, in particularly Portugal) and eventually find a in between ground. Football became a business as many others and is high time it is treated as such with the help of Law, without never impairing its nature, which is comprised of entertainment.

\(^4\) FIFA’s Regulations on the Status and Transfer of Players.
\(^5\) By contrast to the article 18bis which used to be applied to TPO, still in force but only for Third-party influence which is further explained in page….: “No club shall enter into a contract which enables any 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 performance of its teams.”.
An Overview on the Football Industry

Football is the King of all Sports. Worldwide it is just as popular as the music, fashion and film industry. To name just a few, Pele, Cruyff, Maradona, Ronaldo, Zidane, Ronaldinho, Messi and Cristiano Ronaldo are examples of football idols and also role models for the last 4 generations. Moreover, 2.65 billion people play worldwide, and in addition with over 5 million of referees and officials, (totalling 2.70 billion people) comprise 4% of the world’s population. The popularity of the sport was further confirmed during Brazil’s 2014 FIFA World Cup totalling 3.2 billion total viewers and 1 Billion viewers for the final alone.

Coupled with its popularity come massive and complex organisations – both global and regional – such as FIFA (Fédération Internationale de Football Association) and UEFA, AFC, CAF, CONCACAF, CONMEBOL, OFC, respectively, whose collective goals are to organize and regulate the sport on a worldwide scale. Furthermore, there are national Federations and Leagues which play a similar role and on the bottom, Football Clubs. Within this business, billions of jobs are created – positively influencing the global and national economy. However, Football is not limited only to entertainment or employment. In fact, FIFA engages in projects, presumably based on altruistic or social motives, such as Football for hope or Football for the Planet among others against discrimination and racism that are supposed to improve its reputation.

Football is also a business. FIFA is an association with a non-commercial and not for profit purpose. Notwithstanding, it deals with huge amounts of capital every day. Beyond associations, also football clubs profit a lot from national leagues such as the English Barclays Premier League or the German Bundesliga and mostly from regional Tournaments, the best example being the UEFA Champions League. They benefit at the same time from astronomic sponsorship (e.g. shirt and kit, the prime example being the $130 million a year arrangement between the publicly traded Manchester United and Adidas), television deals (such as the three-year, $7.9 billion agreement

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6 Matthias Kunz, 265 million playing football. FIFA magazine (2007)

7 FIFA.com, 2014 FIFA World Cup™ reached 3.2 billion viewers, one billion watched final (2005)

8 UEFA increased the Champions League pay-out by roughly 50% for the three cycle beginning with 2015-16. This year’s final, between Spain’s Real Madrid and Atletico Madrid, earned each team over $100 million.
between the English Premier League with Sky Sports and BT Sport that starts with the 2016-17 season) as well as from commercial and match day revenue which dramatically increases their valuation. “The 20 most valuable soccer teams in the world are worth an average of $1.44 billion, 24% more than the top 20 teams were worth a year ago. (...)The most valuable team for the fourth consecutive year is Real Madrid, (...) and has generated more revenue than any soccer team for 11 straight seasons. Real is worth $3.65 billion, 12% more than last year and more than any sports team in the world not named the Dallas Cowboys ($4 billion).”

To attract more fans, along with new capital investments U.S Major League Soccer’s clubs have been acquiring stars in the end of their careers such as David Beckham, Thierry Henry or Andrea Pirlo as a strategy. A similar strategy has also been followed both in Middle East clubs like Qatar’s Al Sadd and now in China, the new million investors in football. There are other examples of the connection between business and football such as the Dutch PSV Eindhoven that has a strong partnership with Phillips for decades as opposed to just a sponsorship or the German team’s Bayer Leverkusen and VfL Wolfsburg whose birth as factory clubs is linked to Bayer and Volkswagen, respectively.

Moreover, in the last 15 years, clubs like Paris Saint Germain and AS Monaco (France) and Chelsea FC and Manchester City, from England benefited a lot from their takeovers. These made it possible for them to compete with the traditional favourite clubs of their own Leagues thus allowing them to become regular participants of Champions League, in other words, the League of Millionaires. Throughout the years breaking news spreaded all over European media informing that Russian oligarchs, Arab sheikhs, Chinese investors etc. are willing to invest in European clubs. Take for example, Leicester City FC, an underdog in the beginning of the season and ultimate miraculous and merited 2015/2016 Premier League champions against all odds (5,000 to 1), in the end. Nevertheless, Thai billionaire Vichai Srivaddhanaprabha, who made his fortune through King Power duty-free stores, funnelled millions in to support the club. He has now owned the club since 2010. Despite deserving it, would have the title been attained without the large investment made?

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10 In June, 2016 Chinese Group Suning acquired a 70% stake of Inter Milan.
Thus, on the one hand it is evident that football is a form of business as legitimate and profitable as many others. World class footballers’ wages (even though they are justified by the fact their career is shorter and yet highly competitive) are likely to be rather higher than a top Investment Bank CEO’s. According to France Football, in 2015, the two best paid players in the world, Lionel Messi and Cristiano Ronaldo won €74 and €67.4 million, respectively. As already expressed, over the years, the numbers involved on agreements signed by clubs with sponsors increase whether they are Sports, beverages, airlines, telecommunications companies, etc. Furthermore, new complex vehicles, often based on dubious and unclear legal forms as well as offshore companies whose beneficial owner is often not known which makes impossible tracking the real owner\(^{11}\), have gained prominence which led to a chorus of critical voices to the extent that clubs and supporters are losing control over the club’s lead. Overall, it is believed that these signs of openness to investment may be harmful to loyal fans as the sport is transforming into a profit maximizing capitalist industry as opposed to its original form of pure entertainment. Further, it is also argued that these potential invisible forces may lead to corruption and/or money laundering as well as match-fixing scandals such as the Italian ones in 2006 and 2011-2012. In fact, result manipulation is linked to another subject, which has also been a challenge for regulators: online sports gambling. In the last decade, online betting has gained high visibility from companies’ ads and sponsorship as well as popularity itself. Organized mafias enjoy global influence from Singapore to Brazil, passing by European leagues and gamble not only in the first divisions, but also in the apparently quiet second’s and sometimes even the third’s\(^ {12}\).

\(^{11}\) ‘Conventional thinking suggests that trust in corporations and markets depend, in large part, on the existence of an accurate disclosure regime that provides transparency in the beneficial ownership and control structures of companies. (...) A **beneficial owner** refers to the ultimate natural person or state that benefits from the ownership of a company, even though formal legal ownership is in the name of another person (the “nominee” or “registered owner”) (...) Beneficial ownership information is necessary to detect and prevent tax evasion, corruption, money laundering, terrorist financing and other illicit behaviour involving one of more companies (...) Even with a robust disclosure regime in place, however, there are a number of lawful mechanisms that are often employed for concealing the true identity of the ultimate beneficial owner of a company’s shares’ such as Pyramid Structures; Nominee Shareholders and Omnibus Accounts – Erik Vermeulen and Mark Fenwick, *Disclosure of Beneficial Ownership after the Panama Papers*. Lex Research Topics in Corporate Law & Economics Working Paper, No. 2016-3. Available at SSRN: [http://ssrn.com/abstract=2777152](http://ssrn.com/abstract=2777152) (May 2016).

\(^{12}\) ‘In Bochum, Germany, where an investigation beginning in 2009 led to 14 convictions, prosecutors initially traced money flows to Singapore via an Asian bookmaker in Britain. In Cremona, Italy, prosecutors who charged 20 suspects with match-fixing last year found they were linked to some of the same Singapore figures (...)’ - Jeremy Grant, *Singapore in spotlight over match-fixing*, Financial Times (February 2013). [HTTP://WWW.FT.COM/CMS/S0/3562BE48-7404-11E2-BCBD-00144FEABDC0.HTM#AXZZ4B6M0JA8Q](HTTP://WWW.FT.COM/CMS/S0/3562BE48-7404-11E2-BCBD-00144FEABDC0.HTM#AXZZ4B6M0JA8Q)
On the other hand, it is still unclear what is lawful and what is not. Legislation has entered over Europe to overcome several issues related to business in football. In UEFA, regarding financial health, there are the Club Licensing and Financial Fair Play Regulations. “The objective of the Regulations is, in reality, pursuance of a greater discipline and rationality in management of club finances to ensure clubs operate within their means so that they maintain financial sustainability\(^{13}\). Moreover, in the German Bundesliga, there’s the 50+1 rule whereby a minimum of 51% of the club must be owned by club members preventing any single entity taking control, thus still allowing private investment whilst preventing from having overall control of the direction of the club. Thus, unlike England or France, in Germany clubs are not under the “risk” of losing a majority stake to investors. Red Bull took control over SSV Markranstädt, from Leipzig, but are not whole owners and thus are not allowed to incorporate their brand into the club’s name as they have done in Austria (FC Red Bull Salzburg), the USA (New York Red Bulls) and Brazil. Nevertheless, the Bundesliga is self-sustainable and enjoys the highest attendances in Europe ranking among the leagues with lowest tickets\(^{14}\). It can be seen the way these subjects are regulated is not the same in all EU countries, which raises Competition Law issues due to different criteria applied. The collision of English and German models also leads to a current reflection of whether fans and shareholders should have a bigger say on the clubs’ management as in Germany or be more open to outside investment as in England.

Lately, FIFA and UEFA have been under fire. Scandals such as those which culminated in the suspension of Joseph Blatter and Michel Platini and many others disclosed both by Football leaks and by Panama Papers.

\(^{13}\) “Through: - a reduction in pressure on salary costs and transfer costs; - the promotion of long term investments in the field of youngsters and infrastructures; - the protection of long term sustainability of European football; - the encouragement of clubs in supporting themselves through personal proceeds; - the payment of debts in observance of the expiry date”, from “Third Party Ownership in the Field of Professional Football: A Critical Perspective”. Rosa Lombardi, Simone Manfredi and Fabio Nappo. Business Systems Review, Volume 3, Issue 1 January-June 2014 (Apr 2014).

CHAPTER 1

Third-Party Ownership's Background & Trends

1.1. A new business is born: from South America to the World

Background and types of TPO

South America breathes and lives Football as in no other part of the Planet. It is something that can only be felt in the Brazilian favelas or in several hectic neighbourhoods of Buenos Aires where the dream of many children is to become a player as their idols. For decades, this continent has polished tons and tons of diamonds who entertained the fans of the sport for their unusual dribbles and fearless attacking styles. Yet, coupled with talent and sporting know-how comes not necessarily wealth. Hence, mechanisms were created in order to boost the sport in the continent.

Among several ways of transferring football players, Third-party Ownership of football players’ economic rights is considered the “South American model”, as once stated Kia Joorabchian, businessman heavily in TPO. In fact, this mechanism originated in the late 90’s is a common practice in Argentina and Brazil where many clubs are insolvent or financially limited but full of young talented players whose majority appear to follow a TPO model. At the time TPO emerged, Brazil and Argentina together, who have won five and two FIFA World Cup titles, respectively, were already the biggest exporters of players to Europe.

In the season of 2012/2013, according to CIES football observatory, the market value of under-26 years old players sold to Europe rose to 142 €MM (515 players from Brazil; 188 from Argentina) – €37.4 MM to England, €20.3 MM to Russia, €55 MM to France and €4MM to Portugal, all in the season 12/13 and €59.3 MM to Spain, in the season 13/14. In fact, there has always been a huge demand from European clubs for South American players in tandem to the dream of South American players to move to Europe to shine in the Champions League and thus to earn much
higher salaries. Furthermore, these clubs have been lacking the means throughout years to maintain those players. One example, which illustrates this fragile situation, was the closing down of Futsal and Women’s Football teams, in 2012, by Brazil Santos FC due to the high salary of their rising star Neymar who the club wanted to maintain both because of his importance and to increase his market value. One year and a half later, he joined FC Barcelona for 88.20 Million €, a record transfer value both in Brazil’s transfer history and FC Barcelona.

These financial limitations led to the creation of TPO, considering the need of quick and easy money to overcome those problems as well as to grow and keep competing. Southern American clubs began thereby trading percentages and sometimes the totality of the most promising footballer’s economic rights with agents, sports agencies, companies, etc. Another way was to provide financial support to professional clubs when signing players in exchange for certain economic rights. Furthermore, agents also started approaching young and emerging players (even amateurs) promising to place them with successful clubs, before the expiry of the employment contract in return for a percentage of the players’ economic rights. On the side of the investors, it was expected the players to perform well so that they would later generate major profits and revenues from a future transfer fee to a European club, for example. According to the information gathered in the KPMG\textsuperscript{15} report on TPO of 2013 “TPO agreements in South America do not usually contain “minimum return” clauses, or clauses providing for the payment of interest. In these TPO agreements, the investors usually assume several risks in the event that the player is not transferred in the future or is transferred for a lower amount than the investment made \textsuperscript{Right off}, which means that the investor’s economic rights are lost and the investment does not generate any returns” (…) The percentage of economic rights owned by investors is estimated to range from 10% to 50%, depending on the TPO model used and the investor’s profile. It must be also noted that third parties and investors are not interested in owning more than 50% of a player’s economic rights, as in this situation the club would no longer be so interested in transferring the player (the amount received by the club in the event of an eventual transfer of the player would be very low) and would therefore prefer to hold onto the player up to the termination of his contract (…) it is also

\textsuperscript{15} Project TPO, KPMG Europe LLP’s subsidiary KMPG Asesores S.L. 2013 (August, 2013). http://www.ecaeurope.com/Research/External\%20Studies\%20and\%20Reports/KPMG\%20TPO\%20Report.pdf, pp. 34, which presents an overview of the situation of TPO in 2013. It is based on the information gathered from interviews and public information. The numbers estimated only consider the first division of each country.
particularly common for clubs agree on the co-ownership of the economic rights of a player, and therefore share the profits arising from a future transfer of the player’s economic rights”.

In order to illustrate the importance and popularity of this practice in the continent, according to the data gathered in the same report, it is believed that in Brazil almost 90% of the footballers registered to compete in the Brazil’s first division League known as Brasileirão have their economic rights shared between different stakeholders.

Although depending on different variants such as the time and the situation in which a player’s economic rights are acquired, the most typical third-party ownership practices in South America, which Europe copied, are the following16:

i. Recruitment TPO/Incorporation17

- It is the case of young players when registered with a club as a result of a company’s (or individual’s) promotion of the player.
- As opposed to Europe, in South America, it is extremely common to all entities linked to a young amateur to acquire a percentage of the player’s economic rights when he is recruited or signs for a South American club. By other words, the club and third party share the revenues and hold a stake in the earnings arising from a future transfer.
- In case this practice is chosen, the standard economic rights assigned to a third party range from 10% to 20%, given that there is no initial financial support or investment by the third party other than the recruitment of the player to the club.
- The third/parties are usually agents, relatives or even players themselves.

16 Also based on the KPMG report.
ii. Investment TPO

- Third parties act as investors whilst a club is interested in signing a player whose federative rights are entitled by another club and thus, provide the club with financial support in regard to the payment of the transfer fee.
- In this type (which has become increasingly common in Europe and is the most commonly used worldwide), when a South American Club is interested in acquiring a player, but lacks sufficient financial support to do so, a third-party investor provides the club with financial support, in exchange for acquiring a percentage of the economic rights and, consequently, of the profits arising from any future transfer of the player.
- From this co-ownership of the player’s economic rights between the club and the investor, a sort of joint venture is constituted, whereby the parties agree to hold together the ownership of the player’s economic rights and share the revenues, which will depend on the player’s performance. In these cases, the club has a duty of transparency and good faith with the investor, with the commitment of transferring the player when an important offer arrives, under the terms and conditions set out in the TPO agreement.
- The third parties are usually companies, sports agencies or investment funds.

iii. Financing TPO

- When a club is in need of economic liquidity to balance their accounts and to comply with its economic obligations (rather than to sign a specific player).
- In South America it not as common as in Europe.

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18 Page 13, Project TPO.
19 Usually Investors don’t owe more than 50% of a certain player’s economic rights. The duration of this type goes as what follows to Financing TPO. See footnote 21. The standard percentage transferred to the third party ranges from 10% to 50%. The percentage will depend on the financial resources of the club at the time of signing the player and thus on the third party investment and financial support provided to the club in this regard.
The third party by providing credit to the club acquires, in return, a certain percentage of the economic rights of one or even several of the players of the club, whose federative rights are owned by the club\(^\text{20}\).

Despite the high numbers of followers of this practice in the continent, the authorities, which govern football, have approved regulations to prevent unlawful practices regarding transfers (either abusive or fraudulent) by all the stakeholders involved: both clubs and third parties.

In Brazil, for instance, Law 9615/9, also known as “Lei Péle” which entered in force in 1998 and established the distinction between federative rights and economic rights\(^\text{21}\), states in its article 27-B (introduced in 2011), similarly to FIFA’s RSTP article 18bis, that “The clauses of the contracts between sport entities and third parties, or between these and athletes, which may intervene or influence in the transfer of athletes or, even, to interfere in the performance of the athlete or the sport entity are automatically null and void, except those in accordance with a collective work agreement.”

Turning to Argentina, several controversial issues have also to be solved. In its first division, just two clubs (Lanús and Vélez Sarsfield) do not depend on investment funds. It is believed that when players who play in the league are sold, clubs receive a small or even nothing of the total transfer fee, which proportionally goes to the bank account of the investor and thus not re-invested in football, but other line of businesses, say, real estate or all sorts of securities the tax authorities.

To overcome suspicious activities, this country entered regulations\(^\text{22}\) in 2013, which mandate the register of transfers and professional contracts and subsequently monitors this information in a system. Clubs are also required to conduct transfers through special bank accounts for this purpose. The goal of these regulations is to achieve more transparency by fighting tax evasion and money laundering in the transfer of players and hence requiring clubs to provide with detailed information such as the list of players whose economic rights are not fully owned by the club, the

\(^{20}\) “In this type of TPO the percentage of economic rights acquired by the third party is not determined by a standard but depends on several factors, such as the investment made by the investors, the potential value, foreseen performance and age of the player, as well as the financial needs of the club at the time the TPO agreement is signed. However, it is believed that the percentage of economic rights acquired in this type of TPO generally ranges between 10% and 40%. The duration of this type of TPO is usually linked to that of the employment contract, and may be extended in line with any extensions to the related employment contract”, pp. 14 of the Report.

\(^{21}\) The ones that can only be owned by a club: the economic content of federative rights, which can be owned by third parties, respectively.

\(^{22}\) General Resolution No. 3432/2013 (GR 3432).
names of the investors that own these rights and full details of the economic rights owned by such third-parties. In case the information requested is not disclosed or does not match, the transfer through the special account will not be approved. The General Resolution also established a set of tax obligations regarding the transfer of professional footballers. “In order to determine the amount to be withheld, the withholding agent has to apply the following tax rates to the total transaction amount: 1) 17.5%, applied to payments from sports entities to investors listed on the ‘Register of investors linked to professional football players’, i.e. any companies or individuals that hold investments in the economic rights of the transferred player; 2) 35%, applied to payments to investors not listed on the ‘Register of investors linked to professional football players’, or listed investors that have failed to report investments in the economic rights of the transferred player23”.

The continuation of players sold from South American clubs being “owned” on a TPO basis has depended throughout years on which Leagues they were transferred to, due to the different regulatory framework among European countries, which can be seen in the next sub-chapters where we aim to analyse how TPO has been regulated in different countries.

1.2. A turning point: the Mascherano and Tévez case

The English Experience

As expressed in the last chapter, TPO emerged in South America. Yet, this profitable and appealing practice crossed the Atlantic leading to huge controversy in the old continent. The peak happened, in particularly, in the Mascherano/Tévez affair which represents a milestone in the history of English football as well as the most known and important case on TPO which changed dramatically the Regulations on Football players’ transfers both in England and subsequently, all over the world.

In the year of 2005, at the age of 20, world class Argentine player Carlos Tévez joined Brazil’s Corinthians (São Paulo) from the Argentina’s Boca Juniors (Buenos Aires), whilst a percentage of 35% of the player’s economic rights were sold to Media Sports Investments Inc. (hereby referred as to MSI), a company registered in the British Virgin Island24. Meanwhile, Iran

23 KPMG Report, pp. 37.
24 A secretive tax haven.
investor Kia Joorabchian was leading a fund, also called MSI, with headquarters in London, which financed and bought Corinthians with its backers nevertheless always undisclosed. Later on, Javier Mascherano also joined Corinthians shortly afterwards for a reported $15m from River Plate\textsuperscript{25} (also from Buenos Aires). On 7 February 2006, Tévez signed a further agreement transferring his economic rights to MSI and Just Sports Inc. The following summer (2006), after starring for Argentina at the World Cup both players signed for English Premier League’s West Ham United, a deal which has posed some suspicion on how this club afforded such stars. On his side, Mascherano was “owned” by Mystere Services and Global Soccer Agencies. Nonetheless, they were not registered to West Ham but loaned and thus still “owned” by offshore companies based in tax havens\textsuperscript{26}. The deal did not please Premier League and disciplinary hearings and a legal case began leading to West Ham being fined £5.5m by a Premier League disciplinary panel for failing to disclose the “third-party arrangements” with the league and the ultimate owners of those companies were never identified.

As a result, the deal was accused of allowing the players’ owners to materially influence the performance of the club’s team as well as providing the third-party a contractual right to force West Ham to sell the player if a suitable bid was received which \textit{per se} constitutes a breach of Rule U18\textsuperscript{27}. According to the Premier League, West Ham “failed to act with the utmost good faith”. Not all third-party would be in breach of the rule, but only in case of “material influence”. However, the players were allowed to continue playing for West Ham and both stayed in England after the case.

Consequently, the English Football Association afraid of presenting what happened in South America, decided to ban the practice in June 2008 after its AGM. It was believed this practice was considered a menace to the integrity and ethics of the sport, as well as an “inedifying trade in young people that rips the heart out of clubs which try to develop players”. The association then drafted new rules (L34 and L35\textsuperscript{28}) which entered into force at the start of the 2008-09 season. Since


\textsuperscript{26} “A year later, the Corinthians deal came under investigation for alleged money laundering by the São Paulo state prosecutor’s office, and a warrant was issued for the arrests of Joorabchian and Berezovsky, alleging that Berezovsky controlled MSI”, from the same article. Boris Berezovsky was his long-term associate. A document stated to be an agreement between MSI, LMC and Patarkatsishvili, in July 2007, seen by the Guardian, asserts that “MSI is beneficially owned as to 100% by Georgian billionaire oligarch Arkadi Patarkatsishvili”, \textit{ibid}.

\textsuperscript{27} Current Rule V.21.

\textsuperscript{28} Current Premier League Rules U39-40.
then, Premier League clubs while buying have to satisfy the football authorities that all other economic interests have been extinguished, in case the other party is an agent or a company who owns the player’s economic rights. Even after the ban Richard Scudamore, Executive Chairman of the highest tier of English Football Association, backed by Platini, lobbied for FIFA’s football committee to adopt a similar ban across world football.

Jean-Louis Dupont, specialized lawyer in EU Competition Law and part of the legal team that led to the Bosman ruling in 1995, which allows players to move for free at the end of their contract, finds the rules which require clubs to fully own the economic rights of a player “not legitimate”. "I'm not convinced restrictions to that business are legitimate. Third parties would own rights of players and have an interest in the potential benefit of transferring a player from club A to club B. We are in a typical case where, in order to avoid the disease, you kill the patient. If you kill the patient, there is no disease - but there is no patient either. The main principle under EU law is the freedom of enterprise, where the restriction is the exception. You should start with the principle rather than the exception”29. Dupont posed the question of what the difference is between a club using a third-party owner and going to a bank for a loan to buy a player. He said: "This is a typical sports federation over-reaction. There are reasons for a federation to be careful when you see third parties investing in football but it does not entitle them to over-react to cancel the freedom of somebody. The rule is not proportionate. The objective is to protect the game - the ethics of it. But to achieve that you cannot just say 'no' to third parties. It's clearly excessive. What is the difference between having a fund [third party] buying a player and a bank doing it?"

Despite all cons, France30 (Ligue de Football Professional) and Poland31 (Ekstraklasa) followed the English FA and thus banned this practice, as opposed as to other European countries

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 (…) It 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. Nevertheless, clubs who ’buy-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” – Daniel Geey, Third party investment from a UK perspective, in Debating FIFA’s TPO ban: ASSER International Sports Law Blog symposium, (Springer 2016) annuary 2016, Volume 15, Issue 3, pp 233–252. http://link.springer.com/article/10.1007/s40318-015-0080-x

30 Article 221 of the French Football League’s 2011-2012.
31 Article 33.4 of the Polish Football Association’s Status and Players Regulation.
where it is not prohibited by national legislation (just by incorporating FIFA’s RSTP) and the practice is still quite popular. Those three countries together account approximately 25% of the European player’s market value (€5 billion).

1.3. Iberian Peninsula & Eastern Europe

According to transfermarkt analysis shown at the KPMG report, in 2013 the total market value of players where the TPO practice was allowed amounted to circa €14.3 billion which represented c.75% of the market value of all the European leagues. The total market share in Europe is estimated to be between 3.7% and 5.7%, whereas excluding countries where TPO is not allowed it hangs between 5.1% and 7.8%.

Hence, the approach of England, France and Poland has not coincided with the other European countries. In fact, TPO has been a mainstream financing mechanism for clubs in countries such as in Spain and Portugal and has been experiencing an upstream trend in Eastern Europe countries in the last years which makes FIFA’s ban even more controversial and hard to enforce. “In the current European scenario, the instrument of listing in the stock exchange and recourse to bank loans have changed the funding model of professional football teams (Andreeff, 2011; Dobson & Goddard, 2001; Neale, 1964), expanding the range of incoming sources available to this field. In particular, the business model of the clubs (Staudohar & Mangan, 1991; Conn, 1997; Franck, 2010; Gomez, et al., 2010; Sordeman, 2013), starting with the use of traditional instruments for company funding, reflects the demand to increase competitiveness through the adoption of instruments and/or processes aimed at the correct execution of company management, in full observance of relative norms.”

Regarding Spain, the leading country in UEFA rankings for club competitions since 2012/2013 season, assessed by the performance of the clubs of each country, TPO investors have strongly

32 See page 8 of the report.

increased in the last years. The interest rates demanded by third-parties range around 8% and 10%, justified by the lack of guarantees (e.g. season tickets or broadcasting rights as these have usually already been pledged to secure other sources of financing\textsuperscript{35}) There, the average percentage of ownership usually ranges between 10%-50%. Clubs mostly resort to them when in difficulties for financing the acquisition of players or for to increase their short-term competiveness. The estimated market share of TPO in its first division is estimated to be between 5% and 8% (€125 to €201 million, considering the total market value of players is €2.483 million)\textsuperscript{36}. Thus, in Spain TPO is in line with average practice. In this country, it is believed that in the first division (known as La Liga) at least 5 clubs are operating with TPO investors and 25 players in Spain who comprise a market share of 4.8% in terms of numbers of players (519 players perform in the league). These clubs are usually medium sized clubs and struggle to compete with sharks as Real Madrid, FC Barcelona or Atletico Madrid. This country is quite interesting considering its greatness and glory internationally both through its national squad (who won FIFA world cup in 2010 and the EURO in 2008 and 2012) and its clubs (in this century has won 8 Champion League and 8 Europa League titles). Yet, in Spain, despite having some of the richest clubs of the world, there are several clubs running into financial problems due to damaging management and indebtedness.

Turning to Portugal, whose three players have won the Ballon d’or\textsuperscript{37} (five times), two teams the UEFA Champions League (twice each) and has exported several coaches to the best European teams, sporting glory does not come in tandem with wealth.

The use of TPO began in the early 2000’s. Moreover, in 2013, the value of the players under TPO practice was between approximately 27% and 36% of the market value of the players who were registered in the Portuguese league (€231 to €303 million in a total of €851 million); 9% to 16% of the total players registered (40 to 70 players, over a total of 451). Therefore, in terms of market value, this country has the most relevant TPO market in Europe. The main average percentage of ownership in the economic rights by third parties is the same as in Spain. In that year, according to the KPMG report, TPO operations appeared to be largely concentrated in the most relevant clubs (SL Benfica, FC Porto, Sporting Clube de Portugal and Braga).

\textsuperscript{35} KPMG report, page 24.
\textsuperscript{36} Ibid, page 6.
\textsuperscript{37} Award which is given to the best footballer of the year which has been given to Eusèbio, Figo and Cristiano Ronaldo (the last has won three times).
However, Sporting’s President Bruno de Carvalho, elected in the same year, launched a crusade against third-party ownership considering that these investors are obscure and a menace to the sport for being unknown and presumably unlawful as many of them “have connections with offshores as well as related to illegal gambling and drug trafficking”\(^{38}\). Another critique was the pressure these funds may lay on clubs’ governance towards selling. The general of the Lisbon club also stated that ‘football should not be the sanctuary of all of the dirty money, solely because it needs that money’ and criticized agents ‘who create illusions on players’ minds telling them the interest of great teams, astronomic salaries and thus, creating instability’. “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\(^{39}\). Now, the club is on trial in the Court of Arbitration for Sports (CAS) against Doyen Sports\(^{40}\), which has had in the last years legal disputes in other countries such as in the Netherlands and Belgium. In litigation, Sporting accuses Doyen of having pressured the club towards the sale of Argentine Marcos Rojo, who later joined Manchester United. On the other hand, Doyen demanded an amount from the share of the transfer to the English club of the player they owned (75%) which Sporting refused. The club lost but will appeal the verdict.

One practice usual in Portugal consists of agreements between clubs and agents whereby the latter would be entitled to certain percentages of young and promising football players’ economic rights and the club would benefit from a new credit line. Gestifute, one of the most important football agencies in the world and ran by world’s number 1 agent Jorge Mendes, who has won Dubai’s Globe Soccer award of Best Agent of the year for the last 6 years, has played a crucial role in this practice mainly by having a good relationship with the main teams in Portugal.


Among others, this agency represents Cristiano Ronaldo, James Rodriguez, Angel Di Maria, Falcao, Thiago Silva and the manager José Mourinho. Clubs have also created their own funds, as SL Benfica did in 2009 with *Benfica Stars Fund*.

Furthermore, another important stakeholder related to financing, in general, and particularly to players’ transfers was Espírito Santo Group, which has had partnerships with the ‘big-three’ clubs for several years. The Holding Group owned the Portuguese biggest bank Banco Espírito Santo and its former and last CEO Ricardo Salgado (also important shareholder as a member of the family who founded the bank) was known by the national media as ‘the owner of everything’ as his influence extended to all sorts of businesses. Notwithstanding, the bank has collapsed in the summer of 2014 and the latter is now on trial for seven economic and tax crimes. This represented a challenge for the future of clubs, which cannot count on this finance tool.

This practice is particularly important in the country where very often clubs are not able to pay salaries to players in the due time. Portugal’s population is 10 million and the majority of the industry and finance are concentrated in the capital, Lisbon and in the country’s second largest city, Porto. Moreover, similarly to Spain, in Portugal there is a huge gap between the top clubs and the remainder in terms of financial situation, influence, popularity and world exposure. In practical terms, this means there’s a huge contrast between clubs regarding all sorts of revenues (such as match days or merchandising) and sponsorship and mainly, TV broadcasting deals, which in Portugal, as opposed to England for example, are not centralized by the League which makes popular clubs earn more than 10 times more than the others. According to the Portuguese League, in 2010 the big three (Benfica, Porto and Sporting) concentrated 70% of the total revenue of the League.

Notwithstanding, there are clear signs which explain the popularity of TPO in Portugal and Spain. Both countries are the closest ports in cultural, linguistic and even geographic terms for South American players who pursue an international career in Europe. Such phenomenon make these two countries an international hub (also for African players, mostly the ones from Portuguese speaking countries as Angola, Cape Verde, Guinea-Bissau, Mozambique and Sao Tome and Principe among some ended up playing in European national squads). After some time, these players are also available to acquire these countries’ citizenship, which depends on requirements such as speaking the language of the country (which in the majority of South American territory is Portuguese and Spanish, which also explains how European agents extend their activity to players
from the other part of the Ocean). Players will benefit from this naturalization, as there are rules over Europe imposing a limit of non-EU citizens on each team and hence will have more opportunities throughout their careers.

Along with those factors, the financial crisis through which the two Iberian countries went in the last 8 years restricted traditional lines of credit (due to the collapse of Banks, such as in Portugal and the dramatically drop on trust both on the market). Thus, TPO investors managed to act as Banks and turned into a crucial provider of capital. Apparently, the FIFA ban on TPO can bring more harm to these two countries, which are dependent on it, similarly to South America countries. These concerns will be dealt with in the sub-chapter 2.2 Discussion.

This practice is also very common in Eastern Europe countries and mostly in the Balkans - Bosnia, Croatia, Macedonia, Serbia, Albania, Bulgaria, Romania, Hungary, Slovenia and Montenegro - experiencing an upward trend in recent years. The TPO market share is estimated to be over 40% of total market value (1,297 to 1,621 players over 3,242). Football players in these countries are represented from a very early stage and the investors are often foreign. It is believed that ‘cash from transfers account around for 70% of the clubs’ annual budgets’. The reason for this is that several clubs in these countries have a weak financial health and do not generate revenues as other clubs from other leagues do from broadcasting deals or sponsorship, for example.

Anywhere else in Europe in countries such as Italy, Germany, Belgium, Russia, Greece and The Netherlands, the practice is insignificant despite the interest from some clubs, especially those with financial difficulties. From this list of countries, it is the latter, which has had a higher market share, where in 2013, was set between 0% and 4% (5 to 15 players, over the total 482 in the Eredivisie). However, the Dutch authorities and mostly KNBV (Dutch Federation) have taken affirmative and strict actions in accordance to the new FIFA regulations which led to the ban of TPO (particularly, RSTP’s article 18ter). It was the case of FC Twente this season (2015-2016). The club was banned from European competitions for three seasons and fined €45,250 for failing to reveal full details of a third-party ownership contract with Malta-based Doyen Sports Investments. Lately, the club was relegated to the second division as a fine for having connections with the latter fund regarding a transfer, which is prohibited by KNVB, the Dutch Federatio

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41 Czech Republic and Slovakia were not analyzed in the report although the practice is also significant there.
2.1. Definitions and elements of a Third-Party Ownership Contract

TPO is a practice followed for more than 20 years and yet, it was not defined by either any national legislation or international regulation until article 18ter came into force as part of the Regulation on the Status and Transfer of Players. In its first paragraph already quoted it is stated that it consists of “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 further transfer or transfer compensation”.

There are also several academic definitions of TPO as follows: “Ownership of economic rights in a football player by an entity which is not a football club”, by Richard Andrews\(^\text{43}\). “Ownership by a third party of the economic value (i.e. economic rights) of a football player’s federative right”, Clifford Chance’s lawyers Romain Soiron and Victoriano Melero\(^\text{44}\). “The Agreement between a Club and a Third Party, such as investment funds, companies, sports agencies, agents and/or private investors, in accordance to which, a Third Party, whether or not in relation with an actual payment in favour of a club, acquires an economic participation or a future credit related to the eventual transfer of a certain football player”, KPMG report\(^\text{45}\).

Regarding the elements of this contract, first, it is elementary to point than no player is owned (which otherwise would seem as a relationship between a slave and his master), but a share of their economic rights. Hence, some authors rather use alternative definitions such as third-party


\(^{44}\) The dilemma of third-party ownership of football players Ibidem, pp. 41.

\(^{45}\) Page 5 of Project TPO.
entitlement (TPE) or Third-party investment. Moreover, this agreement is comprised of two parties, besides the player who is always somehow present (the source of the economic rights). On the one hand, the third-party, necessarily other than the two clubs transferring a player from one to the other, or any previous club, which can be an investment fund, an agent, a private investor, a sports agency, a company, a relative of the player and even the player himself. On the other, the clubs (publicly listed or not) which own 100% of the federative and economic rights of the professional player.

Consequently, besides having parties of different sorts there are also different types of rights involved which make the object of this contract so different and special in regard to contracts, in general. Hence, TPO splits football players’ rights into two: on the one hand economic rights; on the other, federative rights.

The latter are exclusive of the football clubs and connect the player to a club by a working contract, which is duly registered before the respective football association; they cannot be fractioned or shared with third parties and entail the registration rights of transfer. Overall, this rights’ function is to allow players to participate on behalf of the sports entity and to represent it in the competitions in which the club is inserted. This right has been often called as “right of pass” or “right of transfer” and thus, when the media announces that a player has been bought it is implicitly referring to the acquisition of these rights.

On the other hand, Economic rights entail “the right to receive any amounts from the extinction of the federative rights, upon the payment of any compensation arising from the early termination of the employment agreement, or arising out of the temporary or definitive transfer of the player’s federative rights to a third party”\textsuperscript{46}. By contrast, to the federative rights, these are not exclusive of the clubs and thus, able to be held by third parties other than the club. Overall, these are financial rights, which arise from negotiation/transfer of federative rights, in other words, the economic face of federative rights\textsuperscript{47}.

\textsuperscript{46} KPMG report.
\textsuperscript{47} Before article 18ter have these rights as its title, “the Court of Arbitration for Sport (CAS) did recognise those rights in the award ‘Tacuary FBC v. Club Atlético Cerro & Jorge Cyterszpiler & FIFA’, in which CAS stated that ‘In accordance with the FIFA Regulations, a player may only register to play for one club, never two or more at the same time. As such, the partial transfer of federative rights contravenes the essence of the FIFA Regulations and furthermore is impossible (...) As a consequence of this, whilst the “federative rights” of a player cannot be shared between two
Thus, if a TPO structure is followed, the football club are not able to own all the economic rights, or, in other words, is not entitled to 100% of the future transfer value of a player that is registered to play for that club and whose federative rights are therefore owned by the club.

All in all, what defines this contract and its subsequent practice in all its variants is that a company or an individual (as long as registered), via a private law contract, is entitled to a share of a player’s future transfer value by providing a football club or a player with money, in return. "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."  

1. Non-standard TPO practices and Third-Party Influence

Besides the standard TPOs already referred\(^49\), there are other schemes and mechanisms under which, regardless of not being considered TPO stricto sensu, a club owning 100% of a player’s federative rights is not the sole entitled party to the economic rights arising from that player’s future transfer.

Firstly, there is co-ownership. It is an agreement between a club vis-à-vis another one (and not before a third party) at the same time of the main agreement which sets the transfer of a player. Thereby, providing that the club transferring the player would be entitled to a percentage of a future transfer by the current buyer, or to a percentage of the capital gains arising from such transfer. This is a usual agreement as it is a long-term investment over a player whose potential is likely to increase and thus, potentially benefiting the seller. It is also a means, which can solve deadlocks regarding negotiations over players.

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\(^49\) Pages 9-10 (Chapter 1.1).
Moreover, there is co-ownership between clubs and players’ agents, while negotiating the remuneration to the agent who has engaged to act on a player’s behalf as a consequence of the signing of the player, whereby the agent receives a percentage of any capital gains arising from the player’s future transfer. However, it is considered prohibited by FIFA. Similar to the co-ownership between clubs, there is the Italian regulated Accordo di partecipazione by which two Italian clubs agree to share the profits arising from a player’s future transfer. Hence, a club by selling the player acquires an interest in his economic value.

Furthermore, economic rights of players are used as credit guarantee, whilst clubs may own 100% of them, in order to secure financing. It is a practice adopted in Portugal and Spain as a means to outstanding debts. Lastly, in jurisdictions such as the Spanish, in case a club by transferring a player earns a financial gain, the transferred player is entitled to receive a percentage of the transfer fee, whether the transfer is definitive or temporary.

Another practice related to TPO and many times overlapping it, which has been indifferently but wrongly used as a synonym, is Third-Party influence. It is a wider reality in comparison to TPO and “relates not just to ownership of players but outside parties who are not involved in the ownership of the club (e.g. sponsors, intermediaries or some other external third party) having an influence on the way a football club operates” such as in its employment or transfer related matters. On the other hand, Third-party ownership refers solely to an investment by a third party on a player and hence, being entitled to a percentage of the latter is economic rights. Moreover, in TPO the most likely intention of the third party is to benefit from a future transfer of a player, whereas in third-party influence the goals may be diverse such as advertising, market positioning, etc.

Third-party influence, which is able to tie football clubs to outside entities, was already prohibited as of 2008, in FIFA RSTP’s art. 18bis, amended on 2015/2016 at the same time article 18ter was redacted for having an article solely targeting TPO. It goes as follows:

“18bis Third-party influence on clubs

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50 Article 102 “bis” of the Norme Organizzative Interne Della F.I.G.C.
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.

2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.\(^{52}\)

2.2. TPO in practice: How it works, features and clauses

TPO agreement’s goals are to transfer to the investor a certain percentage of the economic rights of a player from whose federative and economic rights are fully owned by the club up to the existence of the TPO agreement. In return, the investor has the obligation to pay for the acquisition.

The contract itself, for the sake of clarity in regard to the rights and obligations of the parties to the TPO agreement, usually provides definitions. They comprise of provisions such as those, which clarify: the economic compensation (‘the amount paid by the investor to the club as a

\(^{52}\)‘FIFA’s Disciplinary Committee has imposed sanctions on several clubs for breaches relating to third-party influence and/or third-party ownership of players’ economic rights (...) The sanctions relate to the following cases:
- Santos Futebol Clube of Brazil was sanctioned with a fine of CHF 75,000, a warning and a reprimand for breaching art. 18bis (2008 edition), as well as annexe 3 of the Regulations. The club was found to be liable for entering into contracts that enabled third parties to influence the club’s independence in employment and transfer-related matters, failing to declare mandatory information in the International Transfer Matching System (ITMS) and failing to cooperate with an investigation conducted by FIFA TMS.
- Sevilla FC of Spain was sanctioned with a fine of CHF 55,000, a warning for breaching art. 18bis (2012 edition), as well as annexe 3 of the Regulations. The club was found to be liable for entering into contracts that enabled a third party to influence the club’s independence in employment and transfer-related matters and failing to enter mandatory information into ITMS.
- Club K St Truidense VV of Belgium was sanctioned with a fine of CHF 60,000, a warning and a reprimand for breaching art. 18bis and art. 18ter par. 1 (2015 edition) of the Regulations. The club was found to be liable for entering into contracts that enabled a third party to influence the club’s independence in employment and transfer-related matters and entering into an agreement that assigns rights to a third party in relation to the future transfer of a player.
- Club FC Twente of the Netherlands was sanctioned with a fine of CHF 185,000, a warning and a reprimand for breaching art. 18bis (2012 edition), art. 18ter par. 5 (2015 edition) as well as annexe 3 of the Regulations. The club was found to be liable for entering into contracts that enabled a third party to influence the club in employment and transfer-related matters, failing to upload a TPO agreement into the library in TMS, breaching confidentiality rules and failing to declare mandatory information in ITMS.

result of the acquisition of part or whole of the player’s economic rights; the economic rights; the federative rights; minimum return (when agreed).

Furthermore, the contract will set and regulate the rights, credits and obligations both parties are subjected to, specially the ones in case there is a future transfer of the player to another club before the expiry date of the TPO agreement. Hence it will include the agreed percentage the investor is entitled in case of any amounts received by the club upon the transfer of the player’s federative rights (for example 20% if the same amount was paid and then acquired of the economic rights). Percentages of the amounts earned from compensation events in case the player breaches the contract can also be stipulated. Moreover, the parties can also agree on a percentage of ‘any amounts resulting from the transfer or use of the player’s image rights when such amounts are obtained by the club as a result of the transfer or expiry of the Player’s federative rights’.

One of the upsides of TPO contract is to allow the share of risks and awards by clubs and third-parties, meaning both parties are dependent on a future sale of the players’ rights. Nonetheless, investors may minimize risks by requiring a guaranteed minimum return, which comprises of a minimum amount to be paid to the investor whether or not the player is transferred within the term of the TPO agreement, which usually equals the amount invested, plus interest. Therefore, investors’ risks will solely base on the financial situation of the club.

Regardless of the general agreement made by the parties concerning the club’s obligation to pay the investor (e.g. 20%) of any amounts/compensation emerging from the transfer of the player, some TPO agreements provide clauses, which impose certain secondary obligations to the club. One can enter agreed buy-out clauses paid by the player in the event the player is definitively transferred for any reason. This “compensation clause” operates in tandem with the payment by the club to “the investor the higher of the following: (i) the percentage of the player’s economic rights acquired by the investor (in this case 20%) applied buy-out fee or investor to the total transfer fee or fee, (ii) the minimum return agreed between the club and the investor”. Moreover, the parties can agree on a clause providing a penalty arising from rejecting a transfer offer from another club for the definitive transfer of the player (and thus his economic rights), “for a sum equal to or higher than an agreed amount (...) the club will be immediately obliged to

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53 Ibidem.
54 Page 38 of the KPMG report.
55 KPMG report, page 38.
repurchase the percentage (20%) of the player’s economic rights transferred to the investor, for a sum equivalent to 20% of the transfer offer received by the club”.

The contract may also comprise clauses such as the freedom to establish the contractual provisions of the employment contract between the club and the player. Yet, the club and the investor usually agree, “that the club will be totally free to agree the contractual provisions applicable to the employment relation with the player, including but not limited to amendments to the buyout clause, contract renewals, etc. without the need to report to or request the authorization of the third party”\textsuperscript{56}. Furthermore, the investor may have, in case this clause is entered, the option to receive the minimum return in the event of modifications to the terms of employment. Notwithstanding, should the new terms of employment agreed between the club and the player include an increase in the buy-out Clause equal to or higher than a certain percentage, or an increase in the player’s salary equal to or higher than a certain percentage of the salary stated in the player’s employment contract at the signing date of the TPO Agreement, the investor would be entitled to the following options: (i) to maintain the economic rights of the player after the modification of the employment conditions under the same terms and conditions or (ii) to request the payment of the minimum return from the club\textsuperscript{57}.

Other clauses can also be contained such as the reacquisition of the player’s economic rights by the club. By contrast, a non-transfer clause can provide that, in the event the player is not transferred by a determined date (usually the transfer window prior to the expiry of the TPO agreement), the investor will be entitled of an amount equivalent to the compensation paid by the investor in order to purchase the percentage (20%) of the player’s economic rights, plus interests. Lastly, aiming to facilitate the definitive transfer of the player can be the investor authorized to promote the definitive transfer of the player, if the agreements provides so. Nonetheless, the investor will not represent the club as the latter will not have the capacity to accept any offer in the club’s name or interests, or to negotiate the economic terms of the transfer, and hence will be obliged at all times to follow the instructions provided by the club.

\textsuperscript{56} Ibidem.

\textsuperscript{57} Ibidem.
Turning to the duration of investment in a player, it averagely ranges from two to three years in the club considering the first season is a “year of exposure” of the player to the market in which the player’s market value is expected to increase. In addition to that, the agreement signed between the club and the investor is ‘usually linked to the term of the employment contract signed between the club that owns the federative rights of the player, and the player himself”

2.3. FIFA’s Regulatory Framework and Compliance with EU Law

Indeed the Tévez/Mascherano case, in 2007/2008, constitutes a milestone. This affair unveiled TPO to the world and paradigmatically influenced a few European national regulations (England, France and Poland) towards the ban. Seven years after, is TPO banned worldwide through the last version of the Regulations on the Status and Transfer of Players, which for the very first time refers to TPO and players’ economic rights. “On 22 December 2014, the member associations were informed by means of Circular Letter no. 1464 about the inclusion of the new provisions in the Regulations on the Status and Transfer of Players (RSTP) and their coming into force on 1 January 2015”. These new provisions included article 18ter which established the ban on TPO, as a consequence of the discussions during the 64th FIFA Congress, within FIFA standing committees, a dedicated group created for that purpose (“TPO WG”) and mandated studies. Hence, finally is TPO autonomously regulated in lieu of remaining within the scope of Third-Party Influence, regulated in article 18bis. It reads as follows:

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.

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58 Page 38 of the KPMG Report.
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.

The article is self-explanatory. TPO is not permitted anyhow, anymore, anywhere. According to article 1, paragraph 3 a) its provisions are binding at national level and must be included in the member associations' regulations, despite some already have done so, priory. Moreover, existing agreements can remain in place until their ordinary contractual expiry. As an additional obligation, all existing agreements covered by the ban need to be recorded within FIFA’s Transfer Matching System by the end of April 2015 and agreements made between 1 January and 30 April 2015 were subject to a time limit (one year maximum). The main reason for the establishment of a transition period is to adapt to South America’s reality (and contingently to European countries where TPO is trendy).

Many remarks can be made to the new article, despite the fact it is rather clear. First, regarding the agreements, which predate 1 May 2015 it seems the regulation adopted a naïve criteria. Considering one of the main reasons of the ban on TPO was the obscurity of its investors and beneficial owners, it is unlikely that an effective regulatory oversight can take place, despite Transfer Match System and its records. Hence, this regulation can bring less transparency to the football business, which is exactly the opposite of what these regulations aim. If some clubs are extremely dependent on TPO and considering football is a business disclosure is not high, the ban can achieve quite the opposite as well as bring new similar vehicles or ways to circumvent
these prohibitions. Moreover, the fate of the economic rights currently owned is uncertain. In fact, investors appear not to sell their stakes. Hence, the transition period, as an adaptation period may not be enough to tackle this practice, mostly due to its popularity.

Nevertheless, in accordance with paragraph 6 of the article 18ter, FIFA is much more vigilant. In the event the world football association is aware of TPO practices by clubs there will be no tolerance as it culminated in FC Twente’s relegation.

Turning to the relation of the ban with EU Law, the positions vary. The Spanish (LFP) and Portuguese (LPFP) Football Leagues have filed a complaint with the European Commission, in February 2015, defending it is contrary to EU competition law (Article 101 and 102 TFEU) and to the EU free movement rights (Article 63, 56 and 45 TFEU). Nevertheless, the scope of rules regarding sports is limited. “The CJEU’s Meca Medina ruling sets the scope for the assessment of the validity of transfer rules in relation to EU law principles on free movement and competition. In its judgment the Court first reiterated that sport is subject to EU law only in so far as it constitutes an economic activity. Where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional athletes, it is subject to Community law. According to the Court, the provisions on freedom of movement for persons and freedom to provide services do not affect rules concerning questions which are of “purely sporting interest” and, as such, have nothing to do with economic activity. In assessing the compatibility of the disputed (anti-doping) regulations with EU competition law (…) Therefore, does the ban by FIFA on agreements between football clubs and third party investor/owners intentionally effect the prevention or restriction of competition between football clubs in the Member States? Article 101(1)(d) states that there will be a competitive disadvantage where an agreement applies “dissimilar conditions for some undertakings to equivalent transactions with other trading parties”. LFP and LPFP are challenging FIFA, (which is deemed as an association of undertakings) on the premise that the ban will have a particularly detrimental impact on clubs with lower incomes / spending power and who have become increasingly reliant on sharing players’ economic rights with third parties. TPO provides these clubs with the opportunity to acquire players at an affordable price as they can share the cost with an investor. Once the ban is in force it is argued that these clubs will be unable to compete with the wealthier clubs in the transfer market (…) There is also an argument that the ban infringes Article 102, which is intended to prevent a dominant position in the market being abused. The ruling in Piau determined that FIFA holds a collective dominant position in the market. The European Commission (EC) will have to determine whether the ban amounts to an abuse of this position. The ban has the potential to put smaller clubs at a competitive disadvantage to those larger clubs, which it could be argued, amounts to such an abuse”.


60 Case C-519/04 P - Meca-Medina and Majcen v Commission of the CJEU.
the CJEU noted that, first of all, account had to be taken of the overall context in which the decision of the sporting associations was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.\(^{62}\)

Furthermore, Jean-Louis Dupont (Bosman ruling’s lawyer) defends that clubs should not be obliged to own all the economic rights of their players, underlying on principles such as freedom of enterprise, whose restriction is the exception and not the principle. In the same way, states Kees Jan Kuilwijk: “in addition to violating competition law and the rules on free movement of persons the TPO ban may also constitute an infringement of the Treaty rules on the free movement of capital. It could be argued that a ban prevents the establishment of an internal market for investors in football players and that restrictions may tend to affect the ability of players to move from one club to another, thus infringing free movement of capital principles”.\(^{62}\)

On the other side of the barricade, some believe that the ban is not against EU Law, defending that “an infringement of Article 101 is permissible if it is in pursuit of a legitimate objective and it is proportionate. Those against TPO will argue that the banning of TPO has been put into place in order to protect the players’ interests and the integrity of the sport, which ultimately is in pursuit of a legitimate objective. Arguments have also been put forward that TPO contravenes the principles that have been laid down in the EU’s Charter of Fundamental Rights. Footballers become investments upon which those who invest take a share in their ‘economic rights’ and effectively become the party that barters for the footballer’s future, rather than the footballers themselves. This then becomes a restriction on their freedom to move and work for whomever they wish, a right enshrined in EU law.\(^{63}\)

On 11 November, 2015, a group within the EU Parliament composed by 14 members of its political groups’ ALDE, ECR, PPE and S&D, followed FIFA’s steps on the ban on third-party ownership of players in European sport raising concerns over integrity and ethics as well as risks

\(^{61}\) Paragraph 42 of the Case.
of criminal activities into sports and thus, requiring a cross-border solution with their written declaration, under Rule 136 of the Rules of Procedure\textsuperscript{64, 65}.

2.4. Discussion

After having outlined throughout this thesis the surrounding factors of the origins of TPO, its trends across the major football leagues in the world, its basics and common practices as well as the regulatory approach, the aim is to critically expose and then assess the key arguments whether in favour or not of TPO, or even those in between.

There are three ways to tackle TPO: ban, in accordance to FIFA and the provisions approved in 2015; allow without any restriction, as was the situation prior to Article 18ter; or regulate. In my opinion, the third-way is the one, which balances all parties’ interests there and the less restrictive ways of achieving FIFA’s goals. It is not immoral as it may seem regarding the status of players and does not necessarily pose a threat to clubs’ Governance, as I am about to explain below.

Nevertheless, it is true that many TPO investors and mostly investment funds pose threats to the integrity of the game due to the shortage of disclosure and transparency of their activities as well as very often these entities do not have legal personality. Instead of regulating, FIFA radically decided to ban the practice. In contrast, in the aftermath of the crisis of 2007-2008, the U.S. Congress enacted the Dodd-Frank Act. It was adopted in order to reinforce the oversight over funds, in lieu of forbidding hedge funds or private equity funds, for example, which have managed throughout the years to “meet the relevant requirements to be exempt from the laws and regulations

\textsuperscript{64} Please see: \url{http://www.europarl.europa.eu/sides/getDoc.do?type=WDECL&reference=P8-DCL-2015-0066&format=PDF&language=EN}

\textsuperscript{65} “Recently, the European Commission analysed the football scenario, by examining the economic, corporate and legal profiles related to costs borne by European sports clubs for the transfer of footballers, especially on an international level. In this regard, the Commission observed that clubs spend large amounts of money for the transfer of players. This mechanism establishes an improvement to teams with greater availability, unlike the teams with transferred players, burdened by training costs of the players”, Rosa Lombardi, Simone Manfredi and Fabio Nappo, \textit{Third Party Ownership in the Field of Professional Football: A Critical Perspective}, Business Systems Review, Vol. 3, Issue 1, pp. 32-47 (April 2014). Available at SSRN: \url{http://ssrn.com/abstract=2424897}
that could limit their operational freedom. They essentially avoid regulation by following the letter of the law\textsuperscript{66} and their impact in economic terms is much bigger than TPO investors.

As already stated, TPO is seen as an alternative to traditional funding sources. In fact, from a financing view, what is the difference between a club dealing with a third-party investor and going to a bank in order to obtain a loan to buy a player\textsuperscript{67}? Furthermore, in general, banks and creditors demand collateral and guarantees which also has an impact on clubs’ independency, although indirectly. Sponsors, depending on the contracts signed with clubs, may also have a say on the club’s decisions. Moreover, Venture capital funds also invest and subsequently acquire stakes of small companies and start ups in which they see talent and potential value. Inevitably, the founders’ freedom regarding the management will not be the same, in case a venture capitalist invests in such companies or startups. It can be said, TPO is underlined in similar premises and both are agreements in which the parties involved enter in these deals freely (or should) as a means to align interests. Further, players are professional, which refutes the position of UEFA that players should only be transferred for sporting motives as it is normal that they want to transfer to clubs which pay higher salaries. “Pressure to “force” a transfer is usually exerted by the player himself (…) Not by the (partial) owner, because the owner may often not even be certain whether it is the right time to sell. I do not believe for a second that short-term profit maximization typically underlies TPO practices. Sure, some people invest in Google or Microsoft stock to make a profit in the short term. But I do not think that this is typical. Many invest in stocks for the long run. Contrary to the principle of contractual stability, the TPO 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\textsuperscript{68}. Moreover, TPO structures have also similar features to player’s loans as the clubs where they play do not own the economic rights of players.


\textsuperscript{68} Kees Jan Kuijwijk \textit{FIFA TPO ban cannot be justified under EU law} (Oct. 2015) \url{https://www.linkedin.com/pulse/opinion-fifa-tpo-ban-cannot-justified-under-eu-law-kees-jan-kuijwijk}
Regarding the moral argument Platini used calling TPO a way of trading humans and modern way of slavery, it is essential to remind that “other industries have not dissimilar arrangements without much concern being expressed. Music agents help to move their contracted acts from record label to record label. What is so special about sports’ integrity, human dignity and rights of man, when clubs freely move their players on when it suits them? The only legal issue has been whether the agreement with the ‘owner’ was freely entered into”69. “An investor simply owns a share of the profit of a potential future transfer, not a part of a human being. Clubs typically own 100% of a player. How immoral is that?”70 Moreover, regarding minors they can be protected even if TPO’s allowed as well as they can be subject to exploitation if it is not by clubs. Although, TPO agents may invest in minors, it is something, which can happen also through clubs.

I agree with Dupont when he says that “we are in a typical case where, in order to avoid the disease, you kill the patient. If you kill the patient, there is no disease - but there is no patient either” to the extent the ban can impair those clubs and leagues which relied on TPO to boost competitiveness.

Hence, less restrictive regulations should have been adopted in order to prevent third-parties to intrude in the management of the clubs as well as to enhance transparency over funds’ activities. On the other hand, the new provisions have not mitigated the disputes between the parties involved71. To this end, in accordance to the Spanish league proposals in lieu of the ban, I do believe the following measures would benefit football much more than the ban itself and enhance transparency as well as fostering and encourage social function of sports (education of youngsters).


71 Due to that, Dutch FC Twente was relegated (2016/2017) to the second division as a fine for having connections with Doyen Sports Investments fund regarding transfer, which is prohibited by KNVB, the Dutch Federation. In 2015 Belgian’s Brussels Court of Appeal also dismissed an appeal from the same investment fund seeking a temporary injunction to suspend the implementation of the worldwide ban. The Court rejected that the ban broke EU Competition Law.
First, provisions prohibiting the ownership of economic rights and transfers of minor. This would prevent the exploitation of the latter whose rights are acquired by funds several times, in return of promising careers. Secondly, a maximum percentage of the economic rights of the players (e.g. 25%). Hence, clubs would have the strongest on the fate of the player whose rights are shared. Similarly, to avoid a situation in which funds had a huge influence in the football business, quantitative limitations on the maximum number of players of clubs and leagues could be a good policy. Furthermore, strict and mandatory rules should be applicable to every TPO contract so that the investors do not act solely for profit reason. Thus, it should be imposed a maximum remuneration of investors as well as on other royalties they would get from the players' transfers.

Moreover, for the sake of maintaining the independency of clubs from third-parties regarding their own management certain clauses should be prohibited such as those that would enable the funds to decide on the players' transfer. In accordance to that, investors should not be allowed to own players who play in clubs they have a significant share or position. Hence, an investor could be a director or another similar position in the management of the club.

Lastly, a set of duties of information and a whole new system of monitoring these deals could be established through which investor would have to be registered (including full identification of the beneficial owners) as well as the financial transactions themselves. This would only be effective in the event polices and national and international authorities cooperate mutually to oversee these transactions.
Conclusion

It is visible the importance TPO had as a finance tool, mostly to weak clubs. However, FIFA had not the perception that Football evolved to a business as many other involving billions. Then, the worldwide football federation did not follow modern times the same way IP Law did regarding the copyrights of musicians by authorizing their music to be available in platforms such as Spotify or iTunes, in return of counterweight to the artists, as a means to not lose totally the war against piracy.

The ban pushed Football Business to another level. It is still uncertain if it will be effective and if there will be high compliance rates. Apparently, clubs will have more bargaining vis-a-vis weak clubs to sign players for lower prices than the real value from those clubs who highly depend on TPO and cannot refuse such offers. According to this view, the South American, Iberian and Eastern Europe Leagues will be extremely affected and the flows and movements of players between those countries and continents are likely to decrease. What is known is that FIFA will be much more vigilant although it will be difficult to enforce such measures in national jurisdictions where TPO is a common practice. The upside of the ban may be an opportunity for “in-house players” who are formed in such clubs which are not able to contract new players anymore the way they did before the ban.

Nevertheless, the market will most probably respond as it always has by reinventing itself. Stakeholders will find vehicles to circumvent such restrictions. Thus, I believe, on the contrary, ironically the ban will bring less transparency and more “off-the-record” deals as disclosure rates have always been low in Football. Through regulating instead of prohibiting FIFA would have the opportunity align the interests of young players, clubs, and fans. Hence, I believe the ban can bring more harm.

“The absolute ban imposed by FIFA, like most bans (whether on drugs, prostitution or human organs), will likely lead to the creation of a black market out of regulatory control and would therefore have the opposite effect; it would endanger the integrity of the competitions instead of protecting them”\(^\text{72}\)

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**Regulations and Legal documents**


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