

TPO: pros and cons

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Relation with the ban of FIFA

Third party ownership (TPO) -or investment (TPI), as the investors prefer to name it- of the economic rights of football players is among many others topics one of the most controversial to discuss. Maybe only Financial Fair Play rules have been discussed more than this matter in the football world.

To begin with – what is TPO?

It basically is when a football club does not own, or is not entitled to receive, the full amount of the future transfer fee of a player that is registered to play for that club.

Players' economic rights -in other words- are that transfer fee. Anyone, in theory, companies or individuals, can provide football clubs or players with money in return for owning a percentage of a player's future transfer fee.

But why would a company or an individual buy a percentage of the future transfer fee of a

player? Obviously, it could be a great opportunity to invest in possibly successful and talented future players with chances to turn up as new stars in some prospective. Of course one needs some football knowledge and luck to determine which players could be successful in the future. The club receiving money can use it for the transfer of the same player whose economic rights will be sold, for better contractual conditions for a player, etc. And as a person giving money wants, as a general and normal situation, to receive some profit in the future -this process is sometimes also called "investment".

Advantages and disadvantages:

If we start a discussion on the TPO/TPI advantages, the main one which comes to mind is the share of risks, even if it sounds maximalist. But if we look closer at the situation -when a club buys a player with the help of a certain investment- it does not pay

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the entire amount of the transfer sum. The consequence is that this proportion becomes not attributable to the club, but in a future prospective -if the club made a good shot and bought a really good player which could be sold for better money- this is a win-win situation for both the club and the investment fund.

If the player did not manage to satisfy expectations, the club loses money, but since a part of this money was paid by the investment fund, the risks are shared. Of course it is the ideal situation as in practice, investors often try to secure themselves by inserting clauses in the contracts providing for a minimum refund in case of a future sale at a low price -then the club suffers from such situation.

Representatives of governing bodies in football sometimes say that third-party ownership takes money out of the football family, out of clubs. But if one takes a closer look at the matter, what is the conceptual difference between bank loans and third-party investment? No one is saying that bank loans take money away from football. And TPO is sometimes acting in an opposite direction -by giving money to clubs.

This is also linked with the following advantage of TPO: the assistance of investment funds which helps clubs to keep the players for longer. This is caused by the clear difference of markets. The South-American football market is not as developed towards clubs' income as European football. And as the consequence, the clubs have less possibilities and financial instruments, even for things such as salary payment.

Almost no challenge can be offered by a Brazilian club if a European club comes and gives the Player twice the salary he earns with his present club. In this aspect, TPO can help clubs to keep players for longer periods by

offering them better contracts with funds received from investment companies. A commonly known example is the *NEYMAR Jr* case where *Santos* obtained a "suspension" on the player's movement by offering him a better contract so he could play for the Brazilian club a couple more seasons.

But it is far easier to find the disadvantages of TPO, which have been discussed many times. The main is revealed in article 18bis of FIFA Regulations on the Status and Transfer of Players (FIFA RSTP) which tells us about the prohibition of any club to "*enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams*".¹

But what exactly should it mean?

Literally only what is written on the paper -that any "third party" is prohibited from influencing any employment or transfer of players and the Clubs are also forbidden from entering into such agreements.

The ability to influence on transfer-related matters is a very obscure concept. Sometimes investment funds have better connections with the sports world than a particular club and if a representative of an investment fund sends to a club an offer from another club to buy the player (whose economic rights are also partially owned by the same investment fund) for a decent amount of money, is it really an influence on transfer-related matters?

To answer this question, we should maybe look into the recent transfer of the new *Manchester United* defender *Marcos ROJO*, a talented player,

¹ http://www.fifa.com/mm/document/affederation/administration/01/95/83/85/regulationsstatusandtransfer_2014_e_neutral.pdf

whose economic rights were also partially owned by an investment fund. When this investment fund wanted to sell this player and they knew of the possible interest of *Manchester*, their representatives came to *Sporting Portugal* to negotiate a future deal -as *Sporting* managers say now, these people presented themselves as *Manchester United* directors and *Sporting* representatives were fully sure that they were negotiating with the English club². If we imagine that this situation is true -is it influence on transfer-related matters?

Of course one could say that from an ethical point of view TPO is similar to slavery, when people make football players an asset to sell or to invest. But strictly speaking, what is the serious difference between selling part of a player's economic rights and the general concept of transferring a player's federative rights from one club to another in exchange of a transfer fee?

Another low-hanging fruit in the matter of disadvantages of TPO is another type of influence. It is the influence on sports results of the team, in other words match-fixing. It is only a suggestion, and by no means an accusation, but in the modern sports sphere a lot of money is involved, not only directly in clubs, associations and leagues, but also near the field like betting companies -it is a proven fact. For instance, for each match in the 2014-2015 Champions League, around EUR 7-10 million were spent in betting companies -this market is really huge. And now you can imagine that in two teams (opponents of one particular game), there may be several players on the field whose economic rights are owned by one investment company. What would happen if a

representative of this investment company would like to bet on a result of the match? It is not necessary to answer this question. *Michel PLATINI* has already mentioned many times³ that this way of investment creates a possibility to influence sports results, and as a consequence, while uncontrolled and hidden from eyes, can create dangers to the competitive nature of any sport.

But can we say that one or several players would purposely lose in order to have their "owners" win, when it is quite sure that a good behaviour on the pitch will give them and the TPO companies much more benefits? I really do not see this as a real possibility and thus the fear of such an event is not credible.

FA regulations on third party ownership

Some national associations like the English Football Association have already taken some important decisions in order to control money flows originating in investment funds and have adopted "*Third Party Investment in Players Regulations 2014-2015*"⁴. Widely speaking these regulations prohibit any possible investment into players within competitions and in all clubs related to the Football Association (FA). If an English club wants to transfer a player who has some economic rights belonging to third parties, the club must buy out this third party's stake until the end of his initial contract. This limitation to third party ownership was introduced after TEVEZ's and MASCHERANO's case, when *West Ham United* signed contracts with these players without fully acquiring their economic rights and

² <http://www.economist.com/blogs/gametheory/2014/10/third-party-ownership-football>

³ http://europa.eu/rapid/press-release_IP-14-1134_en.htm

⁴ http://www.thefa.com/~media/files/thefaportal/governance-docs/rules-of-the-association/2014-15/029_third-party-ownership.ashx

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without disclosing this information to FA. Before that, Premier League rights did not contain any specific clause prohibiting third-party investment, only acts of third parties which could influence club's policies or employment relations with players, and TEVEZ's contract with third-party investor evidentially contained a clause according to which this investor had the exclusive right to facilitate the player's possible transfer and the club could not object to this right. When the truth came out, not only was the club sanctioned, but third-party ownership was also prohibited within English FA.

Of course these regulations have limits and obviously do not spread over other countries.

CAS Case Law

The Court of Arbitration for Sport (CAS), in its early case law (before FIFA introduced article 18bis of RSTP) has expressed its opinion on the third-party ownership issue several times, and was clearly not against it.

For instance, the award CAS 2004/A/662 states: *"the Panel formation considered appropriate conduct in this respect all consideration of the partial transfer of federative rights of professional players. As already noted in the Award of the matter CAS/2004/A/635, according to FIFA rules a player can only be registered to play for one club, never two or more at a time, so that the partial transfer of their federative rights contravenes the essence of the FIFA regulations and it is also impossible. However, nothing prevents that two clubs decide to conduct business on the 'Economic Rights' on a player, as, for example, a club, that cannot give in any case - as mentioned above - a part of federative rights of a player who, as a*

whole, can only be registered for one club, but can give to another a portion of economic rights - that are not registered and are part of their patrimony - regarding the player and deprived of employment contract" (free translation)⁵.

In the award CAS 2004/A/701, the Panel has expressed its opinion on co-ownership agreements: *"the Panel is of the opinion that the trade - including sale or loan - between clubs of all or part of the economic rights to the performances of a player, with the player's consent, is compatible with FIFA regulations. Accordingly, the Co-ownership Agreement is not per se illegitimate or unenforceable. Therefore, the Panel may adjudicate the substance of the case, i.e. it may determine whether and to what extent the Respondent has breached the Co-ownership Agreement and the Appellant is entitled to receive compensations [...]"*⁶.

It is not so easy to guess what would be CAS's answer to the changes implemented by FIFA when it introduced article 18bis -indeed, this provision forbidding the involvement in club's employment or transfer-related processes should be respected by investors. But the answer to the question of how the new "ban" on TPO will influence CAS case law will depend on the nature of this prohibition and on the severity of this "ban".

FIFA decision

Recently a lot of loud words were spoken by FIFA relating to TPO. A working group organized by the governing body in the world of football has investigated all relevant information and feedback on this matter and still continues its work. But in September 2014 FIFA has

⁵ CAS 2004/A/662 RCD Mallorca v. Club Atletico Lanus

⁶ CAS 2004/A/701 Sport Club Internacional v. Galatasaray Spor Kulubu Dernegi

announced its official position on the TPO matter -the Executive Committee took the decision on a general principle that third-party ownership of players' economic rights (TPO) shall be banned with a transitional period⁷.

There are several details we deem important to reveal in relation to this decision:

1) It seems that the word "*ban*" is too strict, not susceptible to discussion and obviously not flexible at all. The opinion that a "*ban*" of TPO will "*kill*" football in South America, Portugal and even Ukraine⁸ is widely spread. In our opinion, a term that would sound more reasonable in relation to TPO would be "*legal control*".

2) If not destroy this system entirely, in order to make the system more transparent, FIFA should make some steps similar to ones taken before by the English FA for example. Information regarding TPO and economic rights should be revealed and the FIFA TMS system could become a very valuable asset in achieving this task.

3) The words "*transitional period*" used by FIFA are a very wise ones because instantly and totally prohibiting TPO could create a total chaos in the football world, or at least in the part of it related to contracts of players with clubs in many countries. This transitional period should be used wisely by working groups and the FIFA, and if the goal is establishing legal control, then measures of this legal control should be elaborated. For instance, this could be a gradual reduction of investment fund shares in players' economic rights, or the

determination of a maximum proportion of economic rights sold.

4) The strict decision of FIFA triggered immediate reactions from stakeholder in the football world, who looked for solutions on how to evade such a "*ban*" on TPO. We can say that are several ways to "*remain in business*", for instance co-ownership of federative and economic rights of football players by several clubs -the fact of registration in this case would determine the club for which the player will play finally- so instead of third parties the clubs will be the participants of the same market, who will control part of players' rights. This does not solve the issue of influence on sports results and may worsens it.

Several experts have expressed the opinion that FIFA will not be able to totally prohibit TPO -as FIFA will not be able to spread its jurisdiction on internal transactions and transfers of players- so TPO will remain locally and would disappear only in relation to international transfers⁹. This point of view is hardly acceptable as FIFA can easily impose important decisions to all associations and members of organisation.

While waiting for further concrete clarifications from FIFA, we can only guess what particular measures would be proposed in this important sphere of modern football -a real decision is still pending.

However, this prohibition will have to face another scrutiny: the legal one which could be either at the national level or before the European Court of Justice or the European Commission. I am of the opinion that it will be difficult to undermine TPO at that level even

⁷ <http://www.fifa.com/aboutfifa/organisation/bodies/news/newsid=2444471/>

⁸ <http://futbolgrad.com/double-agents-shakhtar-donetsk-role-third-party-ownership/>

⁹ <http://www.si.com/soccer/planet-futbol/2014/10/29/third-party-ownership-fifa-brazil-south-america>

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though the sporting bodies are claiming that there is a “*specificity of sport*” that allow them to prohibit TPO. I am really not so sure about that and, on the contrary, I think that the best move would have been to try to settle with all the stakeholders in order to control TPO and to guarantee for all the participants (clubs, players, investors) a decent and moral point of view as well as a legal one. Remember May 1968 in Paris: “*interdit d’interdire*” ...

The decision taken by FIFA and supported by UEFA will not be easy to work with and it announces a lot of legal claims, but what more could we lawyers ask for? •