

Notes:

O Colapso do “Joga Bonito”: How FIFA’s Banishment of Third-Party Ownership Runs Counter to European Union Law and Has Tarnished the Once Beautiful Game

Brendan A. Bailey

ABSTRACT

FIFA banned the practice of third-party ownership, the division and sale of a portion of a football player’s economic rights to an outside investor, in 2015. The ban was nondiscriminatory, applying to all types of third-party ownership utilized throughout football. Since then, the practice has all but disappeared internationally, with FIFA quashing occurrences of the practice through large fines and other forms of punishment. FIFA’s move to ban the practice came shortly after pressure from leagues that banned it years before—principally the English Premier League, one of the most influential leagues in Europe. However, such a ban was largely propped upon a report completed by the International Centre for Sports Studies that provided questionable conclusions. The disclaimers provided alongside the conclusions of the report would lead any reasonable person to conduct further research on the subject before instituting such an aggressive ban.

FIFA’s ban runs counter to European Union law, butting against decisions from the Court of Justice of the European Union, European Union articles and agreements, and even certain countries’ independent legal codes. This Note hopes to pull the wool away from football supporters’ eyes and perhaps mobilize a group of legally conscious scholars to bring action against FIFA to force compliance with EU law. Beyond that, this Note proposes a new regulatory regime to replace FIFA’s complete ban. Such regime would permit one type of third-party ownership (financing TPOs, used primarily by clubs with struggling balance sheets) that would fully comply with EU law and likely receive deference from EU entities due to FIFA’s stance as an expert within its market sphere.

TABLE OF CONTENTS

I.	INTRODUCTION.....	181
II.	BACKGROUND.....	184
	A. <i>History of Player Ownership</i>	184
	1. Overview of the Normal Transfer	184
	2. The Transfer Process Including TPO	185
	B. <i>Parsing Through the Intricacies of TPO</i>	187
	1. Economic v. Federative Rights	187
	2. Types of TPO Transactions.....	189
	C. <i>League Responses to TPO Arrangements</i>	192
	1. Leagues Banning TPO	193
	a. English Football Association & English Premier League	193
	b. Polish Football Association.....	194
	2. Leagues Permitting TPO	194
	a. Spain & Portugal.....	196
	b. Eastern Europe & South America....	197
	3. FIFA—Article 18, Article 18bis, Article 18ter	198
	a. Article 18: Special Provisions Relating to Contracts between Professionals and Clubs.....	198
	b. Article 18bis: Third-Party Influence on Clubs.....	199
	c. Article 18ter: Third-Party Ownership of Players' Economic Rights	199
III.	ANALYSIS	200
	A. <i>Applicability of FIFA Regulations in Relation to Domestic League Rules</i>	200
	B. <i>CIES Report</i>	201
	C. <i>European Law and TPO</i>	202
	1. European Union Law	203
	a. 2001 Agreement: European Commission and FIFA/UEFA.....	203
	b. Solidarity Mechanism.....	203
	c. Free Movement of Players.....	205
	2. Court of Justice of the European Union	209
	a. <i>Bosman</i>	210
	b. <i>Meca-Medina</i>	212
	3. Country-Specific Laws Conflicting with FIFA Regulations	214
	a. Austria	214
	b. Brazil.....	215
	4. Article 65 of the TFEU.....	217
	5. Article 154 of the TFEU.....	217
IV.	SOLUTION.....	218
	A. <i>Investment and Financing TPO Refresher</i>	219

	B. <i>Solution: A New Regulatory Structure</i>	220
	C. <i>How this System Rectifies Current FIFA Defects</i> ..	224
V.	CONCLUSION	227

I. INTRODUCTION

Carlos Alberto Martínez Tévez was born in Ciudadela, Buenos Aires on February 5, 1984.¹ Tévez grew up in the ghetto of Ejército de Los Andes, an area better known as Fuerte Apache by locals, where Tévez received the nickname “El Apache.”² From the beginning of his football career, Tévez was effectively constrained by red tape, facing both league-registration and ownership-right issues.³ For example, Tévez was forced to adopt his mother’s surname as a child due to a conflict between his two boyhood clubs, All Boys and Boca Juniors, during his transfer from the former to the latter.⁴

After staking his claim at the top of Argentinian football, Tévez looked toward Europe for his next challenge. In 2007, Tévez made his move to Europe, transferring to West Ham United Football Club in London, England.⁵ Tévez’s arrival in England was not smooth, though, as he was immediately thrust into an investigation launched by the English Premier League (EPL) in regards to the third-party ownership (TPO) structure of his rights before moving to England.⁶ While the investigation continued, Tévez played one season for West Ham, but was ultimately told to move on and landed a contract with another EPL club in Manchester.⁷

Worldwide TPO regulations conflicted with one another at the time. Different leagues possessed different regulatory codes safeguarding or forbidding TPO, leading to confusion when players

1. *Biography of Carlos Tevez*, ASSIGNMENT POINT, <http://www.assignmentpoint.com/arts/biography/biography-of-carlos-tevez.html> (last visited Nov. 7, 2018) [<https://perma.cc/F42N-LX9E>] (archived Nov. 2, 2018) [hereinafter *Tevez Biography*].

2. Vannyhenrico, *Carlos Tevez Childhood Story Plus Untold Biography Facts*, LIFE BOGGER (June 19, 2016), <https://lifebogger.com/carlos-tevez-childhood-story-plus-untold-biography-facts/> [<https://perma.cc/75HN-7B2K>] (archived Nov. 2, 2018).

3. *Tevez Biography*, *supra* note 1 (discussing the difficulties Tevez has had with registration in certain football leagues and with third-party ownership issues).

4. *Id.*

5. Danny Nazareth, *Flashback to 2006: Tevez and Mascherano’s shock transfer to West Ham*, SPORTSKEEDA (Oct. 28, 2015), <https://www.sportskeeda.com/football/flashback-2006-tevez-mascherano-shock-transfer-west-ham> [<https://perma.cc/J43K-M53A>] (archived Nov. 2, 2018).

6. David Ornstein, *West Ham charged over Mascherano and Tevez deals*, THE GUARDIAN (Mar. 2, 2007), <https://www.theguardian.com/football/2007/mar/03/newsstory.sport8> [<https://perma.cc/U8ZC-FUZH>] (archived Nov. 2, 2018).

7. *Tevez Biography*, *supra* note 1.

transferred from continent to continent or country to country.⁸ The prolonged transfer sagas that plagued Tévez's career during his time in England eventually led to changes in both EPL and Fédération Internationale de Football Association (FIFA) regulations regarding TPO.⁹ Tévez's transfer issues serve as a cautionary tale for players looking to enter into FIFA-regulated leagues, as FIFA has recently promulgated regulations banning the practice of TPO.¹⁰ Unfortunately, some players are not aware that their rights have been sold or that the practice is even illegal. They operate under the assumption that if they work hard, they can play their way out of unfortunate situations and into the most competitive leagues in the world.¹¹

Throughout the history of the sport of football, or, as commonly referenced in the United States, soccer, regulations of player-ownership structures have remained largely untouched. Up until May of 2015, FIFA had yet to promulgate any worldwide regulations affecting the division of player ownership between multiple parties.¹² Following increasing pressure from select major football leagues and associations, such as the EPL and English Football Association (English FA), FIFA decided to completely ban the practice of TPO, an ownership scheme where an outside investor owns a percentage of a club's player.¹³ TPO is generally defined as "the Agreement between a Club and a Third Party . . . 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."¹⁴ Many different individuals and sources can be labeled as third parties; a few examples are investment funds, companies, sports agencies, agents, and private investors.¹⁵

Football provides avenues for the movement of athletes between teams completely dissimilar to those offered by any domestic American sports league. The velocity with which players transfer between European football clubs stands unparalleled to any free-agency structure that American sports have created. In the summer of 2017,

8. DLA Piper, *FIFA to ban third-party ownership of players*, LEXOLOGY (Sept. 30, 2014), <https://www.lexology.com/library/detail.aspx?g=441139b6-3291-4189-b642-e5efe4005eb1> [<https://perma.cc/Z6SD-HNC2>] (archived Nov. 2, 2018).

9. *Tevez Biography*, *supra* note 1.

10. See generally KPMG, PROJECT TPO (2013), <https://www.ecaeurope.com/media/1682/tpo-report.pdf> [<https://perma.cc/P5YK-PHXX>] (archived Nov. 2, 2018).

11. See *Tevez Biography*, *supra* note 1.

12. Oskar van Maren et al., *Debating FIFA's TPO Ban: ASSER International Sports Law Blog Symposium*, 15 INT'L SPORTS L.J. 233, 233 (2015).

13. Luís Villas-Boas Pires, *Why the Premier League banned 'third-party ownership' of players*, THE GUARDIAN (Jan. 30, 2014), <https://www.theguardian.com/football/2014/jan/30/why-premier-league-banned-third-party-ownership-players> [<https://perma.cc/9YHV-76ZS>] (archived Dec. 2, 2018).

14. KPMG, *supra* note 10.

15. *Id.*

1,687 players transferred between teams in the top five European football leagues, a process valued at around €4.5 billion.¹⁶ Each league alone accounted for an average gross transfer value of around €900 million spent on acquiring players, or USD\$1.045 billion.¹⁷ Major League Baseball (MLB), which has historically outspent the three other major American sports leagues (the National Basketball Association, the National Football League, and the National Hockey League) due to their position as the only major American sports league without a salary cap, spent only USD\$1.411 billion during the 2017 MLB free-agency window, slightly above the mean average of what each individual, top-five European league spent on transfers.¹⁸ Capital expenditures of European football leagues account for a much larger outlay of funds that dwarfs those of American sports leagues.

Unfortunately, as with any lucrative venture, this vast amount of money can lead to corruption. FIFA has zeroed in on the entire practice of TPO as the source of the corruption, but the statistical proof to back up such an accusation may be lacking.¹⁹ FIFA failed to differentiate between the different types of TPO structures that exist throughout the football transfer market. Transfer-fee sharing is the only method through which this article will discuss TPO, as it is the only method banned by FIFA. Whether the corruption FIFA believes is housed within TPO structures is systemic, or bound to only one of two competing structures, is a question that FIFA has yet to answer.

The remainder of this Note will proceed as follows: Part II will discuss the history of player ownership within international football, focusing first on how the transfer process works, then progressing through a description of TPO, its growth, and where it currently stands today through the lens of regulatory scrutiny. Part III will provide an analysis of FIFA's regulations banning TPO and their interaction with European Union (EU) law, arriving at the conclusion that such regulations are illegal on multiple fronts and that FIFA blindly wielded

16. Marcus Christenson & Chris Fenn, *Transfer window 2017—every deal in Europe's top five leagues*, THE GUARDIAN (June 22, 2017), <https://www.theguardian.com/football/ng-interactive/2017/jun/22/transfer-window-2017-every-deal-in-europes-top-five-leagues> [<https://perma.cc/4VF2-L2U4>] (archived Nov. 7, 2018).

17. This is a rough estimate, as certain leagues spent much more than others. For example, the English Premier League spent €1.58 billion (£1.4 billion) this past summer alone, a new summer transfer record for the league. *Premier League clubs spend £1.4bn to break summer transfer record*, THE GUARDIAN (Sept. 1, 2017), <https://www.theguardian.com/football/2017/sep/01/transfer-window-deadline-day-record-spend> [<https://perma.cc/7HHF-6WXX>] (archived Nov. 2, 2018).

18. *2017 Spending by Team*, SPOTRAC, <https://www.spotracc.com/mlb/tools/offseason/2017/> (last visited Nov. 7, 2018).

19. See INT'L CTR. FOR SPORTS STUDIES, *THIRD-PARTY OWNERSHIP OF PLAYERS' ECONOMIC RIGHTS* 4 (2013), http://old.futbalsfz.sk/fileadmin/user_upload/Legislativa/Medzinarodne_institucie/20140512_Third-party_Ownership_of_Players_Economic_Rights_01.pdf [<https://perma.cc/WHG5-Y6G2>] (archived Nov. 2, 2018) [hereinafter CIES REPORT] (discussing how securing reliable information to complete the study was impossible to obtain in order to correctly estimate TPO's global significance).

its power. Finally, Part IV will reimagine a suitable legal solution to regulate TPO that would not only comply with EU law but also permit FIFA to ban the features of TPO it finds unsuitable. Part V will contain a brief conclusion of the topic and recap the solution proposed.

II. BACKGROUND

A. History of Player Ownership

1. Overview of the Normal Transfer

In every European football league, players are permitted to move from one team to another, biannually, in a period known as the transfer window.²⁰ Players change teams on a regular basis, similar to stocks traded on the open stock market, but with limited regulation and oversight beyond a standard set of rules promulgated by individual leagues.²¹ This lack of uniformity in league rules has led to different forms of ownership throughout the world, with neighboring countries sometimes having completely disparate regulatory schemes.²² Ultimately, many transfers have stalled due to these different leagues creating and enforcing sets of rules that do not align with one another.²³

The transfer window is open twice within a twelve-month period; the summer transfer window is open for just under three months, running from early June through the end of August, and the winter transfer window is open only in the month of January.²⁴ Exact opening and closing dates vary country by country and league by league, but for the most part, the preceding dates are followed by the majority of leagues and nations.²⁵

Normal transfers of footballers operate as common buy-sell transactions. Surprisingly, most negotiations take place through WhatsApp, a mobile phone application.²⁶ A typical transfer is conducted as follows: team A offers, or bids, a specific amount of money

20. *How a football transfer works*, THE ECONOMIST (Aug. 7, 2017), <https://www.economist.com/blogs/economist-explains/2017/08/economist-explains-4> [<https://perma.cc/QHG5-998X>] (archived Nov. 2, 2018) [hereinafter *Football Transfer*].

21. See THE FOOTBALL ASS'N PREMIER LEAGUE LTD., PREMIER LEAGUE HANDBOOK SEASON 2017/18 at 217 (2017) [hereinafter PL HANDBOOK].

22. See CIES REPORT, *supra* note 19, at 3 (discussing the differences in third-party ownership rules in leagues and countries throughout the world, and providing results of a FIFA-commissioned study focusing on the viability of third-party ownership).

23. *Id.*

24. Jack Wilkinson, *When does the transfer window open? When does it close?*, SKY SPORTS (updated Aug. 6, 2017), <https://www.skysports.com/football/news/12691/10862752/when-does-the-transfer-window-open> [<https://perma.cc/X7BE-UENF>] (archived Nov. 2, 2018).

25. *Id.*

26. *Football Transfer*, *supra* note 20.

to team B for one of its players, which then accepts or rejects the bid. Depending on the terms of the player's contract, a release clause may be an express term within the contract.²⁷ If the value listed in the player's contractual release clause is met by the bidding team, a virtual trigger is flipped and the owning team must permit the player to complete a transfer to the bidding team in exchange for the stated release clause value. If a team bidding for a player meets or exceeds the contractually agreed-upon release clause, the owners of the player's contract are required to accept the sum and allow the player to transfer teams.²⁸ Alternatively, both sides may come to a fee agreement if no release clause term is contained in the contract or if they waive the release clause. Generally, while team A and team B discuss a fee for the player, team A also negotiates a contract with the player. If all sides come to an agreement, the transfer proceeds, and the player has a new home.

This is a very straightforward process when the player is 100 percent owned by team B. But recent trends in smaller leagues throughout the world toward new forms of ownership have thrown a wrench into this simple process.²⁹

2. The Transfer Process Including TPO

With such exorbitant fees paid by teams, and the prices of talented players continuing to increase as television revenues and sponsorship contracts have fattened, third parties have begun to look at football transfers as an investment tool.³⁰ TPO within international football is a recent strategical advent used by owners to subsidize the costs of running a football organization. TPO is "a financial instrument whose origins go back to South American countries but that, in the last few years, have undergone strong expansion within the European football scenario."³¹ TPO is an investment, by a third-party source, "in the professional players' economic rights."³² A player's rights can be broken into both federative and economic rights: federative rights, which cannot be sold to a third party on any occasion, refer to a player's

27. *Id.*

28. *Id.*

29. See Gabriele Marcotti, *The challenge FIFA faces regarding third-party ownership*, ESPN (Mar. 30, 2016), <http://www.espnfc.com/blog/marcotti-musings/62/post/2840253/the-challenge-fifa-faces-regarding-third-party-ownership> [https://perma.cc/3H4R-TQEC] (archived Nov. 4, 2018).

30. *Football Transfer*, *supra* note 20; see also Jonathan Blumberg, *What Neymar's record-breaking \$263 million transfer fee means for the future of soccer*, CNBC (Aug. 17, 2017), <https://www.cnbc.com/2017/08/17/what-neymars-263-million-transfer-fee-means-for-the-future-of-soccer.html> [https://perma.cc/2JJA-3RKZ] (archived Nov. 4, 2018).

31. Rosa Lombardi et al., *Third Party Ownership in the Field of Professional Football: A Critical Perspective*, 3 BUS. SYS. REV. 32, 34 (2014).

32. TOMÁS MERCÉS DE MELLO MOURÃO-FERREIRA, TILBURG UNIV., *THIRD-PARTY OWNERSHIP OF PLAYERS' ECONOMIC RIGHTS* 4 (2016) [hereinafter MOURÃO-FERREIRA].

ability to be registered within the football association their team is member to; economic rights pertain to the player's owner's rights to profits if a player is sold-on (sold to a different team) after their investment.³³ International response to such ownership styles has ranged from acceptance to staunch disdain, with many influential leagues banning the practice and forcing teams to buy out the third-party owner prior to a player completing a transfer into the league.³⁴

FIFA has taken a strong stand against TPO in both its public statements and regulations, stating that "TPO has harmful effects on football and its essential values, thereby undermining the overall integrity of the game."³⁵ FIFA banned the practice of TPO on May 1, 2015 by introducing and adopting Article 18ter.³⁶ Prior to adopting such regulation, FIFA commissioned the International Centre for Sports Studies (CIES) to create a report on the status of TPO in FIFA's member associations at a worldwide level.³⁷ The report discussed the scale of TPO worldwide and the current status of TPO permissions in football associations worldwide, and also provided comments and suggestions from member associations.³⁸ Ultimately, the CIES concluded that (1) many associations were not concerned about TPO, (2) those concerned with TPO issues had taken action on their own accord to ban the practice within their league, and (3) reliable information for the study to rely upon was difficult to find and it was thus impossible to estimate the global significance of TPO at the time.³⁹ Despite this lack of concrete evidence, FIFA found the conclusions provided by the CIES report sufficient to ban TPO worldwide.⁴⁰ A portion of this Note will discuss the issue relating to the inconclusive sources, which either reference tainted data or do not raise an inference that TPO must be eliminated, that FIFA purportedly relied upon in making its decision to ban TPO.⁴¹

TPO is a tactic employed heavily by teams in South America and smaller leagues scattered throughout Europe.⁴² These teams struggle to pay for players' room and board, training time, and travel expenses;

33. *See id.*

34. *See* CIES REPORT, *supra* note 19, at 3.

35. Bill Wilson, *Football's third-party ownership rule explained*, BBC NEWS (Sept. 27, 2016), <http://www.bbc.com/news/business-37483203> [<https://perma.cc/C55M-9RGL>] (archived Nov. 4, 2018).

36. Van Maren et al., *supra* note 12, at 233.

37. CIES REPORT, *supra* note 19, at 2.

38. *Id.* at 2-4.

39. *Id.* at 4.

40. *See id.*

41. *See id.* (listing the conclusions from the extensive study, with recognitions that "many associations do not feel concerned by the TPO issue," that "reliable information on the scale of the phenomenon is rare," and that it is "therefore impossible for the time being to estimate its global significance.") It is not totally unsurprising that a corrupt organization would take such findings as material and institute a rule completely in favor of large, powerful, rich football associations.

42. Lombardi et al., *supra* note 31, at 34.

to subsidize these costs, an outside investor (third party) pays for a player's expenses, and in return receives a percentage of the player's sell-on transfer fee, helping to keep "lower division clubs afloat."⁴³ In essence, the third party is given a specific percentage of ownership in the player. In some cases, this split in ownership causes transfers to stall, because the third-party owner acts stubbornly throughout negotiations and demands higher transfer-fee payouts or precludes a transfer entirely because the league of destination bans the practice of TPO.

Ultimately, in order for any new TPO-permitted regime to succeed, the third-party owner must be a "silent party." A silent party is a party that does not take part in any personnel, training, or administrative decisions regarding the player. The silent party is the equivalent of a shareholder in a company traded on the New York Stock Exchange; they own a specific percentage of stock but have no actual stake in the day-to-day decisions regarding the company, or in this case, the player. This Note purports to cultivate and provide a potential regulatory regime that could one day persuade FIFA to permit the practice of TPO, for the good of *joga bonito*.⁴⁴

B. Parsing through the Intricacies of TPO

1. Economic v. Federative Rights

As previously stated, a player's rights can be broken into both federative and economic rights.⁴⁵ This division brought the possibility of TPO to life and permitted outside investors to enter into ownership schemes that would not be feasible with a single-owner rights regime.⁴⁶ The greatest differentiating factor between the two sets of rights is that economic rights tend to be transferable and divisible, while federative rights are prohibited from division and must be owned by the club.⁴⁷ Federative rights only "move" when a player is transferred to a new club, as is required by domestic league rules.

Federative rights are the rights of a "sports entity to register a player in a specific official competition organized by a federation or an association."⁴⁸ These rights permit the player to actually participate or

43. Marcotti, *supra* note 29.

44. See Barney Corkhill, *Jogo Bonito: "The Beautiful Game"*, BLEACHER REP. (Oct. 16, 2008), <http://bleacherreport.com/articles/69649-jogo-bonito-the-beautiful-game> [<https://perma.cc/EJ36-3YKG>] (archived Nov. 4, 2018).

45. MOURÃO-FERREIRA, *supra* note 32, at 4.

46. W. Tyler Hall, *After the Ban: The Financial Landscape of International Soccer After Third-Party Ownership*, 94 OR. L. REV. 179, 184 (2015).

47. See *id.*

48. Javier Canosa, *Federative and Economic Rights in Professional Football*, IR GLOBAL (Jan. 18, 2012), <https://www.irglobal.com/article/federative-and-economic-rights-in-professional-football-1330> [<https://perma.cc/8HSQ-H7UT>] (archived Nov. 4, 2018).

play for the club, and are commonly referred to as the right of transfer or, more formally, registration rights.⁴⁹ These rights provide a club with a number of benefits: the rights to register a player with the national organization; to recognize, train, and use the player as part of the club's squad during league and international competitions; to use the image of the player to promote the club; to loan the player to other clubs throughout the world at a period set by the loaning club and agreed to by the loanee club; and the ultimate right to transfer, or sell, the player to another club anywhere in the world.⁵⁰ That being said, federative rights always remain solely owned by the club and are only permitted to be owned by the club; a third-party owner can never own any percentage of a player's federative rights.⁵¹ A third-party owner's rights can only be realized or attained through the purchase of a player's economic rights.

For the purposes of this Note, economic rights will be discussed in reference to a third-party owner's right to profits if a player is sold-on after their initial investment. To recap, economic rights stand as the percentage ownership that a third-party owner purchased as an investment in a specific player. Economic rights are "the rights to receive proceeds from the sale of a [player's] Federative right."⁵² Economic rights can be divided between multiple parties or ownership entities.⁵³ Economic rights make the entire TPO process possible, creating the opportunity for a player's money-making rights to be sold.⁵⁴

Upon the signing of a contract for employment with a club, both sets of rights are activated, permitting the division of rights that makes TPO feasible.⁵⁵ The player is essentially signing his exclusive federative rights over to the club in return for a spot on the roster and a salary. This provides the player access to whatever league he is seeking to join, since the club itself is the exclusive entity permitted to register players into leagues. Economic rights are merely the byproduct of this contractual relationship between player and club. Federative rights, in a way, create economic rights, thus economic rights should be considered as derivative of federative rights.⁵⁶ This division is logical, as without federative rights a player would be

49. *Id.*; Sarah Ochwada, *CAN I OWN A FOOTBALL PLAYER?—Third Party Ownership in a nutshell*, SNOLEGAL (July 11, 2013), <https://snolegal.wordpress.com/category/football/professional-football/federative-rights> [https://perma.cc/4DKV-WTKS] (archived Nov. 4, 2018).

50. *Id.*

51. MOURÃO-FERREIRA, *supra* note 32, at 4.

52. Ochwada, *supra* note 49.

53. Hall, *supra* note 46, at 184.

54. *See* Ochwada, *supra* note 49 (discussing the importance of economic rights to the TPO process).

55. *Id.*

56. Canosa, *supra* note 48.

valueless, since the player would not be permitted to actually register with the league or play in any competition.⁵⁷

The recent realization of a player's divisible rights led to the rise of TPO, an issue that sat largely dormant until the 2000s, when leagues such as the EPL and the Portuguese Primeira Liga began to bicker over its merits and values.⁵⁸ By implementing TPO regimes, certain clubs could acquire players they would not have been able to afford otherwise.⁵⁹ Additionally, the use of TPO allowed clubs to mitigate the costs of a failed investment in a player by spreading the cost to an external entity.⁶⁰ League responses to the widespread use of TPO were varied, with certain powerful leagues lobbying FIFA, the world's most powerful football entity, to ban the practice.

2. Types of TPO Transactions

While the simple division between federative and economic rights permits TPO to occur in theory, different forms of TPO transactions have sprouted up that benefit specific regions and leagues.⁶¹ At the forefront of the sophisticated TPO market are two similar yet distinctive TPO methods: financing TPOs and investment TPOs.⁶² While other methods of TPO transactions are employed throughout Europe, such as the use of economic rights as guarantees or commissions linked to the sale value of a player, no method has risen to quite the same prominence as the financing or investment TPOs.⁶³

The main difference in these TPO vehicles, which FIFA has refused to address, is that financing-TPO transactions are employed to supplement a specific financial need of a club (such as paying for player transportation to away matches), while investment-TPO transactions take place when a club is satisfying a want (by buying a new player), not necessarily satisfying a fiscal need.⁶⁴

Financing TPOs involve the "sale of part of the economic rights of specific players, for which the club receives an agreed amount."⁶⁵ A financing TPO operates similarly to a small business loan, except the consideration exchanged in return for the loan is the economic rights

57. *See id.*

58. Rob Hemingway, *La Liga's relationship with South America*, FOOTBALL ESPANA (Aug. 18, 2017), <https://www.football-espana.net/66753/la-ligas-relationship-south-america> [<https://perma.cc/JED9-WZ7J>] (archived Nov. 4, 2018); *What is third-party ownership in football and why is it controversial?*, THE TELEGRAPH (Sept. 26, 2016), <http://www.telegraph.co.uk/news/2016/09/26/what-is-third-party-ownership-in-football-and-why-is-it-controve/> [<https://perma.cc/KH7Z-J86K>] (archived Nov. 4, 2018) [hereinafter *What is third-party ownership*].

59. Hall, *supra* note 46, at 185.

60. *Id.*

61. *See id.*

62. *Id.*

63. *See id.*

64. *Id.*

65. KPMG, *supra* note 10, at 5.

of one or several players.⁶⁶ This type of TPO transaction benefits “clubs in need of economic liquidity to balance their accounts, and to be able to cover external or internal mandatory expenses.”⁶⁷ The percentage of economic rights received by a financing-TPO investor ranges from 10 percent to 40 percent, avoiding the potential sale of a majority of a player’s economic rights to a third party.⁶⁸ This limit is meant to prevent a financing-TPO transaction from exerting any external or dominant influence over the club’s decisions, allowing the club to repair its financial and liquidity stability.⁶⁹ In essence, when a club is struggling to make ends meet, the financing TPO serves as a bridge loan to assist the organization in rehabilitating its balance sheet and arriving at sustained financial success. The loan exchanges temporary assets—the economic rights of players—and disappears once the player moves to another team. The monetary value due to the outside loaning entity is paid from the sum received in exchange for the player they possessed economic rights to, and the relationship as to that loan terminates at that point in time.⁷⁰

Investment TPOs are the most common type of TPO transaction in the world of football, represented by the “acquisition of a player by a club, and simultaneously part of the economic rights of the player are acquired by a third party.”⁷¹ Investment-TPO transactions occur “when a club is interested in signing a player whose federative rights are owned by another club, but does not have the financial resources to pay the transfer fee.”⁷² This transaction method utilizes a third party to finance the purchase of a specific player. The transaction is not one of necessity, but one of excess. The third-party investor enters into a TPO agreement with the club and provides a portion of the transfer-fee payment for a new player.⁷³ In return, the third-party investor receives a percentage of the purchased player’s economic rights, finding profit in the future transfer of the player just purchased.⁷⁴ The third-party investor, now third-party owner, shares the player’s economic rights with the purchasing football club.⁷⁵ Notably, the auditing company KPMG discovered that, after conducting a thorough case study of TPO throughout Europe, the

66. *Id.* at 13.

67. *Id.*

68. *See id.* If the normal range is less than 50 percent, a player’s rights are never held as a majority stake by a third party owner. *Id.*

69. *See id.* The goal of the financing-TPO is to help strengthen the financial solvency of a club performing poorly, and by keeping the percentage sold of a player below a majority stake helps keep the decision making “in house” with the football club. *Id.*

70. *See id.* Assuming there are no other terms to the sale of a player’s rights under the financing-TPO, the relationship will change once that player is sold. *Id.*

71. *Id.* at 5.

72. *Id.* at 13.

73. *Id.*

74. *Id.*

75. *Id.*

football club “has a duty of transparency and of good faith to the investor,” and that the club could possibly be “obliged” to transfer the player when an offer is made for the player, “pursuant to the terms and conditions set out in the TPO agreement.”⁷⁶ Investment-TPO agreements can range from 10 percent to 50 percent of the purchased player’s economic rights; common practice is for a third party to not own a majority interest in those rights.⁷⁷

Investment TPOs appear to possess many of the qualities that FIFA looked to eliminate by banning TPO worldwide.⁷⁸ While the financing TPO looks to prolong the established football club at its roots, the investment-TPO method could lead to external influences forcing the untimely departure of a player.⁷⁹ The financing-TPO approach looks to assist struggling clubs by providing them large sums of money in exchange for an *existing* player’s economic rights.⁸⁰ Thus, the interests of the third party are different from those of the investment TPO. The financing TPO looks to avoid such external influences by limiting the total percentage that a TPO commonly owns and offering different initial incentives for the investment.⁸¹ The goal is not to profit from the potential boon in sell-on value of the player, but to rehabilitate the club and earn a return on investment from improved club operations and results.⁸²

FIFA seems to have only been targeting investment-TPO transactions through its implementation of Article 18.⁸³ FIFA was attempting to eliminate external influences from affecting the personnel decisions of a football club through this set of regulations.⁸⁴ FIFA’s main intention in implementing Article 18 was to communicate to clubs that it wanted all football-related decisions to be made by club personnel themselves—not by third parties focused on purely financial intuitions.⁸⁵ FIFA failed to thoroughly investigate and differentiate

76. *Id.*

77. *Id.*

78. *See id.* Qualities such as third-party owner influence over transactions can arise with investment-TPOs because the third party may own up to 50 percent of a player, owning an equal interest as the football club, permitting the third-party owner to have an equal say in decision making. *Id.*

79. *See id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* FIFA, REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS 19–21 (2016), https://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransferofplayersjune2016_e_neutral.pdf [<https://perma.cc/3G8V-CB3D>] (archived Nov. 4, 2018) [hereinafter FIFA REGULATIONS]. This belief can be seen through FIFA’s repeated comments that it does not want any outside influences to affect transfer negotiations or have such outside interests lead a club to be forced to sell a player. *Id.*

84. *Id.*

85. *See id.* (showing that repeated comments by FIFA seem to demonstrate fear that the decision-making power can be taken from a club); KPMG, *supra* note 10, at 13

between the different TPO vehicles in Article 18. A full cost-benefit analysis would have led the governing body to discover that clubs in dire need of financial assistance can be protected through the use of financing TPOs.⁸⁶ Unfortunately, FIFA never explicitly stated which type of TPO it meant to target through the implementation of Article 18.⁸⁷ As discussed below, FIFA's regulations directly forbid TPO by explicitly banning the transfer of a player's economic rights through Articles 18, 18bis, and 18ter.⁸⁸ FIFA never differentiated between the many different types of TPO in existence, and instituted a blanket ban of the practice by targeting the sale of a player's economic rights instead.⁸⁹

C. League Responses to TPO Arrangements

The division of economic and federative rights has created tension during transfer negotiations, as the third party is an unaffiliated party that must be negotiated with or paid off.⁹⁰ Based on these complications, teams sometimes forego certain transfers completely, and leagues have banned the practice to avoid the corruption of outside influencers on transfers.⁹¹ FIFA banned the practice of TPO through the introduction of Article 18ter into the FIFA regulations on May 1, 2015.⁹² Shortly before FIFA's ban, the English FA, EPL, and Polish Football Association (Polish FA) each enacted similar bans. While certain leagues banned the practices, others continued to prop up the system; Spain's La Liga and Portugal's Primeira Liga continued the practice, while leagues throughout Eastern Europe and South America also embraced the practice until FIFA's complete ban. The complete disarray of regulatory stances throughout individual domestic leagues worldwide caused confusion for FIFA and its members, leading FIFA to rush into a regulatory stance on the subject that was overly harsh and critical of those employing the practice.

(explaining that investment-TPOs are those that permit an outside third party to potentially take decision making power away from a football club).

86. See KPMG, *supra* note 10, at 13 (noting that financing-TPOs provide many benefits to a club, especially those clubs struggling to make ends meet, by permitting them to sell a player they currently own and to reinvest in their future).

87. See *infra* Part II.C.3. None of FIFA's articles explicitly mention a specific type of third-party ownership, as their only comments pertain to the entirety of the practice and not to specific subsets. *Id.*

88. See FIFA REGULATIONS, *supra* note 83, at 19–21; *infra* Part III.A.

89. See FIFA REGULATIONS *supra* note 83, at 19–21 (explaining that FIFA never explicitly determines or mentions which types of third-party ownership structures it is worried about, instead creating a blanket ban on the entire practice).

90. See *infra* Part II.B.1 (discussing the difference between federative and economic rights).

91. See FIFA REGULATIONS, *supra* note 83, at 19–21; PL HANDBOOK, *supra* note 21, at 214.

92. Van Maren et al., *supra* note 12, at 233.

1. Leagues Banning TPO

a. English Football Association & English Premier League

Although FIFA passed expansive regulations banning the practice of TPO in 2015, major influences within world football banned the practice more than seven years earlier: the English FA and the EPL.⁹³ In 2008, the English FA became the first entity to ban the practice of TPO.⁹⁴ The English FA stands as the regulatory body of English football at all levels, and serves as a member of FIFA.⁹⁵ The English FA was the only major footballing association to ban the practice prior to FIFA's blanket, worldwide ban.⁹⁶

The English FA's ban was not without provocation, as a singular TPO controversy within the league led to TPO's ultimate banishment throughout England and Wales.⁹⁷ The 2006 purchases of the economic rights of Carlos Tévez, discussed earlier, and Javier Mascherano by two offshore companies (third parties) and West Ham United Football Club led to a revelation throughout England that a player's rights were divisible.⁹⁸ Until then, the practice had not spread into England, although it was common throughout Eastern Europe, Portugal, and Spain, and widespread throughout South America.⁹⁹ Upon this discovery, the EPL charged West Ham with violating two regulations, U6 and U18, both of which "forbid third-party player ownership from potentially influencing events at the destination club."¹⁰⁰ Regulation U6 provides that "no person may either directly or indirectly be involved in or have any power to determine or influence the management or administration of more than one club."¹⁰¹ Regulation U18 provides that "no club shall enter into a contract which enables any other party to that contract to require the ability materially to influence its policies or the performance of its teams in league matches."¹⁰²

93. Villas-Boas Pires, *supra* note 13.

94. Fred Nathan, *Sam Allardyce: What is third-party ownership in football and why is it so controversial?*, THE SUN (Sept. 27, 2016), <https://www.thesun.co.uk/sport/1860888/sam-allardyce-what-is-third-party-ownership-in-football-and-why-is-it-so-controversial/> [https://perma.cc/FKD4-BTAY] (archived Nov. 4, 2018).

95. *Competitions*, THE FA, <http://www.thefa.com/competitions> (last visited Nov. 7, 2018) [https://perma.cc/94YW-KMCE] (archived Nov. 4, 2018); *England*, THE FA, <http://www.thefa.com/england> (last visited Nov. 7, 2018) [https://perma.cc/2RS4-NT45] (archived Nov. 4, 2018).

96. *FIFA to ban third parties owning transfer rights*, FOX SPORTS (Sept. 26, 2014), <https://www.foxsports.com/soccer/story/fifa-votes-to-ban-third-party-ownership-of-transfer-rights-092614> [https://perma.cc/RKM5-CNL2] (archived Nov. 4, 2018).

97. Villas-Boas Pires, *supra* note 13.

98. *Id.*

99. *Id.*

100. Ornstein, *supra* note 6.

101. *Id.*

102. *Id.*

The EPL believed that West Ham's signings of Tévez and Mascherano were tied to separate agreements with the individual players' representatives.¹⁰³ The EPL stated that such agreements contained provisions allowing the representatives to "determine such factors as when the players were sold and when they were played."¹⁰⁴ If such allegations were true, the players would be ineligible to play within the EPL or in other competitions for West Ham.¹⁰⁵ Ultimately, the EPL severely punished West Ham, finding the allegations true and fining the club £5.5 million for failure to disclose necessary documents related to the Tévez and Mascherano signings.¹⁰⁶

Whether or not the transfers of Tévez and Mascherano were tainted by traces of TPO, the future of TPO within England was sown: TPO continued to be vehemently restricted by the EPL, and if clubs were caught engaging in the practice, they faced a reduction in points, altering their position on the league table, or other fines if deemed necessary by the EPL.¹⁰⁷

b. Polish Football Association

Around the time the English FA and EPL banned TPO, the Polish FA also banned the practice.¹⁰⁸ Article 33.4, the vehicle used by the Polish FA to ban TPO practices in Polish football, "states that 'clubs cannot sign any contract with a third party which may have an impact on loans or transfers or may create any obligation from clubs towards a third party in case of temporary or permanent transfer of a player.'"¹⁰⁹

2. Leagues Permitting TPO

While the practice of TPO was already prohibited for leagues in England and Poland, the remainder of leagues worldwide did not prohibit TPO until FIFA's worldwide ban.¹¹⁰ The practice of TPO is still widely implemented throughout South America, and to a lesser

103. *Id.*

104. *Id.*

105. *Id.*

106. Villas-Boas Pires, *supra* note 13.

107. Ornstein, *supra* note 6.

108. KEA EUR. AFFAIRS & THE CTR. FOR THE LAW & ECON. OF SPORTS, STUDY ON THE ECONOMIC AND LEGAL ASPECTS OF TRANSFERS OF PLAYERS 66 (2013), <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf> [<https://perma.cc/8C48-A56G>] (archived Dec. 2, 2018) [hereinafter KEA-CDES].

109. *Id.*

110. James Robinson, *When Tevez and Mascherano Went to West Ham*, THESE FOOTBALL TIMES (May 30, 2015), <https://thesefootballtimes.co/2015/05/30/when-tevez-and-mascherano-went-to-west-ham/> [<https://perma.cc/YQT4-Q727>] (archived Nov. 4, 2018).

extent in Portugal.¹¹¹ After completing an extensive market study throughout all European countries containing large football leagues, KPMG discovered that TPO was a very common practice within Europe.¹¹² Its findings were released almost two years prior to FIFA's ban on the practice.¹¹³

In 2013, investors in both Spain and Portugal possessed third-party holdings in players that amounted to about €1.1 billion in Europe alone.¹¹⁴ Those holdings involved over 1,100 players total.¹¹⁵ These figures amounted to 5.7 percent of the European transfer market at the time.¹¹⁶ Immediately following the release of Article 18 under the revised FIFA regulations, Spain and Portugal launched challenges to the new ban on TPO.¹¹⁷ Leagues in these countries do not have the financial might to compete with the likes of giant European leagues such as the EPL. As of 2013, two years prior to FIFA's international ban of TPO, 75 percent of the total market value of players in European leagues was held by leagues that allowed TPO.¹¹⁸ Twenty-four percent of the market value located in European leagues permitting TPO was held within Spanish and Portuguese leagues—18 percent and 6 percent respectively.¹¹⁹ The other 76 percent of that market value was located in countries throughout Europe, with the majority of that value located in Central Europe, and only 6 percent of that market value held in Eastern Europe.¹²⁰

To serve as a general example, most clubs (besides the world's superpower clubs like Manchester City, Barcelona, and Bayern München) receive the majority of their profits from television revenue-sharing rights they gain from being a member of the league in which they play. For example, in 2015 the EPL signed a three-year, £5.14 billion television-rights deal with domestic television outlets; domestic television revenue is apportioned to each club based on merit and a lump-sum value ranging from £156 million to the top earner and £99

111. See Brian Homewood, *FIFA to ban third-party ownership of players*, REUTERS (Sept. 26, 2014), <https://www.reuters.com/article/us-soccer-fifa-players/fifa-to-ban-third-party-ownership-of-players-idUSKCN0HL1DT20140926> [<https://perma.cc/AE8Y-NZA5>] (archived Nov. 4, 2018).

112. KPMG, *supra* note 10, at 6.

113. *Id.*

114. See *id.* at 7 (calculated by adding the percentages provided in a pie chart of “total market value players where TPO practice is allowed”).

115. *The Business of Football: Third Party Ownership of Players*, THE DEAL ROOM (Oct. 2, 2014), <https://www.firmex.com/thedealroom/third-partner-ownership-of-football-players/> [<https://perma.cc/A94L-UAG9>] (archived Nov. 4, 2018) [hereinafter *Business of Football*].

116. *Id.*

117. *Spain and Portugal challenge Fifa's ban on third-party ownership*, THE GUARDIAN (Feb. 10, 2015), <https://www.theguardian.com/football/2015/feb/10/portugal-spain-fifa-ban-third-party-ownership> [<https://perma.cc/Z7Y9-DPRF>] (archived Nov. 4, 2018) [hereinafter *Spain and Portugal*].

118. See KPMG, *supra* note 10, at 7.

119. See *id.*

120. See *id.*

million to the bottom earner.¹²¹ Spain, on the other hand, entered into a similar domestic television-rights deal in February of 2016, for the same three-season period spanning 2016 to 2019, worth only £1.8 billion; in La Liga, television revenue is divided on a lump sum equal basis to each club (where each club earns €50 million, or £44.2 million), as well as a merit basis where the top earning club earns €100 million annually and the bottom earning club earns a modest €12 million.¹²² Clearly, there is a disparity between the capital—in the form of transfer fees—entering and ultimately exiting the two most competitive leagues in the world, the EPL and La Liga. While England could comfortably ban TPO and stay ahead of the competitive curve by subsidizing ever-increasing transfer fees with television revenue, leagues such as La Liga favor only the top performing clubs, and top-to-bottom have fallen behind on the competitive landscape. To offset this disparity, Spain—and other leagues such as the Primeira Liga in Portugal—challenged the ban on TPO.

a. Spain & Portugal

Immediately following the release of Article 18 under the revised FIFA regulations, both the Spanish and Portuguese Football Associations launched challenges to the new ban on TPO.¹²³ The major domestic leagues within each country, La Liga and Primeira Liga, argued that the ban infringed on competition rules and the free movement of labor and capital.¹²⁴ Primarily, the leagues argued that the ban is specifically targeted to hurt clubs “with fewer economic resources,” which limits a club’s ability to not only purchase players, but develop them as well.¹²⁵

KPMG found that TPO is a common practice in Portugal, where about one in four players is subject to some ownership form utilizing TPO mechanisms.¹²⁶ The market value of players under TPO in Portugal was about €267 million, about 30 percent of the entire market value of players within the country.¹²⁷ Clubs relied heavily on TPO, as

121. Owen Gibson, *Sky and BT Retain Premier League TV Rights for Record £5.14bn*, THE GUARDIAN (Feb. 4, 2016), <https://www.theguardian.com/football/2015/feb/10/premier-league-tv-rights-sky-bt> [<https://perma.cc/XB7C-YGVM>] (archived Nov. 8, 2018).

122. *Spanish La Liga New 3 Year TV Deal Worth €2.65 (2016–19)*, TOTAL SPORTEK (Feb. 4, 2016), <http://www.totalsportek.com/money/spanish-la-liga-new-3-year-tv-deal-worth-e2-65-billion/> [<https://perma.cc/96V6-HNFZ>] (archived Nov. 4, 2018).

123. *Spain and Portugal*, *supra* note 117.

124. *See Spain, Portugal against FIFA ban of third-party ownership*, USA TODAY (Feb. 10, 2015, 8:45 AM), <https://www.usatoday.com/story/sports/soccer/2015/02/10/spain-portugal-against-fifa-ban-of-third-party-ownership/23163063/> [<https://perma.cc/23SZ-9Y9G>] (archived Nov. 4, 2018).

125. *Id.*

126. *See* KPMG, *supra* note 10, at 8.

127. *Id.*

a considerable percentage of players within the country were affected by the practice two years prior to its prohibition.

In Spain, the reliance on TPO was not quite as widespread, but still of a hefty enough size to warrant investigation. The estimated market value of players under TPO agreements throughout Spain was about €163 million in 2013, the equivalent of about 8 percent of the market value of all players throughout Spain.¹²⁸ While this figure seems miniscule in the grand scheme of things, it is not without value. KPMG stated that the football investment funds in Spain had “greatly increased in recent years, and are being used by clubs with difficulties in financing the acquisition of new players.”¹²⁹ It could be hypothesized that if TPO agreements were not banned, the percentage of players in Spain under such agreements would likely have increased to an even more substantial figure.

b. Eastern Europe & South America

South America led the way in the evolution of TPO structures and, along with large blocks of Eastern Europe, has relied on TPO to fund its football clubs since the origination of the practice.¹³⁰ The practice of TPO throughout Eastern Europe was more prevalent than throughout any other part of Europe.¹³¹ Clubs in Eastern Europe possessed an estimated TPO-market share in the range of 40 percent to 50 percent prior to FIFA’s Article 18 ban.¹³² The market value of players under TPO contractual agreements was about €406.5 million, or about €140 million more than the next closest region (Portugal).¹³³

South America has stood staunchly against any worldwide ban on TPO since FIFA and select European leagues began to ban the practice in recent years.¹³⁴ While accurate financial figures are hard to find in regards to South American TPO agreements, the controversial practice has thrived in the region due to the lower socioeconomic backgrounds that many players grow up within.¹³⁵ Studies have estimated that around 90 percent of players in Brazil’s top league, Campeonato Brasileiro Série A, are owned through some form of TPO agreement.¹³⁶

128. *Id.*

129. *Id.* at 6.

130. *Business of Football*, *supra* note 115.

131. KPMG, *supra* note 10.

132. *Id.*

133. *See id.*

134. *See Business of Football*, *supra* note 115.

135. *Id.*

136. Poonam Majithia, *Third Party Ownership—a Brazilian perspective*, LAW IN SPORT (Mar. 21, 2014), <https://www.lawinsport.com/topics/articles/employment-law/item/third-party-ownership-a-brazilian-perspective> [<https://perma.cc/8L5C-AH4E>] (archived Nov. 4, 2018).

2. FIFA—Article 18, Article 18bis, Article 18ter

On December 22, 2014, Jérôme Valcke, the Secretary General of FIFA at the time, released Circular No. 1464, alerting international footballing bodies that FIFA recently promulgated new regulations on the status and transfers of players—specifically targeting TPO of players' economic rights.¹³⁷ The circular noted that the FIFA Executive Committee, at a meeting that took place from September 25 to 26, 2014, passed a decision on a revised regulatory approach to a ban on TPO of players' economic rights.¹³⁸ The regulations containing this ban were approved by the FIFA Executive Committee at a set of meetings that took place on December 18 and 19, 2014 and came into force on May 1, 2015.¹³⁹ The findings and conclusions of the FIFA Executive Committee on TPO are codified within Article 18 of the FIFA Regulations on the Status and Transfer of Players and are laid out as follows:¹⁴⁰

a. Article 18: Special Provisions Relating to Contracts between Professionals and Clubs

The introductory section of Article 18 states that any intermediary involved in the negotiation of a contract “shall” be named in that contract.¹⁴¹ The section also specifies requirements pertaining to the age of players and length of contracts, as well as other boilerplate terms, such as that a successful medical examination and work permit must be completed and procured prior to ratification of the contract.¹⁴²

FIFA's regulations are more so guidelines for other leagues to adopt than regulatory regimes of their own.¹⁴³ For example, FIFA regulations limit the length of a contract to five years, but the EPL sets no maximum length of contracts, stating contracts may be for “any length of time.”¹⁴⁴ Largely, administrative and regulatory decisions have been left to individual leagues and competitions, even though

137. Memorandum from FIFA to its Members, Circular No. 1464: Regulations on the Status and Transfer of Players (Dec. 22, 2014), http://resources.fifa.com/mm/document/affederation/administration/02/49/57/42/tpocircular1464_en_neutral.pdf [<https://perma.cc/J5GE-HT39>] (archived Nov. 4, 2018) [hereinafter FIFA Circular].

138. *Id.* at 1.

139. *Id.*

140. FIFA REGULATIONS, *supra* note 83, at 19–21.

141. *Id.* at 19.

142. *Id.*

143. *See id.* at 14, 21, 61. FIFA's goal was to ban the practice worldwide, not just within its own competitive sphere. Upon passing their regulations, FIFA urged all leagues around the world to either follow suit or continuously permit FIFA to fine teams within their league that continued to employ third-party ownership structures. *See id.*

144. *Id.*

FIFA has offered guidance on the topic.¹⁴⁵ That being said, some regulations are required to be accepted for FIFA recognition as a proper footballing body, such as 18bis and 18ter, discussed below. Additionally, some competitions require compliance with FIFA regulations or are organized by FIFA itself, thus requiring compliance as well.

b. Article 18bis: Third-Party Influence on Clubs

Under section 18bis, FIFA forbids clubs from entering into contracts that allow any third party to acquire the ability to influence employment or transfer-related “matters, . . . policies or the performance of its teams.”¹⁴⁶ Within 18bis, FIFA leaves a stark warning that the FIFA Disciplinary Committee “may impose disciplinary measures on clubs that do not observe the obligations” of 18bis.¹⁴⁷

The actual TPO ban that FIFA uses to punish clubs around the world is found within 18bis, but only relates to the third-party’s ability to influence club policy.¹⁴⁸ The regulation itself does not speak to actual, silent ownership of a player, which would seem to leave the door open to some form of alternative ownership by a third party, as long as said owner exerts no influence over the club or its operations. FIFA rectified this odd loophole with the enactment of 18ter, seemingly permitting TPO as long as the owner is a silent party.¹⁴⁹

c. Article 18ter: Third-Party Ownership of Players’ Economic Rights

Section 18ter, which went into effect on May 1, 2015, categorically forbids the practice of TPO in international football:

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.¹⁵⁰

Section 18ter also provides that contracts predating May 1, 2015 could continue in place as they were agreed upon, but could not be extended

145. *See id.* at 3. Many major regulatory changes will trickle down from the top, with FIFA initially promulgating a specific regulation to see how leagues around the world react, and allowing leagues to then adopt what they deem will fit their locales the best. *Id.*

146. *Id.* at 20.

147. *Id.*

148. *See id.* 18bis is titled “third-party influence on clubs,” and seeks to assure that no football club enters into a contract that “enables any other party . . . to acquire the ability to influence . . . its policies or the performance of its terms.” *Id.*

149. *See supra* Part II.C.3.c.

150. FIFA REGULATIONS, *supra* note 83, at 21.

in reliance upon the original terms; this provision has the effect of forcing teams to buy out the third-party owner, sell the player to eliminate the third-party owner's interest, or renegotiate the TPO agreement completely.¹⁵¹ FIFA also stated that no TPO agreements could be entered into during the four-month period between the announcement of 18ter in January 2015 and its official enactment in May.¹⁵² FIFA, through 18ter, also required TPO agreements that were slated to continue to be recorded within the Transfer Matching System (TMS), so that all information regarding the third party involved in the transaction, as well as the full name of the player and duration of the agreement, were known to the governing body.¹⁵³ Lastly, FIFA designated the FIFA Disciplinary Committee as the entity to "impose disciplinary measures on clubs or players" that refused or failed to follow Article 18ter to its exact specifications.¹⁵⁴ Both 18bis and 18ter are binding at the national level and are required by FIFA to be incorporated into each football associations' regulations in some form or fashion.¹⁵⁵

III. ANALYSIS

A. Applicability of FIFA Regulations in Relation to Domestic League Rules

Before delving deeper into TPO regulatory issues, attention must be turned towards the applicability of FIFA regulations. Is FIFA the ultimate authority in football? Can FIFA punish teams in direct conflict with its rules and regulations? National footballing organizations, such as the English FA and the United States Soccer Federation, must comply with FIFA regulations in order to compete in tournaments sponsored by the international regulatory body. The three main articles regulating TPO—18, 18bis, and 18ter—are listed within the Introductory Provision of FIFA's Regulations on the Status and Transfer of Players handbook; these three provisions, along with a limited amount of others, are binding at the "national level and must be included without modification in the association's regulations."¹⁵⁶ To be clear, the regulations mentioned above have no bearing on the FIFA World Cup, as such competition only permits national teams as competitors. Changes to TPO regulations would have no bearing or impact on the World Cup, as TPO regulations only apply to individual,

151. *Id.* at 21.

152. *Id.*

153. *Id.*

154. *Id.*

155. FIFA Circular, *supra* note 137, at 3.

156. See FIFA REGULATIONS, *supra* note 83, at 80–81 (discussing the scope of the regulatory handbook and which rules must be adopted by national footballing associations for recognition by FIFA).

independent football clubs and not national domestic/country football squads.

The question remains, though, as to how certain domestic leagues, such as Spain's La Liga and Portugal's Primeira Liga, continue the operation of TPO structures, even though FIFA fines clubs after finding them guilty of continuing to employ TPO. The answer may be that FIFA's regulations are not binding on all football leagues. FIFA's regulations define "organised football" as "association football organised under the auspices of FIFA, the confederations and the associations, or authorised by them."¹⁵⁷ It is clear from Section 1, subsection 1 that the regulations provided within the FIFA handbook are "global and binding rules concerning . . . clubs belonging to different associations."¹⁵⁸ While "association" is not included within the definitions section of the handbook, it can be assumed from the definition of "organised football" that the only leagues responsible for following the regulations contained within the handbook are those organized under the "auspices of FIFA."¹⁵⁹ Thus, domestic leagues, such as the two aforementioned leagues, should be free to pursue their own rules and regulations permitting TPO as they feel necessary.

To rebuke such practices, FIFA could ban leagues that permit TPO from FIFA-sanctioned competitions for clubs, such as the FIFA Club World Cup (a competition that invites champions from regional competitions around the world) if their league of association membership permits TPO.¹⁶⁰ But FIFA has taken no steps toward that: the current champion, Real Madrid, hails from a domestic league—La Liga—that stands in staunch opposition to FIFA's TPO ban.¹⁶¹

B. CIES Report

The CIES report, commissioned by FIFA, reported the findings of the CIES study of TPO in world football.¹⁶² FIFA utilized this report in large part when deciding to completely ban TPO, but the conclusions provided by the CIES seem to contradict FIFA's ultimate response.¹⁶³

While the report found that TPO concerns varied across association types, sizes, and location, the conclusions of the report

157. *Id.* at 81.

158. *Id.* at 7.

159. *See id.* at 79.

160. Dave Fraser, *What is the Fifa Club World Cup, which teams take part, when is it held and what TV channel is it on?*, THE SUN (Dec. 13, 2016, 6:45 PM), <https://www.thesun.co.uk/sport/football/2214527/fifa-club-world-cup-real-madrid-atletico-nacional-club-america/> [<https://perma.cc/7QK9-HKBF>] (archived Nov. 8, 2018).

161. *See FIFA Club World Cup UAE 2018*, FIFA, <http://www.fifa.com/clubworldcup/index.html> (last visited Nov. 9, 2018) [<https://perma.cc/3BLF-RKUR>] (archived Nov. 4, 2018).

162. CIES REPORT, *supra* note 19, at 2.

163. *See id.* at 4.

contradict FIFA's reasoning for banning TPO completely.¹⁶⁴ For example, conclusion (f) states as follows:

Reliable information on the scale of the phenomenon [third party ownership] is rare and it is therefore impossible for the time being to estimate its global significance (an additional study based for example on a survey of the players could shed more light in this regard). Nevertheless, it is clear that the practice exists—in one form or another—and is concentrated in certain regions, logically those where the economic stakes are the highest.¹⁶⁵

If reliable information was not available as to the scale or size of the phenomenon, but only a statement that the practice of TPO exists in some form, it seems that a complete ban on the practice is aggressive until a full investigation has been undertaken and completed as to its prevalence worldwide. Had FIFA relied upon the report completed by KPMG, it would have arrived at a more acceptable regulatory solution. With a qualifier as damning to legitimacy as that provided within the CIES report, it's hard to understand why a complete ban was immediately warranted based off the utilized data.¹⁶⁶

These conclusions do not match the response reached by FIFA. While the report explicitly mentioned the proposals of certain influential footballing bodies, such as the French and English federations, to prohibit TPO throughout the FIFA territory, it merely listed other federations, such as the Portuguese, Brazilian, and Austrian federations, as those permitting TPO at the time of the study—the report made no mention of their opposition to a potential banishment or that their national laws run counter to a ban of the nature FIFA created.¹⁶⁷ Further research should have been completed by FIFA prior to implementing a worldwide ban (which has not turned out to be incredibly effective) of TPO.

C. *European Law and TPO*

FIFA's blanket ban on TPO runs counter to independent countries' domestic legal codes, to EU articles and agreements, and to precedents set by the Court of Justice of the European Union (CJEU). FIFA seems to genuinely disregard the legal codes of the many countries and unions its regulations impact.¹⁶⁸ European law has approached TPO through a variety of means—through country-specific prohibitions on limiting

164. *See id.*

165. *Id.*

166. *See id.*; KPMG, *supra* note 10, at 10.

167. *See* CIES REPORT, *supra* note 19, at 3–4.

168. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 63, 65, 154, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; Case C-519/04, David Meca-Medina & Igor Majcen v. Comm'n of the European Cmty., 2006 E.C.R. I-06991 [hereinafter *Meca Medina*]; Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman, 1995 E.C.R. I-04921 [hereinafter *Bosman*]; CIES REPORT, *supra* note 19, at 3–4.

the free movement of people and capital,¹⁶⁹ agreements between the EU and international footballing bodies,¹⁷⁰ and EU cases and articles.¹⁷¹ From a worldwide ban by FIFA, to certain domestic league regulations, and ultimately political policies concerning the free movement of capital, a picture of what is permitted as to TPO is far from clear. To understand the trends leading up to and following FIFA's blanket ban, an analysis of competing laws and regulations is necessary. The following analysis will flow similarly to how the order of authorities would flow: beginning with EU law, CJEU opinions, and domestic or national law, and concluding with miscellaneous applicable EU articles.

1. European Union Law

a. 2001 Agreement: European Commission and FIFA/UEFA

The 2001 Agreement was announced following a meeting between commissioners of the European Commission and the presidents of FIFA and the Union of European Football Associations (UEFA), Sepp Blatter and Lennart Johansson, respectively.¹⁷² The agreement served as a pact between the EU and the two major governing international football bodies.¹⁷³ The European Commission hoped that this resolution would provide for “an appropriate balance between a player's fundamental right to free movement and the stability of contracts between clubs and players.”¹⁷⁴ It attempted to achieve this balance through the creation of a “solidarity mechanism” and the stricter enforcement of Article 63, pertaining to the free movement of capital throughout the EU.¹⁷⁵

b. Solidarity Mechanism

A primary product of the 2001 Agreement, the solidarity mechanism, demands that “each time a professional is transferred before the end of his contract, a solidarity contribution [a division of the transfer fee received for the player] is due by the new club to all the clubs for which the player played between the age of 12 and 23.”¹⁷⁶ The goal of the solidarity contribution is to “redistribute a significant

169. CIES REPORT, *supra* note 19, at 3.

170. European Commission Press Release IP/01/314, Outcome of Discussions between the Commission and FIFA/UEFA on FIFA Regulations on International Football Transfers (Mar. 5, 2001) [hereinafter EC Press Release IP/01/314].

171. See TFEU, *supra* note 168, arts. 63, 65, 154; *Meca-Medina*, 2006 E.C.R. at I-7019-20; *Bosman*, 1995 E.C.R. at I-5059.

172. EC Press Release IP/01/314, *supra* note 170.

173. KEA-CDES, *supra* note 108, at 3.

174. *Id.* at 89.

175. TFEU, *supra* note 168, art. 63; FRANS DE WEGER, THE JURISPRUDENCE OF THE FIFA DISPUTE RESOLUTION CHAMBER 447 (2d ed. 2016).

176. DE WEGER, *supra* note 175, at 447.

proportion of income to clubs involved in the training and education of a player.”¹⁷⁷ The 2001 Agreement also provided that the percentage of the fee siphoned from the total transfer fee to be distributed among previous clubs of the player would range from 5 percent to 10 percent, a variable amount depending on the player’s age at the time of transfer.¹⁷⁸

It’s apparent from this agreement that FIFA has sanctioned the division of transfer fees between separate parties in the past, as well as demonstrating an example of previous EU intervention or interjection into shaping certain FIFA or UEFA regulatory policies.¹⁷⁹ While proponents of a TPO ban may point to the fact that ownership interests differ when comparing the movement of players under normal, dual-party ownership and players under TPO arrangements, this argument can be refuted. If FIFA were to even attempt to distinguish between forms of third-party ownership, the practice may be able to continue.

FIFA could very easily distinguish between the two types of TPO. As discussed above, there are two primary types of TPO: investment TPOs and financing TPOs. Financing-TPO arrangements are used predominantly to serve the balance sheet, or financial, needs of a club, while investment-TPO arrangements are used to finance the acquisition of a player.¹⁸⁰ Arguably, such arrangements are established when a club is extending beyond its financial means.¹⁸¹ FIFA could differentiate between the two and achieve a very similar result, as it did in the 2001 Agreement’s solidarity contribution agreement. The solidarity contribution was meant to fulfill a primary goal of the 2001 Agreement: to help with the spread of money throughout football markets, as well as ease financial concerns for lower-league clubs that trained young players only to see them go on and sell for millions of euros at other clubs.¹⁸² If FIFA were to adopt a discriminatory regime, permitting the financing TPO while continuing to forbid the investment TPO, the same goals of the 2001 Arrangement could be produced. By permitting teams to sell a percentage of a player’s rights due to necessity, the overall financial health of clubs within the game would improve. Teams could sell off a percentage of a *current* player they own, and in return use the money to improve the day-to-day operations of the club: improve facilities, pay for player

177. EC Press Release IP/01/314, *supra* note 170.

178. See *What is a Solidarity Contribution in Football?*, FIELD00 BLOG (Apr. 17, 2014), <http://blog.fiieldoo.com/2014/04/what-is-solidarity-contribution-in-football/> [<http://perma.cc/H9AG-FLAY>] (archived Nov. 8, 2018).

179. See EC Press Release IP/01/314, *supra* note 170.

180. KPMG, *supra* note 10, at 13.

181. See *id.*

182. See EC Press Release IP/01/314, *supra* note 170. The 2001 Agreement eliminated the age requirement of player transfers, allowing lesser clubs to sell a youth player at a young age for a large sum of money, created a sanction system that limited unilateral contract breach to an offseason time frame, and created a training compensation to encourage and reward the training efforts of clubs, “in particular small clubs.” *Id.*

training, or pay player wages, for example. By discriminating between the multiple types of TPO and choosing to forbid the investment-TPO scheme, the true harms of TPO that FIFA wanted to avoid—corruption—would still be avoided. Clubs would simply be permitted to employ a diluted version of TPO. While a third-party interest must still be dealt with when the player transfers in the future, terms and limits could be placed within the initial financing-TPO contract. Terms such as autonomous negotiations between the owning team and purchasing team, repayment clauses, and indemnity clauses could create a regime where TPO is permitted and the harms FIFA is terribly afraid of could be completely avoided.

c. Free Movement of Players

The free movement of capital, embodied within Article 63 of the Treaty on the Functioning of the European Union (TFEU), provides that “all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”¹⁸³ FIFA’s worldwide ban of the practice of TPO is arguably in direct violation of Article 63.¹⁸⁴ In December of 2014, FIFA announced that the following May that it would institute a global ban of TPO. On February 2, 2015, not two months after the global ban was announced, Spain’s La Liga and Portugal’s Primeira Liga brought legal proceedings against FIFA.¹⁸⁵ The leagues argued that the blanket ban on TPO worldwide violated EU “competition law and the fundamental rights to free movement of capital and workers.”¹⁸⁶

In fact, Johan Lindholm painted the picture of EU authority within the realm of football perfectly in his 2016 article arguing that FIFA’s ban of TPO may be illegal:

It is well established that measures governing sport activities fall under the scope of the treaties of the European Union in so far as they constitute ‘economic activity’ . . . the Court of Justice of the European Union has . . . held that professional . . . sport in general and football in particular constitutes ‘an economic activity’ to which the Treaties apply . . . the Commission has specifically and explicitly pointed out that ‘the transfer of athletes in return for transfer fees’ constitutes an economic activity.¹⁸⁷

There is a strong argument that FIFA’s series of articles used to ban TPO worldwide are illegal, and within the scope of the EU’s jurisdiction, wherein legal action can be brought to attempt to reverse the banishment of the practice.¹⁸⁸ Lindholm proposed a substantial

183. TFEU, *supra* note 168, art. 63.

184. *See id.*

185. *See* Johan Lindholm, *Can I Please Have a Slice of Ronaldo? The Legality of FIFA’s Ban on Third-Party Ownership Under European Union Law*, 15 INT’L SPORTS L.J. 137, 138 (2016).

186. *Id.*

187. *Id.* at 139.

188. *See id.* at 138–39.

test to determine whether FIFA's TPO ban is in fact an impediment on the free movement of capital, as defined in Article 63.¹⁸⁹

Lindholm's test suggested that three questions must be answered in order to determine such: (1) does the ban have a direct effect (can a private entity, or third-party investor, rely on Article 63 in opposition to FIFA); (2) to what extent does the free movement of capital apply to TPO, and finally; (3) does the ban constitute an obstacle to the free movement of capital?¹⁹⁰

The remainder of this subpart will address the three questions proposed by Lindholm, but will alter his test slightly. The following will propose that questions (1) and (3) are repetitive, and that the third question should instead address whether or not there are alternative forms of a TPO ban that could comply with Article 63. This short analysis will ultimately answer each part of this tripartite test affirmatively: (1) yes, the total ban of TPO has a direct effect on the free movement of capital; (2) yes, Article 63 does cover the economic rights every football player possesses; and (3) yes, there are sufficient alternative forms of TPO that could protect FIFA's interests while aligning those interests with EU law.¹⁹¹

The free movement of capital throughout the EU and non-EU countries is an "essential element for the proper functioning of the large European internal market," thus any regulation inhibiting that movement must be scrutinized with extra care.¹⁹² To comply with the expectations of the free movement of capital, a market participant must be able to offer its resources and financial strength throughout the entire EU, especially in those locations where interest is greatest.¹⁹³

The EU and CJEU provide no explicit definition for "movement of capital," but instead illustrate the meaning of the phrase through various judicial decisions and directives.¹⁹⁴ Directive 88/361/EEC provides various lists of terms, activities, and articles that help to determine whether something inhibits the free movement of capital.¹⁹⁵ A few examples of cross-border capital movement activities or actions that must be protected as the free movement of capital are foreign direct investments, real estate investments and purchases, securities

189. *Id.* at 140–41.

190. *Id.*

191. *See id.*

192. *Free movement of capital in the EU*, EUROPEDIA, http://www.europedia.moussis.eu/books/Book_2/3/6/07/?all=1 (last visited Dec. 2, 2018) [<https://perma.cc/335K-K59A>] (archived Nov. 8, 2018).

193. *Id.*

194. *Capital movements*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/capital-movements_en (last visited Nov. 9, 2018) [<https://perma.cc/G5KN-LRZZ>] (archived Nov. 8, 2018).

195. Council Directive 88/361/EEC of the Council of the European Communities 1988 O.J. (L 178) L178/5, at 8 [hereinafter Council Directive 88/361/EEC].

investments, granting of loans and credit, and other operations with financial institutions.¹⁹⁶

Lindholm argues correctly that FIFA's ban does in fact have a direct effect on the free movement of capital, and also points out that this would be a prime opportunity for the CJEU to determine to what extent Article 63 could be applied to a private entity such as FIFA.¹⁹⁷ Lindholm cites *Walrave v. Association Union Cycliste Internationale* in support of this belief, stating that within *Walrave* the CJEU "declared that sports' governing bodies must respect the right to free movement of persons and services by merit of these governing bodies de facto having and exercising the regulatory function in a particular market."¹⁹⁸ Lindholm concludes by transposing arguments from other CJEU cases concerning the freedom of the movement of capital:

FIFA, UEFA, and the national governing bodies almost exclusively regulate the conditions for access to the football player market. Thus, the right to free movement of capital on this market would become illusory if these actors were exempted from its scope on the grounds that they are not public authorities, the very thing that the Court has not been willing to accept when it comes to the other fundamental freedoms. It therefore appears very likely that in a case like the one at hand, the free movement of capital can be invoked against a private entity like FIFA.¹⁹⁹

By combining the EU's fluid definition of "movement of capital" and Lindholm's persuasive argument as to why FIFA cannot inhibit the free movement of capital, it must be concluded that prong one is answered in the affirmative. The CJEU's opinion that sports' governing bodies, such as FIFA, act as regulating bodies for that sector of the market would lead any reasonable person to conclude that such sports' governing bodies can inhibit the free movement of capital by improperly regulating their sector of the market.²⁰⁰

It also must be concluded that the free movement of capital applies to TPO. As Lindholm begins to point out, a player's economic rights are a form of direct investment, bringing such activity within the purview of Article 63.²⁰¹ Direct investment generally refers to the movement of securities or other financial instruments throughout the EU.²⁰² As referenced previously, the transfer of a football player is similar to the purchase or sale of a stock on the stock market.²⁰³ The similarities

196. *Capital movements*, *supra* note 194.

197. Lindholm, *supra* note 185, at 140.

198. *Id.*

199. *Id.* at 141.

200. *See id.* at 140.

201. *See id.* at 141 ("Investment in football player transfer fees is obviously not a traditional type of investment . . . but the CJEU has interpreted Article 63 TFEU's scope, which is not defined in the Treaties, broadly. Third party ownership likely qualifies as a so-called direct investment.")

202. *See* Council Directive 88/361/EEC, *supra* note 195, at 8.

203. *See supra* Part II.A.1. (describing what the transfer of a football player is and what attributes it necessarily involves).

between direct investment in stocks is directly comparable to the purchase of football players through the transfer market, they are both one in the same.

Again, a player has two sets of rights: economic and federative.²⁰⁴ Federative rights are binary, so there are only two options; a player either has them (and can be registered with the league in which their club participates) or does not have them (thus the player cannot be registered with the league in which their club participates). Alternatively, economic rights possess many of the same characteristics that a security or stock traded on the stock market possesses.²⁰⁵ Some of those characteristics include: risk/return (a security can gain value or lose value, just as a player can suffer a career ending injury at any point in time); volatility (stock markets are volatile, and can fluctuate in value daily, just as a player can gain transfer value through good performances and lose value through poor form/performances); selection (stock markets offer a wide range of instruments, just as the entire world of football offers players at different positions, with different characteristics or different levels of talent); liquidity (market makers stand ready to sell a security at any time while the market is open, just as teams can transfer players at any time when the transfer market is open); global nature (every major economy possesses a stock market, just as professional football leagues are prevalent throughout the world's major countries); and lastly, regulation (stock markets are regulated by a financial regulatory body, just as football is regulated by FIFA or a specific country's football association).²⁰⁶

It is clear, following comparison, that a player's economic rights are the equivalent of a security being traded on a stock market. So, to answer Lindholm's question, the free movement of capital does in fact apply to TPO. The transfer of economic rights is the equivalent of a direct investment, or capital moving throughout the economy, which the EU has already stated falls directly within the safeguards of Article 63.²⁰⁷

Lindholm ends his three-prong analysis with the following question: Does the ban constitute an obstacle to the free movement of capital?²⁰⁸ This prong appears to be repetitive, relating closely to prong one ("does the ban have a direct effect on the movement of capital?"). A

204. See *supra* Part II.B.1. (describing the difference between the economic and federative rights every player possesses).

205. See *Common Stock Features*, INVESTOPEDIA, <https://www.investopedia.com/walkthrough/corporate-finance/3/stock-valuation/common-stock.aspx> (last visited Nov. 9, 2018) [<https://perma.cc/2H23-WCAG>] (archived Nov. 8, 2018).

206. Chirantan Basu, *6 Characteristics of Stock Markets*, ZACKS (updated May 22, 2018), <https://finance.zacks.com/6-characteristics-stock-markets-2511.html> [<https://perma.cc/7D2C-N4RY>] (archived Nov. 8, 2018).

207. Council Directive 88/361/EEC, *supra* note 195, at 8.

208. Lindholm, *supra* note 185, at 141.

better question would ask whether there is an alternative option. Are there alternative forms of TPO that would permit the free movement of capital, but also allow FIFA to regulate TPO?

A strong case can be made that there is an alternative scheme for FIFA to employ that would permit TPO in a limited form, but not restrict the free movement of capital. It has already been established that the EU defers to sports' governing bodies, such as FIFA, as the regulatory bodies in charge of their individual market segments.²⁰⁹ Thus, FIFA should be permitted to restrict the practice of TPO, but not with unbridled authority. Such action would most likely be permitted by the EU and CJEU through deference to a regulatory body's expertise within its market segment.

As has been discussed, there are two distinct types of TPO.²¹⁰ FIFA could delineate between the two, and permit financing TPOs while banning investment TPOs. Investment TPOs are used to purchase a player that a club cannot afford, while financing TPOs are used when a club sells a portion of the rights of a currently owned player in efforts to fund the continued existence of the club.²¹¹ In other words, financing TPOs are employed by clubs that cannot afford to continue operations or meet current obligations, an objective FIFA recognized as an issue it wanted to improve within the 2001 Agreement. The results of this three-question inquiry should surely lead the EU to the result that, not only does FIFA's TPO ban infringe upon Article 63, but that there are suitable alternatives that could arguably evade such infringement.

2. Court of Justice of the European Union

Several decisions from the CJEU paint a vivid picture of the reach the judicial system may have over continental (UEFA) and international (FIFA) football regulatory bodies; two decisions in particular, discussed below, seem to broaden the reach of the EU legal system over regulatory actions UEFA and FIFA may take.²¹² In *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, the CJEU found that UEFA regulations could run counter to certain EU articles, and that the EU could curtail those regulations in efforts to force compliance with EU law, specifically the free movement of labor.²¹³ More importantly, *Meca-Medina v. Commission of the European Communities* established the supremacy of EU law over the regulations of sports federations, further supporting the premise that

209. See *infra* Part III.C.

210. See *infra* Part II.B.2.

211. See *id.*

212. See Case C-519/04, *David Meca-Medina & Igor Majcen v. Comm'n of the European Cmty.*, 2006 E.C.R. I-06991, at 7021–27; Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-04921, at 5079–80.

213. *Bosman*, 1995 E.C.R. 5055.

the EU could take direct action to force FIFA to change its regulations relating to TPO.²¹⁴

a. *Bosman*

Bosman stands as one of the most important rulings concerning football and the free movement of labor throughout Europe since the creation of the EU.²¹⁵ The 1995 decision was one of the first cases decided by the CJEU that limited the power of sports' regulatory bodies with a continental or international reach.²¹⁶ The CJEU ultimately banned restrictions on foreign EU players within national leagues, and permitted players within the EU to move between clubs after the expiration of their contracts without requiring the acquiring team to pay a transfer fee for such player.²¹⁷ Prior to *Bosman*, a player was not permitted to leave their club at the end of their contract unless one of two things occurred: either the club renounced the player's rights, both economic and federative (thus, agreed to let the player leave the team for free); or, the club could sell the player's rights to an acquiring club (the equivalent of a transfer fee).²¹⁸ Bosman was at the end of his contract with a club in Belgium (RFC Liege) and wanted to move to a club in France (USL Dunkerque) that had offered him an improved contract.²¹⁹ RFC Liege refused to let him move to USL Dunkerque unless the French club paid a transfer fee for Bosman.²²⁰ Ultimately, USL Dunkerque (a second-tier club, with little financial resources to pay such a large transfer fee) conceded and gave up pursuing an acquisition of Bosman. As a result, Bosman was stuck on RFC Liege's roster, no longer a first-choice player, and RFC Liege cut his wages by about 75 percent.²²¹

Bosman, aggrieved, brought legal action within the CJEU, citing Article 48 of the Treaty of Rome (1957), which guaranteed the freedom of movement for players throughout the EU.²²² The Treaty of Rome's guarantee of freedom of movement is eerily similar to Article 63's

214. *Meca-Medina*, 2006 E.C.R. 7021–27.

215. See Gerard Brand, *How the Bosman rule changed football—20 years on*, SKY SPORTS (Dec. 15, 2015), <http://www.skysports.com/football/news/11095/10100134/how-the-bosman-rule-changed-football-20-years-on> [https://perma.cc/EQ73-33F5] (archived Nov. 8, 2018).

216. See *id.* The *Bosman* decision limited FIFA and UEFA's regulatory powers by completely changing how a player could move from team-to-team at the end of the contract, changing how and if players were counted as foreigners towards competition count requirements as to domestic or foreign roster composition, and permitting clubs to play as many EU players as they wanted, strengthening the flow of capital and labor throughout the continent. See *id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

guarantee of the freedom of movement of capital, which should aid in a determination of Johan Lindholm's altered tripartite assessment, as discussed in the previous subpart.²²³

Ultimately, Bosman was victorious, providing a major windfall for European players continent-wide.²²⁴ The decision by the CJEU permitted a player to leave a club on a free transfer after his contract expired.²²⁵ For once, power was given to the players, who could now demand a transfer prior to the end of their contract, lest their current club be left with nothing at the expiration of the player's current contract.²²⁶ The CJEU stated in its ruling that the provisions of Article 48 "are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds . . . and *preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.*"²²⁷ Further, the court stated that any provisions precluding or deterring a national of a member state from leaving his country of origin in order to exercise his right to freedom of movement constitutes an obstacle to such freedom, even if such provisions apply regardless of that individuals nationality.²²⁸ Ultimately, the court ruled that requiring a new club to pay a transfer fee for a player whose contract has already expired constituted an obstacle to the freedom of movement for workers, thus said rule was deemed invalid.²²⁹

The court justified its extension of judgment into national footballing bodies from separate countries rather simply. The court stated that:

[A]lthough the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers . . . application of those rules (Article 48) would still have to be . . . to ensure achievement of the aim in question.²³⁰

223. TFEU, *supra* note 168, art. 63; *see infra* Part III.C.1.c.

224. *See infra* Part III.C.1.c.

225. *See id.*

226. *See id.* (discussing how the *Bosman* ruling shifted power-share in international football between player and club).

227. Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman, 1995 E.C.R. I-04921, ¶ 94 (emphasis added).

228. *Id.* ¶ 96.

229. *See id.* ¶¶ 99–100 (implying that if a player is not under contract, they should be free to leave the country and pursue other employment opportunities of their own accord).

230. *Id.* ¶ 103.

Lastly, the CJEU propped a portion of its decision upon the “considerable social importance of sporting activities,” recognizing football as one of the more important sporting activities in the EU.²³¹

Not only does this case begin to support the notion that the freedom of movement of labor—or by extension capital—can be infringed upon by sports’ regulatory bodies such as FIFA with overly preclusive regulatory rules, this ruling also begins to paint the picture that the CJEU and EU can issue rulings and opinions restricting regulatory rules issued by sporting bodies, with UEFA serving as the main culprit in the *Bosman* decision.²³²

b. *Meca-Medina*

As previously mentioned, *Meca-Medina* helped to assure the supremacy of EU law over the regulations of sporting bodies throughout Europe.²³³ Aside from that major step, the ruling helped set the rules and scope of authorities’ assessment of the validity of transfer rules in relation to EU law principles on free movement and competition.²³⁴

The two plaintiffs in the proceedings, *Meca-Medina* and *Majcen*, were long-distance swimmers from EU member states Spain and Slovenia, respectively.²³⁵ They both challenged the same antidoping rules promulgated by the International Olympic Committee (IOC) and the Fédération Internationale de Natation (FINA), the swimming equivalent of FIFA.²³⁶ Following a first- and second-place finish by the two swimmers, both failed post-race doping tests, testing positive for nandrolone, an anabolic steroid banned by FINA.²³⁷ Soon after being hit with an initial four-year suspension, scientists discovered that nandrolone can be produced naturally by the human body at levels that surpass the permitted limit under FINA regulations—then set at two nanograms per milliliter—if certain foods are consumed, such as boar meat.²³⁸ This finding led the swimmers to initiate legal action against FINA and the IOC.

Following a series of hearings in front of the Court of Arbitration for Sport, and an appeal in front of the same body, the swimmers were left with a two-year ban.²³⁹ Both swimmers then brought action within the CJEU, claiming that IOC and FINA rules as to doping were

231. *Id.* ¶ 106.

232. *See id.*

233. *See generally* Case C-519/04, *David Meca-Medina & Igor Majcen v. Comm’n of the European Cmty.*, 2006 E.C.R. I-06991.

234. *See id.* (establishing the supremacy of EU law and creating a rigid structure for sports’ regulatory bodies regulations to fall within).

235. *Id.* at I-7006, I-7009, ¶ 37.

236. *Id.* ¶¶ 2’1-6, 3’162’3.

237. *Id.* ¶ 3’8.

238. *Id.* ¶¶ 2’3-4, 3’9.

239. *Id.* ¶ 3’13.

incompatible with EU rules concerning competition and freedom to provide services.²⁴⁰ Ultimately, the plaintiffs filed a complaint stating that the antidoping rules breached Articles 81 and 82 of the European Commission Treaty on Competition.²⁴¹ The plaintiffs were not only challenging the compatibility of regulations adopted by the IOC and implemented by FINA, but also certain doping-control practices within the Community rules on competition and freedom to provide services.²⁴² The swimmers claimed that the application of the IOC/FINA rules and regulations led to the “infringement of the athletes’ economic freedoms, supposedly guaranteed by Article 49 of the EC Treaty on Competition and infringed on their rights as athletes—which may be asserted under Articles 81 and 82.”²⁴³

The court ultimately held that “where a sporting activity takes the form of gainful employment . . . which is true for the activity of semi-professional or professional sportsm[e]n,” it falls within the scope of EU law; thus, EU law applied to the swimmers’ complaint and IOC/FINA regulations ran counter to established EU law.²⁴⁴ While discussing Article 39, the court stated that the “provisions on freedom of movement for persons and freedom to provide services . . . extend also to rules . . . aimed at regulating gainful employment and the provision of services in a collective manner.”²⁴⁵ The court then stated that it would not regulate questions that were of purely sporting interest and had nothing to do with economic activity,²⁴⁶ such as regulating “the size of the ball or the shape of the goalposts.”²⁴⁷ Just because the issue at hand is sporting in nature does not remove the issue from the scope of the treaty and EU law as a whole.²⁴⁸ Ultimately, the regulations at issue were struck down by the EU.²⁴⁹

It is not a large step to take in arguing that FIFA’s banishment of TPO directly affects economic activity, prohibiting certain clubs not only from purchasing certain players, but also from continuing to exist entirely. While sporting in nature, similar actions taken by international sporting bodies that infringe upon EU law have been struck down in the past, just as certain doping regulations were struck

240. *Id.* ¶ 3’16.

241. *Id.* ¶ 3’15.

242. *Id.* ¶ 3’16.

243. *Id.* ¶ 3’17.

244. *Id.* ¶ 23.

245. *Id.* ¶ 24.

246. *Id.* ¶ 25.

247. Press Release, UEFA, *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?* (Oct. 2, 2006) [hereinafter UEFA Press Release] (directly quoting Gianni Infantino, then-Director Legal Affairs at UEFA and now-FIFA President, located in an official UEFA document released soon after the *Meca-Medina* ruling discussing Infantino’s supposed fears that the EU will overstep their boundaries and begin to regulate football).

248. *Meca-Medina*, 2006 E.C.R. ¶¶ 27–29.

249. *See id.*

down in *Meca-Medina*.²⁵⁰ This direct effect on economic activity, the transfer of money between clubs (both within Europe and throughout the world) is exactly the type of limiting activity that has caused the EU to step in throughout the past to overturn and forbid. To buttress this idea, the CJEU in *Meca-Medina* stated that even if the sporting activity at issue falls within the scope of an EU treaty, the conditions for continuing such sporting activity are subject to every obligation that may be required as a result of falling within the confines of said treaty.²⁵¹ FIFA cannot evade EU law because it regulates sporting interests; it is held to the same standards that any country, business, or citizen is held to within the EU.

Following *Bosman* and *Meca-Medina*, the CJEU and EU successfully created a judicial framework for the EU to serve as a watchdog over European sporting bodies. Initiated in *Bosman*, the CJEU established that certain sporting-body regulations can be determined to be in opposition to EU law.²⁵² Shortly after, in *Meca-Medina*, the CJEU again expanded its power over sports' regulating bodies, this time taking an even larger step by asserting the primacy of EU law over regulations of sports federations where they perturb economic activity within the EU.²⁵³

3. Country-Specific Laws Conflicting with FIFA Regulations

While certain leagues implemented regulations regarding TPO up until FIFA's worldwide banishment of the practice, other leagues have been incapable of implementing such regulations due to their national laws and customs. Certain national laws have prohibited national sporting bodies of all types from impeding the free movement of capital and persons.²⁵⁴

a. Austria

In a response to the CIES investigation of TPO for FIFA, the Österreichischer Fußball-Bund—the Austrian Football Association—stated that restrictions on TPO in Austria were nearly impossible.²⁵⁵

250. *See id.*

251. *See id.* ¶ 28 (“It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition.”).

252. *See* Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-04921.

253. *See generally Meca-Medina*, 2006 E.C.R. I-06991.

254. CIES REPORT, *supra* note 19, at 3–4.

255. *See id.* at 4 (reporting on the response of the Austrian Football Association to questioning regarding the possibility of restricting third party ownership in their nation's football leagues).

The association explained “that overly severe restrictions of contractual freedom might be deemed contrary to” Austrian law.²⁵⁶

Austrian contract law, which governs any transfer or acquisition of a football player within the country, reinforces the belief that “freedom of contract is the underlying principle of Austrian contract law.”²⁵⁷ This freedom is absolute, and neither Austrian domestic law nor international regulations can infringe on any term or agreement within a contract. Further, business transactions in Austria are “subject to either the contracting parties’ terms and conditions *and* Austrian law safeguards that such general terms pass a test of fairness.”²⁵⁸

Any blanket ban of TPO could be seen as unfair and overly harsh within Austrian borders. FIFA, after clearly being informed of Austrian law and the potential for conflict if forms of ownership are restricted internationally, ignored the potential for direct conflict with national laws.²⁵⁹ FIFA’s ban could be construed as supplying illegal avenues around Austrian contractual law, thus the ban is not entirely enforceable within Austria’s borders.²⁶⁰

b. Brazil

While this Note has predominately focused on European law, as the EU is the entity most likely to halt any regulations promulgated by FIFA, Brazil has arguably been the country that is most adversely affected by FIFA’s TPO ban. Thus, a practical inquiry into why Brazilian clubs stand so staunchly against FIFA’s TPO ban is warranted.

Brazil, and its league the Confederação Brasileira de Futebol (CBF), has similar regulations to Austria, but instead of regulating contractual law, its laws directly target TPO.²⁶¹ Again, this fact was reported within the CIES report compiled at the behest of FIFA.²⁶² The CBF stated that it considered TPO permissible by virtue of national law, and that national law requires associations, their members, and third parties to accept the practice of TPO.²⁶³

256. *Id.*

257. RA Jakob Widner, *Primer on Austrian Contract Law*, ADVANTAGE AUSTRIA, <http://www.advantageaustria.org/international/zentral/business-guide-oesterreich/importieren-aus-oesterreich/normen-und-recht/recht.en.html> (last visited Dec. 2, 2018) [<https://perma.cc/2XDW-TX8A>] (archived Nov. 4, 2018).

258. *Id.* (emphasis added).

259. CIES REPORT, *supra* note 19, at 4; *see* Widner, *supra* note 257.

260. *See* Widner, *supra* note 257. The ban is not entirely enforceable within Austrian borders due to the commanding contract law principle of freedom of contract. The third-party ownership ban easily impinges upon the freedom of contract. *Id.*

261. CIES REPORT, *supra* note 19, at 4.

262. *Id.*

263. *Id.*

While Austria's promotion of the freedom of contracts runs counter to any ban on TPO, Brazil claims to legitimately safeguard the process of TPO and forbids any impediment whatsoever upon the practice.²⁶⁴ Since the ban, the CBF has banned TPO to bring itself in line with FIFA rules, yet clubs have not eliminated the practice entirely; in 2016, for example, FIFA fined Santos Futebol Clube, a prominent Brazilian football club, for breaching TPO regulations.²⁶⁵ While the CBF was the first football federation in the world to adopt the exact wording of FIFA's Article 18ter and ban the practice of TPO, it is still in complete juxtaposition to Brazilian law to have promulgated such regulation.²⁶⁶

As of January 2019, no research or reporting can be found regarding whether or not FIFA's regulatory scheme has been challenged in Brazilian courts. If such action is brought, it could very well be held that FIFA's regulations—and by extension CBF's adoption of similar regulatory language—are contrary to Brazilian law. Brazilian opposition to the ban can be found rather easily: Rafael Botelho, the director of legal and corporate affairs for Traffic Sports Marketing in Brazil, stated, following FIFA's ban, that "in legal terms, it's impossible for FIFA to say what" football clubs "can or cannot do in Brazil."²⁶⁷ He went on to state that the country treats "the assignment of economic rights of the players as a regular assignment of credit that is ruled by Brazilian civil law."²⁶⁸ While the CBF was required to come into compliance with FIFA's articles banning TPO, legal challenges could prove successful in restoring the legality of the practice within Brazil.²⁶⁹

It's clear from these responses that FIFA could easily overstep its bounds in restricting TPO and subject some of its member nations to severe legal penalties by doing so. This is but another reason for FIFA to refrain from a worldwide restriction of the practice. FIFA itself does not seem to care if it oversteps the bounds of national law; if it did, it would at least make the most miniscule of efforts to tailor exceptions

264. *See id.*

265. Andrew Downie, *Brazil bans third party ownership in line with FIFA rules*, REUTERS (Jan. 13, 2015), <https://uk.reuters.com/article/uk-soccer-brazil-ownership/brazil-bans-third-party-ownership-in-line-with-fifa-rules-idUKKBN0KM2EY20150113> [<https://perma.cc/6M89-KBUN>] (archived Nov. 4, 2018); *see* Wilson, *supra* note 35.

266. Marcos Motta & Pedro Fida, *The FIFA ban on TPO in Brazil and the Maidana Case*, WORLD SPORTS LAW REP. (Nov. 2015), <http://www.bicharaemotta.com.br/wp-content/uploads/2015/11/TPO-in-Brazil-Maidana-Case-Pedro-Fida-and-Marcos-Motta-November-2015.pdf> [<https://perma.cc/QE6R-UD4N>] (archived Nov. 4, 2018).

267. Liviu Bird, *FIFA's third-party ownership crusade has major implications in S. America*, SPORTS ILLUSTRATED (Oct. 29, 2014), <https://www.si.com/soccer/planet-futbol/2014/10/29/third-party-ownership-fifa-brazil-south-america> [<https://perma.cc/9EYC-MUQ3>] (archived Nov. 4, 2018).

268. *Id.*

269. *See id.*

to fit the many different competing legal structures evident throughout the entirety of Europe.

4. Article 65 of the TFEU

Article 65 of the TFEU reinforces the provisions contained within Article 63, those relating to the free movement of capital throughout the EU and elsewhere.²⁷⁰ Article 65, paragraph 1, clause (b) adds to Article 63 that member states are permitted to take “all requisite measures to prevent infringements of national law and regulations.”²⁷¹ Thus, Austria as a member state currently possesses the right to aggressively fight against FIFA’s ban of TPO, a direct infringement on Austria’s contractual freedom.²⁷²

Through the employment of Article 65, member states of the EU—such as Austria—that determine TPO prohibitions run counter to their national laws should have the right to bring legal action against FIFA to invalidate regulations contrary to that nation’s public policy or security.

5. Article 154 of the TFEU

As previously mentioned, Article 63, pertaining to the free movement of capital throughout member states of the EU as well as non-EU countries, can be construed to directly implicate FIFA’s TPO ban as illegal throughout Europe.²⁷³ While it may seem unorthodox for a governing entity such as the EU to regulate affairs of an international organization that is not actually headquartered within an EU member state, such as FIFA, Article 154 of the TFEU provides a sweeping grant of labor-promotion tactics to the EU when foreign policies directly affect member states.²⁷⁴ Article 154 states that the EU “shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balance support for the parties.”²⁷⁵ The clause immediately following states that “the Commission shall consult management and labour on the possible direction of Union action”—specifying that the EU shall negotiate and discuss actions taken by

270. TFEU, *supra* note 168, arts. 63, 65.

271. *Id.* art. 65.

272. *See* Widner, *supra* note 257.

273. *See* TFEU, *supra* note 168, art. 63. By construing Article 63 strictly, it is clear that all restrictions on the movement of capital within the EU are forbidden, and FIFA’s ban clearly infringes on the movement of capital in a number of ways. For example, the ban may not permit certain players to move from team-to-team without third party financing. *Id.*

274. *See id.* art 154.

275. *Id.*

organizations residing within member states or third-party nations if their mandates run counter to EU principles or articles.²⁷⁶

Article 154 has already been applied in such a way as to lead the EU and European footballing bodies to work together.²⁷⁷ In July of 2008, the EU created a committee of social dialogue in the field of football, preceded by the *Bosman* decision—discussed above—encouraging clubs, federations, and other governing bodies throughout Europe to work in cooperation with the EU and players' representatives.²⁷⁸ These discussions eventually led to a resolution between the EU and UEFA as to player contracts and standard terms and requirements in such contracts.²⁷⁹

Article 154 can be construed so as to warrant direct action and involvement by the EU into FIFA's regulation of TPO. Additionally, several other EU articles and previous CJEU decisions, described above, can be read as to frustrate the legality of FIFA's worldwide TPO ban. Potentially, this frustration is to such an extent as to warrant, or even mandate, legal action by EU entities, or at the least, a corrective investigation by FIFA. The omnidirectional tensions that FIFA's previous attempts at regulating TPO have caused prove that the status quo FIFA has created is untenable. Interested participants must find a prudent mechanism to deal with the dilemmas the TPO ban has already created, such as legal action or corrective investigations. Such legal action or corrective investigation could open a line of dialogue between the EU and FIFA, which may ultimately result in a solution similar to the one proposed below.

IV. SOLUTION

The problem FIFA has created for itself, potentially opening the entire entity to EU scrutiny, can be easily fixed. A simple revision of the three articles FIFA passed to phase out TPO could rectify many of FIFA's problems. Such revisions, proposed below, would permit FIFA to come into compliance with the many articles and EU precedents with which current FIFA regulations do not currently.²⁸⁰

As previously stated, FIFA failed to discriminate between different types of TPO that exist throughout the market.²⁸¹ FIFA blatantly ignored vital information available to it by refusing to

276. *Id.*

277. *See* KEA-CDES, *supra* note 108, at 90.

278. *Id.*

279. *Id.*

280. TFEU, *supra* note 168, arts. 63, 65, 154. *See generally* Case C-519/04, David Meca-Medina & Igor Majcen v. Comm'n of the European Cmty., 2006 E.C.R. I-06991; Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman, 1995 E.C.R. I-04921.

281. KPMG, *supra* note 10, at 13.

discriminate between the many different forms of TPO.²⁸² Instead of relying on information at its fingertips, such as the KPMG report containing a plethora of research relating to TPO and its usage worldwide, FIFA wiped its hands of the entire practice, rather than parsing through the intricacies that certainly helped struggling clubs survive.²⁸³ KPMG published its report in 2013, yet FIFA did not even announce its ban until 2014, providing sufficient time to complete such a review.²⁸⁴

A full cost-benefit analysis would have led the governing body to discover that clubs in dire need of financial assistance could be protected through the use of TPO.²⁸⁵ Thus, the solution this Note proposes will make that distinction for FIFA, advocating that financing-TPO structures should not only be permitted, but would be in compliance with the EU's current regulations. Aside from splitting the difference for FIFA, this Note also proposes a stringent regulatory structure to accompany the revival of TPO structures throughout the EU and hopefully the world.

A. *Investment and Financing TPO Refresher*

The main difference between the two predominant TPO vehicles is that financing-TPO transactions are employed to supplement a specific financial need of a club, while investment-TPO transactions take place when a club is satisfying a want (by buying a new player), not necessarily satisfying a fiscal necessity.²⁸⁶

Investment TPOs involve the acquisition of a new player by a club, while a percentage of the economic rights of the purchased player are simultaneously acquired by a third-party investor.²⁸⁷ A financing TPO operates slightly differently, wherein a club sells a portion of the economic rights of a player currently owned, and the club receives the full, lump-sum amount paid by the third party. This type of structure would only be permitted when a club is in fiscal necessity, such as a lack of liquidity to meet payroll demands, to pay for stadium operations, to cover travel expenses for the club, or any other monetary demands the operation of a club requires.²⁸⁸ In complete juxtaposition, an investment TPO is used when a club wants to purchase a player currently owned by another club, but cannot afford the full fee for such player; in other words, the acquiring club is overextending itself in order to bring in a new player.²⁸⁹

282. *Id.*

283. *Id.*

284. *Id.*

285. *See id.* at 13.

286. *Id.*

287. *Id.* at 5.

288. *See id.* at 13.

289. *See id.*

The rationale in choosing to embrace a financing-TPO permitted regime at the expense of exiling the investment-TPO vehicle is simple: an investment TPO is a joint venture, where the club takes on a duty of good faith to the investor, while within the financing TPO the rationale for purchasing a player's rights is much simpler—to ensure the continued existence of the club.²⁹⁰ Within the investment TPO, the club must honor the “commitment of transferring the player when an important offer arrives.”²⁹¹ In complete contrast, within the financing TPO, several factors are taken into account to value the investment, the principal one being the financial needs of the club at the time the TPO agreement is signed.²⁹² Thus, financing-TPO structures would seem to eliminate many of the factors that FIFA dislikes about TPO structures in general—the fact that investment-TPO structures seem to *require* or *force* a club to transfer a player when a lucrative offer is made by another club, taking the ultimate decision out of the hands of the club.²⁹³

The benefits of the financing TPO should be those that are embraced by FIFA, not shunned. The duration of the relationship between club and third party lasts only as long as the employment contract lasts, thus there is a certain finality associated with the financing TPO.²⁹⁴ This finality is important. Conversely, an investment-TPO arrangement could last forever, until the player is actually sold to another club.²⁹⁵ In short, not only does the financing-TPO format permit a club to prolong its future while improving its financial position, but it also may keep the third-party owner's opinion out of any future transactions, a type of corruption FIFA was wary about when promulgating its initial ban.²⁹⁶

In summary, the drawbacks FIFA hoped to avoid by banning TPO arrangements—conflicts of interest, moral dilemmas associated with owning a player (which has been likened to a type of modern slavery), and circumvention of UEFA's financial fair play rules—can all be avoided by embracing a discriminatory TPO approach.²⁹⁷ These concerns will be addressed within the following subpart, which will propose a new regulatory system for FIFA that would avoid the pitfalls that have been described above.

B. *Solution: A New Regulatory Structure*

A narrowed regulatory structure, which would serve as a ground-floor level of regulation for all national footballing associations, could

290. MOURÃO-FERREIRA, *supra* note 32, at 13–14.

291. *Id.* at 13.

292. *Id.* at 13–14.

293. *See id.* at 13.

294. *See id.* at 4.

295. *See id.*

296. FIFA Circular, *supra* note 137.

297. Van Maren et al., *supra* note 12, at 234; *What is third-party ownership*, *supra* note 58.

easily be reconciled with the drawbacks FIFA hoped to eliminate by banning TPO in its entirety. This regulatory structure would need to possess a few common traits to achieve the desired result: a limitation on the total percentage a third-party investor may own in a player, a finality or termination to the agreement upon a concrete date in the future, and a transparency requirement wherein the team is required to report the third-party transaction to all major footballing entities within an international registry system. These, among a few other small terms, would permit FIFA to authorize a limited TPO structure, one that is more related to stimulating the financial books of a club instead of lining the pockets of an outside investor.

First, FIFA must finally address and differentiate between financing-TPO and investment-TPO structures. FIFA should continue to ban investment-TPO structures, as they permit too much outside influence and allow a club to overextend itself, but should permit financing-TPO structures because of their ability to save a struggling football club while also benefitting every player on the squad in the process.²⁹⁸ FIFA's mysterious disinterest in differentiating between TPO types remains an open issue since it instituted its blanket ban, and remains a silver lining of hope for those that advocate for the process to continue. By permitting only financing-TPO structures, FIFA would be advocating for the improved financial health of clubs throughout the world, while condemning the overextension of a club's financial resources that is evident through the employment of investment-TPO schemes. There are a variety of ways FIFA might create change that would remedy the issues previously considered when FIFA originally banned the practice of TPO.²⁹⁹

To rectify the conflict of interest issues between club and third-party owner, this new regulatory scheme would limit the maximum ownership share a third party can hold in a player to less than or equal to 49 percent. Also, this regulatory scheme would require boilerplate terms in every TPO contractual agreement forbidding and limiting decision-making powers possessed by the third party. They should have no say in the decisions a club makes regarding the player. The third party will play the role of the consummate silent party.³⁰⁰ The third party must have no authority in regards to any personnel, training, or administrative decisions concerning the player. FIFA's initial concerns regarding conflict of interest could be mitigated through requiring silence from a third party. Limiting the total amount that a third party may own in a player would also limit the potential for moral hazard. Limiting the total ownership to less than a majority share would not change the way the player would be treated; no other entity, other than the club the player is already owned by, would have any say over that specific player's ownership decisions. If FIFA would

298. See MOURÃO-FERREIRA, *supra* note 32, at 13–14.

299. Van Maren et al., *supra* note 12, at 234–35.

300. See *supra* Part II.A.2.

continue to equate this style of ownership to “modern ‘slavery,’” then it should take steps to alter the common ownership structure it permits now—there is no difference between one club owning a player entirely, or still owning a controlling interest.³⁰¹ Again, the third party will be more akin to an investor purchasing a singular share of a company on the stock market than a partner in a joint venture.

UEFA’s concern that clubs will attempt to use TPO structures to shirk or find an avenue around certain “Financial Fair Play rules”—rules that attempt to limit the amount a club can spend in transfer fees annually to level the spending playing field—can be easily remedied.³⁰² By mandating high initial barriers to entry for any TPO arrangement, and requiring those barriers to be verified for every new third-party arrangement a club attempts to enter, clubs would not be able to skirt the rules easily. The point of differentiating between investment and financing TPOs is to prevent clubs from overextending themselves financially, and purchasing players they cannot afford for inflated values that are financed by third parties. These potential barriers to entry could vary league to league, continent to continent, or be strictly enforced at the international level by FIFA. Examples of potential minimum requirements that may be illustrative of the need to seek TPO arrangements are as follows: providing club balance sheets that illustrate the threat of a shortfall, providing salary/pay stubs for players that prove the club would not be able to make payroll, or other financial documents that illustrate need on behalf of the club. Before any club could employ the use of a TPO structure, the club would need to be approved as “financially unstable” by its national football association as a club using such a technique for need-based purposes. By employing a need-based system of entry, the goal of the TPO arrangement would not be to shadily bypass rules, but to secure the long-term existence of the club. This would not only benefit the club, but also the player by allowing him to continue to improve his performance and hone his skills with the club he is already established and comfortable in. Also, a club’s right to employ TPOs closes once the club is in “stable financial order,” to be determined on an annual basis by the national football association. Once a club’s finances have recovered and it no longer needs TPOs in order to balance its books, the club’s right to offer third-party arrangements to outside investors ceases. Any obligations from TPO arrangements currently in existence are to continue as the contract itself states and terminate when the player leaves the club.

All three of the main reasons for FIFA’s ban—conflicts of interest, moral dilemmas, and the evasion of rules—could be avoided by requiring that clubs self-report existing contracts containing a TPO structure within an international contract reporting system. FIFA

301. *What is third-party ownership*, *supra* note 58.

302. Van Maren et al., *supra* note 12, at 234.

actually touched on a similar system within Circular No. 1464, the document wherein FIFA announced its intent to promulgate regulations to completely ban TPO.³⁰³ This system was meant to record all agreements clubs had entered into with third parties “in their entirety, including possible annexes or amendments . . . specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.”³⁰⁴ Employing a similar system upon the reimplementation of TPO arrangements would permit FIFA or UEFA—both levels at which would provide sufficient dual-level oversight to regulate on a large scale—to keep a watchful eye over the regrowth of TPO and avoid the recently mentioned pitfalls. These bodies could determine if TPO arrangements are an attempt to evade important rules, or if they cause a moral dilemma.

FIFA wants to avoid conflicts of interest; it does not want any third party to have control over the footballing decisions of a club.³⁰⁵ Any regulatory system proposed to replace FIFA’s current ban must embrace this ideal fully, but at the same time must provide some financial incentive to third-party investors in order to attract them to the investment venture in the first place. After all, if there is no chance of an increased return value, there is no incentive to invest to begin with. FIFA’s concern over conflicts of interest would already be addressed within this legal system by including contractual terms forbidding third-party influence into the original agreement with the third party. Constructing a system of returns to third-party investors without reigniting those conflict of interest concerns is not as easy. Thus, the regulatory system being proposed would contain a termination period in the third-party agreement, limiting the total amount of time that a third-party investor’s interest in the player exists. In essence, it would appear as a loan with contingencies: upon a specific, negotiated event occurring, the third party would be paid out. If such event does not occur, then the loan would lapse and the borrowing club would be required to pay out the negotiated principal—and potentially interest—agreed upon between participating parties at the origination of the loan.

At the termination of such relationship, the club would pay back the principal amount originally loaned to the club from the third party, plus a negotiated percentage increase on top of that lump-sum amount. The negotiated percentage would be an area of flexibility and creativity for the club and third party, attracting outside investors to struggling clubs seeking to raise capital through a financing-TPO arrangement. Examples of negotiated terms could range from the point in time at which the third party is paid back (either at the termination of the term period or at the time of sale of the player under the third-party agreement—whichever happens sooner), the percentage return the

303. FIFA Circular, *supra* note 137.

304. *Id.*

305. Van Maren et al., *supra* note 12, at 234.

third party will receive and whether such amount would be based on the riskiness of the club or the potential increase in player value over the course of the loan, and ultimately the term of the loan—which FIFA could cap as an extra regulatory structure. Lastly, third-party rights would only attach to the current contract; if the player under contract extends his contract then the club must settle up with the third party for the required amount at termination or extend the third-party agreement.

Finally, and most simply, clubs will only be permitted to sell the economic rights of a player currently on their squad. This continues the theme of what was originally permitted within TPO arrangements: only economic rights of players can be sold through third-party arrangements; federative rights may not be sold in any form.³⁰⁶

C. How This System Rectifies Current FIFA Defects

A regulatory scheme similar to that proposed above would be in compliance with CJEU precedent, namely the two precedents that have heavily influenced FIFA regulations: *Bosman* and *Meca-Medina*.³⁰⁷ *Bosman* and *Meca-Medina* do not directly implicate FIFA's complete ban on TPO, but certainly begin to pave an avenue to establish EU oversight over major actions taken by sports' regulatory bodies.³⁰⁸ In *Bosman*, the CJEU found that UEFA regulations could run counter to certain EU articles, and that the EU could force sports' regulatory bodies to comply with EU law.³⁰⁹ In *Meca-Medina*, the court established the supremacy of EU law over sports' regulatory bodies' regulations.³¹⁰ These cases provide a substantial argument for the EU to step in and halt FIFA's ban on the practice of TPO, because, as was discussed within the previous Part, FIFA's ban runs counter to multiple EU articles.³¹¹ That being said, the new regulatory scheme being proposed is designed to comply with EU articles and does not stymie the free movement of labor.

Such system is designed to comply with current EU law that FIFA currently runs counter to with its complete ban on TPO tactics.³¹² If FIFA permits a form of the financing TPO to exist, then it should align closely enough to current EU legal strictures that the EU would defer to FIFA's judgment as a sports' regulatory entity with substantial expertise. Such inference stems from the *Bosman* ruling, wherein the CJEU stated their understanding that an organization with specific,

306. MOURÃO-FERREIRA, *supra* note 32, at 4.

307. See generally Case C-519/04, David Meca-Medina & Igor Majcen v. Comm'n of the European Cmty., 2006 E.C.R. I-06991; Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman, 1995 E.C.R. I-04921.

308. See *supra* Part III.C.2.

309. *Bosman*, 1995 E.C.R. I-04921.

310. *Meca-Medina*, 2006 E.C.R. I-06991.

311. See *supra* Part III.C.

312. See *supra* Part IV.

niche expertise can exhibit the best judgment over its own market share.³¹³ It can be assumed, through CJEU case law, that if FIFA were to permit any small modicum of the practice of TPO, it could very easily comply with EU law.³¹⁴

The new regulatory scheme would not completely inhibit the free movement of labor, as opposed to FIFA's total ban on the practice, because it would still permit players to move from team to team at their or the team's own free will. FIFA's blanket ban inhibits the movement of labor throughout the EU, and with *Bosman*, the EU opened the door to regulating sports entities of "considerable social importance."³¹⁵ This new regulatory system will not preclude players from moving from club to club or limit the free movement of labor, as it requires that TPO schemes terminate or be paid out when a player's contract expires or a player moves to a different club. *Meca-Medina* provides even greater support for a new regulatory regime, as the CJEU determined that EU law reigned supreme over sports federations and that the court could regulate questions of sporting interest that relate to economic activity.³¹⁶ FIFA's ban clearly impacts economic activity and should attract the EU's scrutiny; specifically, FIFA's ban inhibits the transfer of money between clubs throughout Europe and intercontinentally.

The new regulatory system would not cause such impediments to the movement of capital. While a full ban of TPO completely halts economic flow, a partial ban may stimulate and continue the flow of capital and labor throughout the EU. The sales of players' ownership rights would only be permitted for currently owned players, not for the acquisition of new players. This would allow capital to move at a high velocity, as quickly as a third party became interested in investing within a team. As has been previously discussed, a sports' regulatory body can in fact regulate the specifics of its sport, as it is an expert within that market share.³¹⁷ As long as FIFA does not completely inhibit the free movement of labor, the EU should defer to FIFA's expertise and permit this new and improved version of TPO.

The 2001 Agreement provides a clear illustration of previous cooperation between UEFA, FIFA, and the EU.³¹⁸ The solidarity mechanism it provides is important, showing the EU's commitment to spreading wealth throughout the continent.³¹⁹ This mechanism provides a good example of FIFA permitting the division of transfer fees between parties in the past, as would be necessary with the new regulatory regime.³²⁰ This discriminatory regime would avoid the

313. See *Bosman*, 1995 E.C.R. I-04921.

314. *Meca-Medina*, 2006 E.C.R. I-06991; *Bosman*, 1995 E.C.R. I-04921.

315. *Bosman*, 1995 E.C.R. ¶ 106.

316. *Meca-Medina*, 2006 E.C.R. ¶¶ 27–29.

317. Lindholm, *supra* note 185, at 140.

318. See EC Press Release IP/01/314, *supra* note 170.

319. See *id.*

320. See *supra* Part III.C.1.a.

harms FIFA had targeted in its original ban of the practice—corruption—while still allowing teams to participate in a watered-down TPO regime. Terms such as autonomous negotiations with the club, repayment clauses, and opportunities for profit, as well as indemnity clauses would create a regime where TPO is not only permitted, but complies with EU law while keeping FIFA happy.

A regime supporting financing TPOs also supports the free movement of players required by Article 63 of the TFEU.³²¹ Not only would capital flow freely through member states, but players would be permitted to move from team to team at their own free will since third-party owners would be legally forbidden from exerting any influence over their decisions. Players could pursue their own goals, seek out new opportunities, and gain the vital experiences that all football players yearn for throughout their careers. The new regime of TPO would stimulate investments into football, a goal that the EU would surely be happy to see the sport achieve.³²² This stimulating effect would come directly from the potential allowance of TPO mechanisms, something that would surely excite investors throughout the entire EU.

Article 65 of the TFEU permits member states that determine that corporate regulations run counter to their national laws to bring legal action against such corporations to invalidate rules that are illegal within their borders.³²³ Austrian contract law, for example, reinforces the belief that “freedom of contract is the underlying principle of Austrian contract law.”³²⁴ The new regime of TPO proposed would not impinge upon this freedom of contract, as it would still permit the practice of TPO to occur. The new regime will merely limit a specific subset of the practice, not the entire practice generally—not an entire form of contractual law as FIFA currently bans.

Finally, Article 154 of the TFEU provides a sweeping grant of labor promotion tactics to the EU to regulate affairs of an international organization such as FIFA that affects business within EU borders. Hopefully, the EU will notice that there are alternative avenues to a TPO regulatory regime and advocate for changes in FIFA’s regulatory scheme to help stimulate the movement of labor and capital throughout the EU—two major concerns within the TFEU.³²⁵

This new regulatory regime permitting TPO should help remedy many of the legal concerns that FIFA’s current ban has created. While it may be impossible to regulate the entire practice and comply with every EU regulation, the EU has shown a willingness to act deferential toward entities that are experts within their fields or are capable of

321. See TFEU, *supra* note 168, art. 63.

322. See *id.* (considering the goal of the Article is to limit restrictions on the flow of capital between member states and third countries, this allowance by FIFA would surely stimulate some of those goals).

323. *Id.* art. 65.

324. Widner, *supra* note 257.

325. TFEU, *supra* note 168, art. 63; EC Press Release IP/01/314, *supra* note 170.

controlling their market share.³²⁶ While FIFA has shown it is more than capable of controlling its own market share, it has shown great apathy, or maybe even ignorance, toward flouting current EU regulations. While the proposed regulatory regime may not be perfect, any open dialogue with the EU would help to craft a successful and legal new regulatory regime. Hopefully this proposal can help to initiate some form of constructive dialogue between the two powerful entities.

V. CONCLUSION

Sadly, this exercise will likely prove to be academic; FIFA has stood as a corrupt organization for years and will only attempt to change or lift the ban if it can in some way profit.³²⁷ Understanding why TPO came into existence is important to understanding why FIFA's ban is not only illegal, but completely unwarranted: stimulating the ability for soccer players to grow from improved opportunities on and off the pitch, as well as the ability for clubs to grow or improve their financial position through the use of financing TPOs. Regulation of such activities is warranted, although not to the extent FIFA decided was necessary. FIFA's complete ban of TPO was propped up on reports that provided insubstantial conclusions that did not completely connect to the ultimately aggressive FIFA regulations.³²⁸ It is apparent from the study of the development of TPO regimes, and an understanding of how clubs and players improved from usage of the practice, why it is a concern that TPO has been banned internationally.³²⁹

Following a thorough analysis of applicable EU law and CJEU precedents, it is apparent that the EU could form a strong case to exert its authority over FIFA and other football regulatory bodies throughout Europe.³³⁰ Both the *Bosman* and *Meca Medina* transactions paint a clear picture of the EU's willingness to intrude upon nongovernmental regulatory associations that conduct business within EU member states' borders.³³¹ Thus, the EU should not hesitate in at least beginning to investigate FIFA's reasoning for banning the

326. See generally Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-04921 (finding that if a sport's regulatory body regulations infringe EU law, the EU can halt such regulations and force compliance).

327. See *Fifa corruption crisis: Key questions answered*, BBC NEWS (Dec. 21, 2015), <http://www.bbc.com/news/world-europe-32897066> [<https://perma.cc/LF75-6LFP>] (archived Nov. 4, 2018).

328. See CIES REPORT, *supra* note 19, at 4. The author of this Note requested to receive a copy of the entire CIES report from FIFA, but such requests were denied.

329. See *supra* Parts II & III.

330. See *supra* Part III.

331. See *supra* Part III.C.2.

practice. The multiple EU articles that FIFA's ban could be construed to run counter to—for example, inhibiting the freedom of movement of labor and the freedom of movement of capital—could serve as reason enough to at least temper the ban's broad reach throughout the EU.³³² Beyond those two basic tenets of EU law, the 2001 Agreement between FIFA, UEFA, and the EU illustrates a prime example of how the EU has already stepped in to regulate the activities of major footballing entities. It is likely that FIFA promulgated its regulations in complete ignorance of their effect on EU law. Hopefully this Note will lead to further inquiry on the subject by EU-based scholars or barristers.

Finally, the new TPO regulatory regime proposed within this Note would attempt to remedy the defects that FIFA's incongruous ban has created.³³³ While no sort of regulatory system may align with some of the EU's more stringent articles, the CJEU, and by extension the EU, has shown a willingness to defer to certain regulatory entities' structures when those entities possess the requisite expertise and a large market share.³³⁴

With all of this being said, the new regulatory system described above may not be the best or only answer to solve FIFA's regulatory headache. What is apparent is that the current regime should not continue in perpetuity, and if legally challenged it may crumble. Optimistically, this Note may serve as a warning shot across the bow of FIFA's unbridled power, and ultimately lead to some form of regulatory change. This change may even assist clubs struggling financially to employ TPO arrangements to improve their long-term stability. Any withdrawals and changes to FIFA's complete ban on the practice of TPO would benefit clubs, leagues, and players from all around the world. To reestablish *joga bonito*, one thing is certain: action must be taken to push back against FIFA's complete ban of TPO.

Brendan A. Bailey*

332. See *supra* Part III.C.

333. See *supra* Parts III & IV.

334. See *generally* Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Jean-Marc Bosman, 1995 E.C.R. I-04921.

* J.D. Candidate, 2019, Vanderbilt University Law School; B.S.B.A., 2016, University of South Carolina. Thank you to the members of the *Vanderbilt Journal of Transnational Law* for their attention to detail and outstanding editorial contributions. To Professors Yesha Yadav and Todd Koesters, thank you for your invaluable advice and guidance while writing this Note and throughout my time as a student. Finally, I would like to dedicate this Note to my Mom: without your love and support I would not be where I am today. I love you and Huck.