

2.5 Third-party ownership of football players: human beings or traded assets?

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*Today, it's shameful to see some players with one of their arms belonging to one person, a leg belonging to a funds pension located who knows where, and a third person owning his foot. It is shameful; we're dealing with a type of slavery that belongs to the past.*²

UEFA president Michel Platini

The grip of third-party owners of economic rights in the transfers of footballers between clubs worldwide has grown stronger in recent years, increasing economic and legal risks and inviting corrupt behaviour and conflicts of interest. The three letters 'TPO' have come to symbolise the commercial exploitation of sporting talent and the ever-growing trend of profit maximisation in the transfer market for football players. Third-party ownership is considered a risk so significant to players, clubs and football's integrity that a global ban was imposed by the Fédération Internationale de Football Association (FIFA), which is now subject to legal challenge in the courts and at the European Commission. This legal battle is a stand-off between those who seek reform and those benefiting from a non-transparent transfer market that is worth billions and open to corruption.

Background

TPO is operated in different models around the world, but in the European markets arises in the following rough scenario.

- A football club needs money, usually for the 'acquisition' of new employees (players), or sometimes for other projects in a drive to boost competitiveness.

- A third party – an agent, investment fund or other entity – provides the club with the required money.
- In return, this third party does not receive a typical commercial value (such as a sponsorship) or a guarantee on the club's infrastructure, but 'acquires' the partial or complete rights to the fee the club will receive in the future for transferring the employee to a new club.³

The interest of the third-party investor is obvious: maximising his or her return on investment via the transfer of the player to another club during the duration of his or her contract at the maximum transfer fee, in the shortest possible timeframe. The risks of collusion and sharing in undue financial kickbacks between agents, club managers and investors are high. The football player, who at least in Europe is usually not party to these agreements and is often not even aware of such agreements,⁴ thereby becomes the asset in an investment agreement, while his or her rights as a citizen and worker are at risk.

The emergence of TPO has led to an intense political struggle⁵ – and, more recently, a legal battle⁶ – about the impact, causes and the prohibition of TPO. Proponents of TPO view it as a regular investment policy, benefiting clubs' competitiveness in a market of growing financial disparity; these are mainly TPO investment funds (such as Doyen Sports Group), agents and certain clubs deeply invested in TPO funding models.⁷ The fight to remove TPO is based on concerns about infringements of human rights and labour rights, general threats to the integrity of competitions, and negative medium- and long-term economic consequences, which have been characterised as setting clubs in a vicious cycle of debt and speculation.⁸ The trade unions representing professional football players are natural opponents of TPO, and find support from FIFA and the Union of European Football Associations (UEFA).

Labour relations in professional football

Comprehending third-party ownership requires an understanding of the very specific nature of the football labour and transfer market system. In professional sport, the workforce of a club or franchise is the most valuable asset of the employer, not only because of the labour the workforce provide but also because of their image and intellectual property rights, which are of immense importance to safeguard the main revenue streams – broadcasting, sponsorship and merchandise, as well as gate receipts.⁹ On the other hand, having the freedom to offer their services on the labour market is the key for athletes to maximise their salary income in what is often a short-lived and precarious career.

Consequently, the history of collective labour relations in professional sport has been marked by a struggle for freedom of movement and free agency on the part of the players, against restrictive rules – such as retain and transfer systems, the reserve clause, salary caps, etc. – that help to exert control over this workforce, and their pay, for clubs owners and management.¹⁰ Prior to the 1995 ‘Bosman ruling’ of the European Court of Justice, a player, even after the end of his or her employment relationship, depended on an agreement and compensation payment between the former and future employers in order to have his or her player licence transferred, and thereby being cleared to play. The Court recognised this as an infringement of freedom of movement, permitting players to move to another club at the end of a contract without a transfer fee being paid to the previous club.¹¹

A subsequent investigation by the European Commission (EC) into specific labour market regulations of football culminated in an informal agreement via an exchange of letters between Mario Monti, the Competition Commissioner, and FIFA president Sepp Blatter in 2001.¹² This agreement settled a long

dispute between the Commission and football's international federations, and, while its legal status remains questionable, it establishes the basis on which the current transfer system operates:

- a system of training compensation aligned with the movement of young players to reward their training by the home club, as well as a solidarity mechanism to the same effect;
- the creation of two limited periods per year (transfer windows) during which transfers of players are exclusively allowed;
- minimum and maximum duration of contracts of, respectively, one and five years;
- a protected period during which the unilateral breach of an employment contract is subject to a sporting sanction, which in the case of the player equals a ban on participating in matches;
- breaches of contracts to be exclusively possible at the end of a season;
- a system of financial compensation for unilateral contractual breaches by clubs or players; and
- the creation of an arbitration system in which members are chosen equally by clubs and players with an independent chairman, including an appeals body; such arbitration is voluntary and does not prevent recourse to national courts.¹³

From the perspective of the players' unions around the world, the implementation and application of this agreement has failed football on various levels, and it continues to impose an imbalance of power between the vast majority of players and their clubs while limiting the application of general workers' protections.¹⁴ It has also facilitated and sustained widespread abusive practices, such as delayed or withheld salary payments and players becoming trapped with clubs that are acting in bad faith, and has encouraged business models such as TPO.

As a result, despite the Bosman ruling and the EC intervention, football continues to operate as a market in which players and their labour are traded assets.

The relevance of TPO

This particular set of market mechanisms, paired with the accelerating commercial expansion of football (2014's US\$4.1 billion in transfer compensations was the highest to date),¹⁵ has opened the floodgates and attracted third parties seeking to exploit this opaque and at times seemingly irrational industry. It is not surprising that such a market is subject to criminal activities such as money-laundering and trafficking, as recognised by the Financial Action Task Force (FATF) in a 2009 report on the football industry.¹⁶ Long before TPO was a topic of public debate the FATF concluded that 'money laundering...through the football sector is revealed to be deeper and more complex than previously understood..., [with] a variety of money flows and/or financial transactions...related to the ownership of football clubs or players, the transfer market, betting activities, image rights and sponsorship or advertising arrangements. Other cases show that the football sector is also used as a vehicle for perpetrating various other criminal activities such as trafficking in human beings, corruption, drugs trafficking (doping) and tax offences.'¹⁷

The underlying philosophy and mentality in much of professional sport is one of short-term success – the next match is in a few days, relegation or promotion are only weeks away – and, in the absence of sustainable revenue-sharing structures, poor performances and rankings can throw a club into a cycle of declining revenue and non-competitiveness. While the highest payroll does not guarantee a title, competitiveness in professional football is known to have a close correlation with expenditure on wages.¹⁸

The threshold to compete for the best players is based not only on the capacity to pay wages over the course of a contract but also on the ability to pay a large up-front transfer fee. Clubs can therefore turn to high-risk budget management strategies and speculative investment models, such as TPO, in attempts to accelerate their sporting performance by ‘doping’ their financial capacity.

Although reliable data on TPO agreements are hard to come by, two recent studies commissioned by FIFA and the European Clubs Association, an association of some 200 leading professional football clubs across Europe,¹⁹ projected that the market share of players under TPO in all European leagues is between 3.7 per cent and 5.7 per cent, and the value of third-party investments is between 10 per cent and 50 per cent of players’ market value.²⁰ This amounts to an estimated US\$359.52 million per season in transfer compensation. Of the total amount of transfer compensation appropriated by third parties, 97.3 per cent concerns European or South American releasing clubs.²¹

Effects of TPO

Investment by a third party with a purely commercial interest in the maximised transfer of an individual player has the potential to undermine players’ fundamental freedoms to move freely, choose their employer or even decide to enter a new career path. By contrast, TPO supporters invoke the argument that investors could never blatantly interfere with employment decisions, as, without the agreement of the current employer and the player, no contract can be terminated and no transfer agreement made. While this statement may hold true on paper, one of the most relevant objections concerns the amount of freedom that the player and the current club have in giving or withholding their consent.

There exists a public misconception about the negotiating power of players vis-à-vis their current and possible future employers. The vast majority of non-‘superstar’ professional players from the ‘secondary market’ offer their services to a limited number of clubs, so the number of buyers (clubs) is small but the number of sellers (players) is large.²² Large parts of the football industry are also prone to labour contract abuse and discriminative practices, including the late payment or non-payment of salaries, harassment, violence and discrimination in the workplace.²³ A player’s career is short and precarious. Strong competition between players means that market value has to be continuously established, and any period of non-performance may limit football players’ future employment opportunities. Thus these players can be very vulnerable to management’s power, and their consent can be forced.

Likewise, employing clubs can lose their decision-making freedom via TPO agreements. Analysis of the few accessible TPO agreements shows the dominant position of third-party owners, assigning them direct or indirect powers regarding employment decisions at the club,²⁴ including fines or extended ownership rights if a club extends a player’s employment contract or fails to transfer a player by a certain date or for a certain value.

The risks of corruption are further increased with the commonly understood involvement of some player agents, who are deeply engaged in TPO. Conflicts of interests are inevitable if an agent who represents a player or a club in labour negotiations is at the same time financially invested in the value of such agreements. The best personal choice of the player may very well not be the most profitable for the agent. It therefore seems clear that third-party investors can and do possess power over labour related decisions, and thereby limit players’ freedom of movement and undermine existing contracts.

TPO also affects the economic sustainability of football. Although TPO investments could add further resources, these amounts plus interest are later withdrawn, while the clubs remain reliant on the continued supply of such external funds to maintain their business models and their sporting competitiveness. TPO also has the potential to affect the sporting integrity of football. Controlling the rights of a network of players could provide third-party owners with the ability to directly impact game performance. Such power has repeatedly been cited by FIFPro and UEFA as a credible threat in terms of match-fixing.²⁵

Finally, recent revelations about corruption scandals in and around FIFA have led to the indictment, and guilty plea, of José Hawilla,²⁶ the owner and founder of Traffic Group (a multinational sports marketing conglomerate), who is reported to have detailed to US authorities his central role in a bribery scheme of more than US\$100 million in the acquisition of commercial rights related to major sporting competitions.²⁷ While no connection has been established to these activities, it is worth noting that Traffic Group has been one of the leading TPO investors in the South American market.²⁸

The regulatory response

In September 2014 FIFA's Executive Committee decided to impose a stringent prohibition of TPO, and in December that year adopted an amendment to the FIFA Regulations on the Status and Transfer of Players along the following principles:²⁹

- TPO, under a more stringent definition than previously, was to be banned as of 1 May 2015;
- existing TPO agreements signed before 2015 would remain in force until their ordinary contractual expiry;

- between January and April 2015 new TPO agreements could be signed with a maximum duration of one year after the interdiction; and
- all existing TPO agreements were to be uploaded and disclosed by the clubs participating in the FIFA Transfer Matching System.

Within weeks of this decision FIFA Circular 1464 (which encompassed this ban) as well as existing domestic TPO bans,³⁰ were the subject of legal challenges based on EU competition law and EU internal market grounds by the football leagues in Spain and Portugal, where the practice has been quite widespread, and by Doyen Sports, one of the more prominent TPO providers, in front of the European Commission's Directorate General for Competition and in domestic courts in France and Belgium.³¹ In parallel, convinced of the inherent illegality of TPO agreements on the grounds of human rights, workers' rights, competition law and EU internal market freedoms, a 'counter'-complaint was jointly filed with the European Commission in an unprecedented move by FIFPro and UEFA.³² At the time of writing it remains to be seen which side will obtain the upper hand.

Those opposing the ban on third-party ownership present two central arguments. The first is that TPO should be regulated rather than banned, in order to allow a continued yet regulated supply of funding to clubs. It is very likely, however, that a formal acceptance of regulated TPO would spread the practice, which is dominant only in certain regions at present, to other markets, and therefore possibly lead to an overall growth in what FIFPro and UEFA view as, in its very essence, an infringement of the fundamental rights of players. Moreover, football in various other areas, such as agents and general labour relations, has shown a marked inability to manage such regulations effectively.

The second defence of TPO is as a means to counter a growing financial and sporting disparity between clubs. This speaks to an important problem of the growing financial pre-eminence of a small group of elite clubs in Europe, for which TPO seems an unsuitable and ineffective intervention. Other responses that do not target the labour market, impact the fundamental freedoms of players or carry such significant risks of corruption, but that allow a greater range of clubs, players and fans to share in the undeniable prosperity of the football industry, should be identified.

Conclusion

While the legal arguments about third-party ownership are being exchanged in the courts and in front of the European institutions, the media and the court of public opinion, it needs to be realised that TPO, significant as it is in its own right, is a symptom and a symbol of a larger malaise. Poor governance standards and an industry in which labour is a commodity of trade have created the breeding ground for many of football's most severe problems. In addition to exorbitant agent fees, the non-payment of salaries, match-fixing, money-laundering and the trafficking of minors, TPO corrupts labour relations in football for the gain of private third entities, establishes conflicts of interest and may further other financial crimes.

Ultimately, a meaningful reform of the culture and governance of football must put individual rights and freedoms over commercial and power-driven self-interests, achieve financial transparency and establish strong checks and balances and resilience against corruption.

Notes

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- ¹ Jonas Baer-Hoffmann is the Director Policy of FIFPro Division Europe.
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