

# Third party ownership: Goliath's victory

FIFA's decision to ban third party ownership ('TPO') of football players has polarised opinion. Those seeking to implement the ban argue that TPO takes money away from the clubs, allowing third party investors to take money out of the game by trading players. Those seeking its retention argue that it allows smaller clubs to retain and develop players and obtain a decent profit once they are old enough to be internationally traded. José Maria Montenegro, a Sports and Tax Lawyer with Morais Leitão, Galvão Teles, Soares da Silva & Associados and a Professor at the Polytechnic Institute of Porto, comments on why smaller clubs are increasingly seeing FIFA's decision as an attempt to freeze them out of the game.

## Introduction

Third party ownership ('TPO')<sup>1</sup> is the burning issue that continues to divide the world of football. While on one side are UEFA, some of its top clubs and national associations (mainly English and French)<sup>2</sup> who support a ban on TPO, on the other are the clubs of South America and some of the most important clubs in Spain and Portugal, who are its unshakable supporters. Looking only at the identity of the supporters of each side of the feud it is not surprising, unfortunately, that FIFA has taken sides<sup>3</sup> with the former.

The arguments of those who oppose the existence of TPO in football are known<sup>4</sup>, for there have been many public demonstrations, especially by leading UEFA officials, over the past two years. Prominent are the moral arguments, fleshed out by the idea that this type of instrument is akin to treating players as slaves, calls into question the integrity of the competitions by virtue of cross-interests in several clubs that compete with each other, and presents the potential for money laundering. There are also arguments of an economic nature, with special emphasis on the allegation that TPOs appropriate revenues generated by football which should remain with football. And, lastly, the legal argument that the FIFA Regulations on the Status and Transfer of Players (Article 18-bis) expressly prohibit the influence of third party investors over the clubs, a prohibition which can only be ensured through a total ban on TPO. The bolder have not even hesitated to assert that TPOs "are bad for the development and for the integrity of players, for the clubs, for everything!" though such assertions add no grounds that can be substantiated<sup>5</sup>.

This brief introduction highlights the biggest obstacle to any serious

discussion to be had on this topic of admissibility of TPO: the permanent and indisputable imputation that those who do not oppose the total ban on TPO go along with immoral practices, with no economic rationale and doubtful legality. The old argumentative reasoning of 'if you're not with me you're against me.'

## Contradictory evidence

The truth, however, is that the (triumphant) arguments of UEFA about TPO are not - indeed - transparent and are mostly incomplete. Those who listen to and those who read the work of the main opponents of TPO are left with the certainty that these instruments bring about only disadvantages for football, and have no merit<sup>6</sup>. This Manichean vision of the problem is not, however, backed by truth. No matter how often the arguments against TPO are repeated, no matter how impressive the arguments, no matter the merit of the underlying concerns, the reality of the clubs, of the players and of the competitions does not confirm such pernicious effects.

It's elementary to see - and this should be the starting point in a constructive debate - that use of TPO has served two of the biggest challenges of football:

- the funding, and possibly even the survival, of the clubs that operate in economically weaker markets<sup>7</sup> against a background of unprecedented financial crisis and of huge pressure on their traditional partners (banks, sponsors, fans); and
- the challenge of competitiveness, of the unpredictability of the competitions, of the drawing closer of the small and medium-sized clubs to those that are traditionally bigger and more robust in financial

and sporting terms. To which must be added the fact that this approach is virtuous, because it is based on the rise of small and medium clubs and not the decline of those historically more dazzling.

TPO is the reason for many investors (financiers would be a better term) to enter the football industry who would otherwise not be in this industry. These financiers are sometimes from geographies foreign to football, who would otherwise not be interested in the game. This enlargement and diversification, if properly regulated, can only be considered positive.

### Competitive effect of TPO

On the other hand, the contractual model of *société en participation* (joint venture) that they use - in which the third party owners are true members of the club in relation to the player in which they invest - has been a key instrument in the enhancement of the squads, in strengthening the competitiveness of clubs and their brands, with a consequent increase in sporting success. This conclusion, unlike the arguments touted by opponents of TPO, is demonstrated by objective data. Clubs that have used this funding mechanism have increased their sporting and economic performance. Examples of this are clear to see. In this matter, we do not intend to name names, but must at least invoke a club that, having made frequent use of partnerships with TPO in the acquisition of players for its squad, is perhaps the most 'iconic' in representing what we assert here. Atlético de Madrid, with revenues of little more than one fifth of those generated by its competitors Real Madrid and Barcelona<sup>8</sup>, managed to shatter the bipolar hegemony of these two clubs in Spain by winning La Liga BBVA

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2013/2014 and reaching the final of the UEFA Champions League that season. The quality of its squad was boosted by players whose economic rights were not wholly owned by the club. To the example of Atlético de Madrid we could add other clubs, particularly Portuguese or Brazilian, where their competitiveness and sporting success has been sustained by players acquired using TPO.

Would these clubs prefer to have those players, sharing their investment, rather than not having them in their squads<sup>9</sup>? Players wholly owned by the club often stay at a club longer compared to players shared with third party owners. This leads to the question of whether the clubs would rather have a relevant player for one season than for three or four? Clubs would often choose to rely on that relevant player during one season, rather than not have that player at all. Or, to put it another way, clubs prefer to have relevant players every season, even if this means having to take on a new relevant player every season.

At no time does TPO threaten contractual stability - another criticism very frequently used against their use. This threat consists, rather, of breach of contract and it would not appear that the participation of TPO in the acquisition of players drives this risk. The stability that the clubs cannot do without is that the contracts be fulfilled - and they are fulfilled both by the players staying on for the period provided for by contract and also by putting a termination clause into motion. And the transfer of a football player - be it at the beginning, middle or end of the contract - can never be seen as trafficking of players, far less for not entailing the acquisition of the whole of the respective economic rights.

### Debate

Any debate, however complex it may be, must have a minimal consensual basis for discussion. Both sides have legitimate purposes that support their argument. Banning TPO for the purposes of transparency is a legitimate objective, however the concerns expressed about the effect such a ban would have on the financial viability of clubs and their competitiveness is an equally valid argument.

Out-of-hand, abrupt elimination of TPO, as from 1 May 2015, constitutes not only contempt for the merits of the clubs that have managed to find an alternative tool to service their financial needs and their competitiveness. It means, above all else, the establishment of a divisional barrier between rich and poor, between clubs having exponential conventional revenue and clubs with chronic barriers to growth. And this laconic, radical decision causes huge legal perplexities, in particular whether a ban on TPO constitutes a restriction on competition<sup>10</sup>, of contractual freedom and of freedom of association. And to that extent, a judgement of proportionality in light of the final accommodation of such rights will always be unavoidable.

Acknowledgement that TPO provides the football industry with an important funding alternative and contributes to greater competitiveness among the clubs, drawing the less outstanding closer to the more powerful, would have determined a different path towards the goal of greater transparency. Proposals to this end are well known and have been presented: regulation, mandatory and clear identification of the parties involved in a TPO transfer, the establishment of a centralised register of licensed third party owners, a limitation of the number

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of players per club whose economic rights are shared, setting a maximum ceiling for the percentage of a player held by a third party owner, strict rules of incompatibility.

TPO has not been the only recent novelty within football. Over the past decade, the football industry has been shaken by very different business paradigms that have not been regulated. For some of these innovations, limits were proposed and approved. For others not even that. For TPO it was the end.

Yes, there were alternatives. And we know full well who would benefit from them. We also know who benefits from this decision to ban. It was not the little and fair David of football.

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**José Maria Montenegro** Sports and Tax Lawyer  
Morais Leitão, Galvão Teles, Soares da Silva & Associados, Porto  
jmm@mlgts.pt

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1. It is common to consider TPO as investment funds in the economic rights of a football player. This is just one of its forms, albeit the most common.
2. See Ezéchiél Abatan, 'An Overview of Third Party Ownership in European Professional Football,' Sports Law Bulletin, EPFL, number 10, June-October 2012, pp. 22-32.
3. FIFA's Executive Committee decided that it would seek to ban TPO on 19 December 2014: <http://fifa.to/1uPBkwV>
4. See Marcelo Robalinho, 'third party ownership of football players - Why are the big actors in the football market afraid?', 2014, Booktango, ISBN: 978-1-4689-4179-1 (e-book).
5. David Gill, current vice-Chairman of the English Football Association, in his opening speech at the Football Talks conference in the debate 'third party ownership of players. Pros and cons' (Estoril, Portugal, 15 January 2015).
6. In the words of David Gill, "they are bad for everything!" (cit., preceding footnote).



**José Maria Montenegro**

7. The clubs of South America and several in Portugal and Spain.
8. See 'Football Money League 2014' Deloitte Report, January 2014, available at: <http://deloi.tt/1yCoCRL>. That season, 2012/2013, Real Madrid (€518.9 million) and Barcelona (€482.6 million) were the two teams with the world's biggest revenues, while Atlético de Madrid ranked twentieth (€120 million).
9. Often, the motivation of the investment in association with TPO is underpinned by purpose of sharing the risk, in which one could not even invoke a preference for 100% acquisition.
10. The risk that FIFA's decision to ban TPO could be viewed as an infringement of competition arises both in light of Swiss law (Federal Act on Cartels and other Restraints of Competition - Cartel Act, Charter, Article 7) and also of European Union legislation (Article 102 TFEU).

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