

The New Definition of Third-Party in the FIFA RSTP and its Potential Consequences



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→ TPO/TPI - Economic rights agreement - Player transfer - FIFA - FIFA RSTP

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Introduction

Third-party ownership of players' economic rights (TPO) - a financial instrument whose origins go back to South American countries - has been intensively debated at various levels within the football community since the introduction in 2015 of Article 18ter of FIFA Regulations on the Status and Transfer of Players (RSTP). In short, TPO refers to “*third-party investments in the economic rights of professional football players, potentially in order to receive a share of the value of any future transfers of those players*”.¹ From a technical point of view, the operation is characterized by the “*presence of third parties, acting as private investors or investment funds, whose objective is the acquisition of the stake represented by a quota of rights to the sports value of the footballer linked to his performance*”.²

One can affirm that the advent of TPO's phenomenon in the international scenario started well before 2015, more specifically, back in January 2008, with the rule imposed by FIFA against “*Third Party Influence*” reflected in Article 18bis RSTP. This rule prohibited clubs to enter into contracts that are liable to jeopardize the club's independence, its policies or the performance of its teams and freedom of decision-making in employment and transfer-related matters.

After several studies providing data and information on TPO in several countries during the period of 2012 to 2014, it was felt that Article 18bis RSTP was not sufficient and did not properly address this issue. This phenomenon and the continuous controversies created by the latter, led FIFA to organize a specific intervention and create a taskforce/working group directly aimed at prohibiting and/or limiting the acquisition procedure of parts of rights to sports performance of professional players by individuals outside of the football clubs.

Indeed, the discussions on TPO within the various standing committees, not only confirmed that there was a need for a broader analysis of TPO, but also terminated in a very dramatic and radical way: the introduction of Article 18ter FIFA RSTP, which bans third-party ownership of players' economic rights and, as a consequence, also provides a new set of definitions specifically incorporating the concept of “*third-party*”. The announcement of this ban gave rise to a massive criticism, including the possible incompatibility of FIFA prohibitions with the EU laws and principles.³

¹ Third-party ownership of players' economic rights, (April 2015) www.fifa.com

² ROSA LOMBARDI, SIMONE MANFREDI and FABIO NAPPO, “*Third Party Ownership in the Field of Professional Football: A Critical Perspective*”, Business Systems Review, Vol. 3, Issue 1, pp. 32-47.

³ In fact, the Spanish and Portuguese leagues lodged a complaint with the European Commission arguing that the FIFA ban is contrary to EU competition law. However, according to FIFA and most recently the CAS in the award CAS 2016/A/4490 *RFC Searing v. FIFA*, even though Articles 18bis and 18ter FIFA RSTP restricted the free movement of persons, services and capital, these restrictions pursued legitimate objectives, such as preserving the regularity of sporting competitions and ensuring the independence and autonomy of clubs and players by preventing third parties' influence in sporting decisions.

The core issue – Who shall be considered as a third party?

TPO is a practice followed for more than 20 years and yet, it was not defined by either any national legislation or international regulation until Article 18ter came into force. In its literal wording, Article 18ter establishes that *“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.”*

From the content of this Article alone, it is not possible to conclude who, in practice, is considered to be a “third-party”. This is why the interpretation of Article 18ter had to be combined with the definition of “third party” provided for in the FIFA RSTP, which establishes the following: *“Third party: a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered.”*

The inclusion of both provisions in the FIFA RSTP immediately led to a discussion regarding who was considered as a third party. One could easily be found in a position to conclude that the Player, as “a party other than the two clubs”, could be considered a “third party”, in case he has agreed to a clause in his contract that guarantees him a percentage of his future transfer fee. This wording led to a scenario where the main character of the transaction - *i.e.*, the Player - was considered foreign to his own transfer. What is even more reproachable is that this interpretation - meaning, that the Player is to be considered as a “third party” in its own transfer according to the definition of FIFA RSTP and Article 18ter - was precisely the one used by several football stakeholders in numerous conferences and seminars, including the author of the regulatory process itself (FIFA), which naturally caused a high degree of criticism by the international football community.

It was not until this year that FIFA concluded that the way the Regulations were drafted, especially the combination of the definition of *third-party* and the content of Article 18ter RSTP, did not reflect two of the main objectives the legislator was trying to defend: the player’s best interests with regards to human and labor rights and the integrity of the competition.

In fact, in June 2018, FIFA issued a Media Release explaining in short the story of four different clubs⁴

(the German club *SV Werder Bremen*, the Greek club *Panathinaikos FC*, the Chilean club *CSD Colo-Colo* and the Peruvian club *Universitario de Deportes*) who were found to have entered into agreements with some of their respective players that entitled the latter to receive a specific compensation - a lump sum or a percentage - in case of their future transfer to another club.

Such amounts promised to the players were finally seen by FIFA as part of their remuneration under their employment relationships with their clubs. Consequently, the Disciplinary Committee found that the players could not be considered a third party with respect to their own future transfers and, therefore, the fact that they may receive a specific compensation - regardless of being a lump sum or a percentage - in relation to their future transfer to a new club, is not considered a violation of FIFA’s rules on third-party ownership of players’ economic rights. These FIFA decisions indeed clarified the position of the Player in his own transfer and in the TPO practice.

This finally led the FIFA Congress⁵ to adjust the concept and existing definition of “third party” by issuing a new version of the FIFA RSTP, in force as of 1 June 2019 (Version of 2019).

The new definition no. 14 included in the amended version of the RSTP establishes that a third-party is *“a party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered.”*⁶

According to this amended version of the 2019 RSTP, the Player being transferred from one club to another will no longer be considered as a third party within the context of Article 18ter of FIFA RSTP, and thus, he will no longer be a “stranger” to his own transfer, a clarification (change) which is, indeed, very welcome!

The potential consequences of the new interpretation of a “third-party”

One should remember that initial TPO agreements could take place without the consent of the Player and without him even being informed of the assignment of his economic rights, which indeed had unfair implications for the Player. With this new definition, the Player will have a more important position and role in the contractual and transfer mechanisms by being able to hold in total or in part his economic rights. Likewise,

4 FIFA Media Release - www.fifa.com

5 The FIFA Congress was held in March 2019 in Miami.

6 <https://resources.fifa.com>

the Player, by taking part in his own economic future, should feel more responsible and motivated to increase his performance and value. However, this change does not mean that the Player does not have to observe the obligations provided for in Article 18ter RSTP: he remains unable to assign a part of his own transfer fee or economic rights to a third party, given that the FIFA Disciplinary Committee could sanction him based on Article 18ter par. 6 FIFA RSTP.

Furthermore, the revision of definition no.14 will also allow clubs to have different negotiation tools and strategies when negotiating or renegotiating an employment contract. For example, clubs may offer a lower salary to the Player in exchange of a percentage of his economic rights, which could be more profitable for him in the near future; this option could be essential to convince the Player to sign or extend his employment contract.

But this redefinition also comes with other side effects which may further broaden the - already-existing - TPO grey area. Specifically, we refer to the fact that while clubs have an obligation to enter details of domestic or international transfers within TMS - in particular declare any third-party payments and influence and third-party ownership of players' economic rights (Article 4 (3) of Annexe 3 FIFA RSTP) - the players are, *in theory*, only bound by this duty of information in case of the creation of an ITC instruction, *i.e.* in international transfers (and not domestic transfers) according to Article 8.2 of Annexe 3 FIFA RSTP.

” How is FIFA going to control and prevent the private agreements signed by the Player? “

We highlighted “*in theory*” because nothing will prevent the Player - other than the obligation contained in Article 18ter - from signing the declaration expressed in Article 8.2 Annexe 3 FIFA RSTP stating that “*there is no third-party ownership of the player's economic rights*”, and afterwards, signing a private agreement assigning those rights to a third party. In this context, the following questions must be raised: How is FIFA going to control and prevent the private agreements signed by the Player? How can the Club confidently declare that there is no third party in the operation if the Player omits or hides this information, or transfers his share after the signing of this declaration? Should the Player be included as a TMS user to take responsibility of his declarations and to confirm that the operation is transparent and complies with the FIFA Rules?

Take, as a simple example, the Player's intermediary: if the Player holds a stake of his economic rights or is transferred and receives a percentage of the fee, he may

share - or the intermediary may demand as a bargaining method - an amount of his economic rights under a private agreement, which is entirely outside FIFA's control or, at least, very difficult to track such operation.

Another scenario could be the use of this new interpretation by the sports investment funds specialized in TPO when negotiating with the players, instead of negotiating with the clubs. Despite FIFA's best efforts to eradicate TPO, these investment funds have created new mechanisms to avoid monitoring and circumvent the law with the participation of clubs. Summoning all football players as possible holders of their economic rights will indeed attract the attention of these companies in order to engineer new contracts and methods to jump into the business. This would entail a great demand and responsibility for FIFA to investigate, pursue and sanction the members that take part in these illicit transactions - which will not be an easy task indeed.

Conclusion

The former President of UEFA, Mr *Michel PLATINI*, once said that “*Today, it's shameful to see some players with one of their arms belonging to one person, a leg belonging to a funds pension located who knows where, and a third person owning his foot. It is shameful; we're dealing with a type of slavery that belongs to the past*”.⁷ Whether true or not, the reality is that four years later we are still trying to figure how to correctly apply the FIFA Regulations on TPO.

Indeed, the adjustment of the definition of a *third party* will definitely benefit the Player given that he will no longer be considered as separate from his own transfer, which puts him in a much higher and important position in the contractual mechanism. Nonetheless, we are afraid that this new definition could also cause the emergence of a more sophisticated TPO practice involving the Player himself, therefore leaving Article 18ter RSTP devoid of any sense.

In our opinion, it is still premature to assess whether this new definition is a positive or negative measure, or if FIFA will need to take new actions to counter TPO. Yet, one thing is certain: there is no doubt that the parties in favor of TPO's practice will take advantage of this apparent breach opened by FIFA, to the extent that private agreements that players may enter into with third parties will be beyond FIFA's scope of control and influence, trying to provoke a new era of TPO agreements. It remains to be seen which position will obtain the upper hand.

⁷ <https://in.reuters.com>