

A review of the 2018 Report on the Football Transfer Market in the context of the 2013 Study

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In March 2018, the European Commission published an update to its January 2013 study 'The Economic and Legal Aspects of Transfer of Players'¹ (the '2013 Study') entitled 'An update on change drivers and economic and legal implications of transfers of players' (the '2018 Update'). However, unlike the 2013 Study, which looked at football, handball, rugby and basketball, the 2018 Update focuses almost entirely on football, with a few references to basketball.

The predominance of football as the main focus of the 2018 Update is due to its economic relevance not only as a sport but, particularly, due to what is regarded as its associated transfer market. The following set of figures illustrate the size of the market:

Value (in € million)		2011/2012 Football	2015/2016 Football
Broadcasting rights		4,238	8,518
Commercial ²		2,168***	4,100*
Sponsorship		3,683***	2,600*
Transfer fees	International	2,710	4,790
	International & domestic	2,000**	5,900**

Source: The 2018 Update

* Financial Year 2015

** Aggregate data covering the big five leagues, i.e. England, Spain, Germany, Italy and France

*** Estimation of Financial Year 2013 figures

The market size, as well as football's unique features in regards to sporting competitions, limit the extent to which good practices and rules from other sports may be adopted in football. In any event, from a regulatory point of view, as the 2018 Update points out, there is room for improvement in the rules and regulations governing football.

This article focuses on the 2018 Update, analysing the legal and regulatory developments since 2013, in particular assessing the success of the 2013 Study in prompting actual changes and provides a review of the regulations currently in place.

The EU legal order, especially the so-called specificity of sport, and recurring topics in football governance, such as competitive balance, the role of intermediaries, youth protection and development, and transparency and redistribution in transfers - mainly, but also relating to the integrity of competitions and the financial stability of clubs - provide the framework for the 2018 legal analysis of the transfer system. All of this amid the sharp growth of the football market over the past five years and the more recent inflation of football player valuations and the associated transfer fees.

Competitive balance: The Financial Fair Play ('FFP') Regulations, the ban on Third Party Ownership ('TPO'), and loan transfers

¹ <http://ec.europa.eu/assets/eac/sport/library/documents/cons-study-transfers-final-rpt.pdf>

² Merchandising, stadium tours and other commercial operations.

The 2013 Study concluded that redistribution mechanisms and financial accountability may contribute to the improvement of competitive balance in football. In response to such conclusion, over the last years football governing bodies have introduced the following regulatory changes aimed at bringing into effect the changes required by the 2013 Study policy recommendation: the FFP Regulations, the TPO ban, and limiting the number of players per squad to 25. However, other suggested initiatives have not yet found their way into the rulebook of the football authorities, namely: a fair play levy on high-level transfers, players passport development for training and solidarity compensation overdue payables³, and a specific regulation of loan transfers.

The FFP Regulations (LS)

Since its implementation in 2011, the objective of the FFP Regulations has been to control clubs' finances. To this end, UEFA has used the possibility of preventing access to its club competitions as a form of deterrent; and so, financially unaccountable clubs have been systematically declared ineligible to enter UEFA competitions when in breach of the FFP Regulations. Therefore, at best the FFP Regulations have only an indirect impact on the transfer market.

The 2018 Update reviews the changes brought about by the FFP Regulations and their impact on the transfer market, and claims that despite their indirect impact the FFP Regulations do contribute to the monitoring and implementation of the transfer rules.

However, the introduction of the break-even requirements in 2013, as part of the overall FFP framework, and its application by the UEFA Club Financial Control Body ('CFCB')⁴ mainly had an impact on smaller clubs and their ability to compete with the more established clubs. In order to address these shortcomings UEFA amended its FFP Regulations in 2015 in an attempt to encourage competitive balance, or at least try to facilitate it, while easing control on club finances. These are the changes underlying the revised approach:

- encouragement of sustainable investment, i.e. to undertake business restructuring, to respond to economic shocks and to deal with structural market deficiencies, which were welcomed as long as they also supported sporting competitions and did not neglect financial stability;
- a distinction between good and bad losses allowing for the exclusion of certain accounting items from the break-even assessment calculation;
- an attempt to spread good practices by offering break-even assessment type services to clubs not participating in UEFA competitions - and thus not compelled to submit to such an assessment; and
- a new accounting procedure allowing the distribution of transfer fees over the respective contract length.

³. 'An international harmonisation of player "passports" should be considered in order to know the transfer history of a player. The international Federations should define the general framework. This should encourage national federations (at least for major ones with the support of FIFA) to develop an electronic system for player registration, including amateurs. With this system, it would be easier to determine the amount and the distribution of the solidarity contribution between clubs.' 2013 Study, page 253.

⁴. The CFCB decides over disciplinary measures and sanctions clubs in breach of the FFP Regulations. Since the introduction of FFP (2011), six clubs have been denied access to European competitions, due to failures to comply with the break-even requirement or due to unpaid salaries or fees to other clubs.

From an EU law perspective, the FFP Regulations debuted with the support of the guardian of the EU Treaties, in the form of a UEFA-EU joint statement published on 21 March 2012⁵. According to the joint statement, FFP was regarded as positive at club and competition levels, respectively, in order to improve the financial and economic capability of clubs while encouraging them to operate within their means, and by protecting the integrity of UEFA club competitions and the long-term sustainability of UEFA football clubs, as well as being a mechanism to increase overall transparency. However, unlike the 2018 Update seems to suggest, I do not agree that the rejection of the request for a preliminary ruling made in the *Striani* case is tantamount to the confirmation of the compatibility of the FFP Regulations with EU law. As a matter of fact, the referral for preliminary ruling by the European Court of Justice was declared inadmissible on procedural grounds⁶.

In conclusion, the 2018 Update claims that the FFP Regulations have had a positive impact on the financial stability of clubs and on the overall financial environment; while, on the downside, they may have contributed to further imbalances between clubs, despite the voluntary break-even initiative. In any event, it must be acknowledged that the FFP Regulations score well in regards to its main aims: good governance and financial stability.

The TPO ban (LS)

Article 18ter of the FIFA Regulations on the Status and Transfer of Players ('RSTP') governs the TPO ban, which became applicable from 1 May 2015 and seeks to prohibit clubs and players from entering 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 from one club to another or is being assigned any right in future transfer or transfer compensation⁷.' The TPO ban, however, does not prevent clubs from resorting to other forms of external investment.

Three main concerns should justify the ban on TPO: Firstly, the perceived threat to integrity and the development of young players allegedly posed by the conflict of interest resulting from the holding of stakes in several different clubs; secondly, the promotion of the independence of clubs, which otherwise may fall prey to a vicious circle of debt and dependence whereby the decrease in the value of its assets - fully or partially in the hands of third parties - renders more difficult their access to other financial options; and, thirdly, the divergent, or even opposed, interests of clubs and investors, as it is almost impossible to reconcile short term profits with the club's focus on the creation of a solid and stable team.

The abovementioned reasons apparently warranted, in the view of FIFA, nothing less than the strict ban provided in Article 18ter RSTP. However, it seems that many in the sector did not share this view. Those opposed to the ban have already made themselves visible in many ways: through the increased use of bridge transfers⁸ - already labelled as a hidden form of TPO - widespread in South America; the creation of a black market; the search for loopholes in the

⁵. https://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/58/1772158_DOWNLOAD.pdf

⁶. <http://e-comlaw.com/hottopic.asp?id=1469>

⁷. Article 18ter, paragraph 1, RSTP.

⁸. According to FIFA, 'bridge transfers involve clubs collaborating to transfer players through a 'bridge' club to a destination club where the player was never fielded by the bridge club.' FIFA, 2014. Argentinian and Uruguayan clubs sanctioned for bridge transfers:

<http://www.fifa.com/governance/news/y=2014/m=3/news=argentinian-and-uruguayan-clubssanctioned-for-bridge-transfers-2292724.html>

Regulation; and the questioning of its compatibility with EU law⁹, in particular in relation to competition law rules and the free movement of labour and capital, and despite the specificity of sport supported since the entry into force of the Lisbon Treaty by Article 165 of the Treaty on the Functioning of the EU¹⁰. This opposition cannot have come as a surprised to the football governing bodies, as even the studies commissioned by FIFA did not fully support a strict ban.

Despite the actions of UEFA and FIFPro seeking to secure the endorsement of the European Commission, the fate of the TPO ban in the EU will be determined by the weighing the interests linked with the specificity of sport - in this case, the integrity of the game and the ethical issues relating to the development of young players - and the actual access to other forms of investment, against EU competition rules and the free movement of labour and capital.

Loan transfers (LS)

A common practice in modern football, loan transfers prove very useful in serving the needs of clubs in search of alternative placements for young as well as experienced players. However, according to the 2018 Update, some associate its extensive use with prejudices impacting the integrity and fairness of competitions and the development of young talent, as most loans involve players under 23 years of age.

Against this background, the existing minimum regulation, i.e. Article 10 RSTP, was thought to be insufficient to provide the means to tackle the alleged prejudicial effects on football. Since the 2013 Study, which raised the issue, two developments have been introduced to try and address it: a limit on the number of players per squad and a ban on emergency loan transfers¹¹. Further developments, such as limiting the number of loans per lending club and the adoption of a specific legal framework for loan transfers were not being considered by football governing bodies until very recently. On 12 April 2018, it was reported that FIFA President, Gianni Infantino, is considering limiting loans, getting rid of the winter transfer window and not allowing transfers after the season has started¹².

Notwithstanding the developments, it could also be argued that loan transfers can be positive for the competitive balance in football and that there are thus positive effects for the lending and beneficiary clubs.

The Intermediary Regulations (SH)

⁹. In 2015, the Spanish and Portuguese leagues joined efforts and filed a complaint against the ban on TPO before the European Commission, http://www.cecileparkmedia.com/world-sports-advocate/article_template.asp?Contents=Yes&from=wslr&ID=1742

¹⁰. A specific test for the application of specificity of sport was laid down in the 2013 Study: *'Rules aimed at implementing sports specificity derogating from normal labour or competition laws that apply to traditional industries, can only be justified if sports bodies guarantee, through adequate mechanisms, that sporting values are upheld against strict commercial objectives. Such values relate essentially to the organisation of fair and balanced competition, the enforcement of collective solidarity mechanisms and youth development.'*

¹¹. A practice adopted in the English professional leagues allowing a player to move on loan from one club to another club outside the regular transfer window period, in cases of emergency arising when the player of a team has suffered serious injuries or disciplinary sanctions.

¹². <http://www.marca.com/en/football/international-football/2018/04/10/5accdff2ca4741a4578b4611.html>; and <https://www.si.com/soccer/2018/04/10/fifa-discuss-changes-loan-transfers-some-clubs-increasingly-abuse-current-system>

FIFA's Regulations on Working with Intermediaries ('RWI') entered into force on 1 May 2015 to essentially change the regime in place, replacing the 1991 players' agent regulations, which had already been amended on two occasions (2001 and 2008).

The RWI intended to address a number of shortfalls identified under the former regulation, namely: the very high number of transfers completed without the involvement of a players' agent (70%); the lack of transparency even where transactions were concluded through a licensed agent; and the problems related to the role and obligations of club representatives and players' agents.

The introduction of the RWI has brought about increased transparency, as it provides for the full disclosure and publication of fees and for the full disclosure of conflicts of interest. In addition, the RWI also contributes to the protection of minors by proscribing commission for players under 18.

However, the RWI has also spurred debate over several modifications that were introduced. Firstly, critics have warned about the risks of deregulation represented by the abolition of the agent registration, which may ultimately lead to the exploitation of young players and about the limited scope of the RWI in that it only applies at the moment the transaction takes place. Secondly, the recommended remuneration cap set at 3% of the player's basic gross income or transfer compensation is perceived as well below the market rate and thus fails to sufficiently incentivise the intermediary to negotiate the best possible deal for players; moreover, Football Associations ('FAs') are free to adopt the cap or set a different one, opening the door to uneven working conditions across the EU for intermediaries. Thirdly, the removal of the registration requirement of legal persons as intermediaries means that there is no indication as to who is actually representing the player. Fourthly, the prohibition on intermediaries to provide their services for a fee to minors, causes disdain amongst intermediaries, while not limiting the length of representation contracts, which has potential negative effects on a player's career - such is the risk that, for instance, that the English and Spanish FAs have set a maximum duration of two years for representation contracts.

The shortcomings pointed out above warrant a reassessment of the current regulatory framework. The suggested review would focus on the alleged conflict of interests affecting agents, i.e. the fact that agents profit from the transfer of players when acting as intermediaries, however they should only concern themselves with protecting players' interests. The Regulations Governing Player Agents of the National Basketball Players Association is presented by the 2018 Update as good practice and stresses the importance of the reintroduction of a centralised licensing system.

Youth protection and development (SH)

The international transfer of underage players is governed by the RSTP, which as a principle prohibits such transfers unless one of the exceptions set out in Article 19 RSTP applies¹³. As to

¹³. a) The player's parents move to the country of the new club for reasons not linked to football, b) if the transfer takes place within the EU or EEA and the player is aged between 16 and 18. In this case, the club shall provide adequate football education and training, academic and/or school and/or vocational education, and provide optimum living standards, or c) the player lives no further than 50km from the national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border.

the enforcement of this special regime for the transfer of minors, regard must be had to Article 19bis.

As reported in the 2018 Update, while the rules are perceived as adequate, concerns exist about their enforcement, in particular with respect to the non-EU transfer of minors into EU Member States. Such transfers are inevitably subject to a multi-layered process involving football governing bodies, namely the Subcommittee appointed by FIFA Players' Status Committee, as well as public authorities, which may give rise to discrepancies. The following factors contribute to often conflicting decisions: different rules on home-grown player quotas and divergent practices for releasing residence permits across EU Member States. The ensuing uncertainty is exacerbated by attempts to circumvent the rules in the form of undue requests for the application of exceptions to the transfer of minors prohibition, namely the player's parents move to the country of the new club for reasons not linked to football, and the exchange agreements between clubs.

Moreover, the 2018 Update identifies additional sources of concern for youth development: buy-out clauses and preliminary contracts. Where clubs, normally in a better bargaining position, abuse these contractual tools, they can easily frustrate a young player's career.

In light of the above, it is argued that although regarded as effective, there is room for improvement of the current regulatory framework governing the transfer of minors. The 2013 Study recommended making the necessary adjustments in order to adapt it to EU law and now the 2018 Update is calling for the harmonisation of the relevant rules across Member States and for better enforcement of non-EU transfer of minors rules.

Transparency and redistribution in football transfers (SH)

The Transfer Matching System ('TMS')¹⁴, credited with facilitating transfer market procedures and protecting minors, has contributed greatly to transparency in football transfers since its use became mandatory in October 2010. At the same time, TMS has enabled the creation of a database containing all the player details relevant for the determination of training compensation ('TC') and solidarity contributions ('SC'). TC and SC are FIFA's compensatory mechanisms warranting the redistribution of the proceeds generated by player transfers.

The benefits of the TMS explain FIFA's efforts to promote a domestic transfer version of TMS ('DTMS') in order to create a complete database of player transfers. However, so far only five FAs have implemented DTMS systems¹⁵.

In addition, TMS helps raise awareness of the compensation due resulting from the application of FIFA's compensatory mechanisms and in so doing it contributes to the aim to achieve a more balanced system. This is all the more valuable because the impact of TC and SC, in terms of redistribution, does not seem to be significant and, moreover, figures show such payments have stagnated, decreasing between 2012 and 2016¹⁶.

¹⁴. TMS is an online platform set up to process international transfers of footballers. Through the TMS system the two clubs involved in the transfer of a player separately insert all the relevant details of the transaction, as well as upload the associated documents. Then, if the data match, the International Transfer Certificate (i.e. the FA document allowing the release from the issuing FA and the registration with the new FA), which is necessary for the administrative completion of the transfer, is issued.

¹⁵. The Netherlands, Iran, Malawi, Nigeria and Ecuador.

¹⁶. Page 21 of the 2018 Update - Figure 8: Evolution of the training compensation and solidarity mechanism - in percentage of total transfer fees and in total amounts.

Against this background, and with the backing of the European Court of Justice, which has recognised the compatibility of FIFA's compensatory mechanisms with EU law¹⁷, FIFA should put in place a more adequate and proportionate reward mechanism for training clubs.

The release of the 2018 Update comes at a time, and may have even accelerated events, when FIFA has expressed interest in tightening the transfer market rules¹⁸ and reports of the FFP probe into PSG suggest that a strict stance will be taken on the assessment of sponsorship deals with linked parties¹⁹. It is no surprise that football governing bodies are trying to capitalise on the momentum that the need for revision of the rules and regulations seems to be gathering. However, it must be remembered that the most significant changes will need to be subject to a compatibility test with EU law and that the decision to harmonise the relevant regulations will ultimately depend on the will of the Member States.

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¹⁷. C-325/08136 (Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC).

¹⁸. <http://www.marca.com/en/football/international-football/2018/04/10/5accdff2ca4741a4578b4611.html> and <https://www.si.com/soccer/2018/04/10/fifa-discuss-changes-loan-transfers-some-clubs-increasingly-abuse-current-system>

¹⁹. <https://www.ft.com/content/004c9d5e-3cdc-11e8-b7e0-52972418fec4>