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Third Party Player Ownership: the Regulations for Premier League and Football League Clubs for the 2009/10 Season

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ABSTRACT

This article aims to explain what third party ownership in football is and the regulatory rules that are relevant to any Premier League (PL) and Football League (FL) club. FIFA, the PL and the Football Association (FA) have all recently amended their rules and regulations governing this contentious and topical issue.

The PL and FA rules on TPPO were amended in time for the 2008/09 and 2009/10 season respectively. Before 2008 in the PL and 2009 in the FL, third party player ownership (TPPO) was regulated through a generic material influence clause. This forbid any entity having the ability to affect the behaviour of a PL or FA-affiliated club. The new rules from the 2008/9 and 2009/10 seasons now appear to prohibit a third party owner, without the consent of the FA, having any economic rights in a player registered to a PL or FA-affiliated club. See section E for the debate about whether the FA rules apply especially to FL clubs.

The FL rules make no express reference to TPPO. Only the provisions relating to dual interests may be seen as

regulating a third party owners' ability to own the economic rights of more than one FL player. However, in contrast to the FA and PL rules the current guidance from the FL suggests that in certain instances TPPO is permitted.

KEYWORDS

Football - Regulations - Material Influence- Conflicts of Interest - Transparency- Integrity

INTRODUCTION

There are a variety of TPPO rules governing different leagues and competitions. For a PL or FL club, there are currently PL, FL, FA, UEFA and FIFA rules in place. This article discusses each football association's individual regulations and then highlights a number of TPPO questions and scenarios. 1

The Tevez affair jumpstarted the PL in 2008 and the FA in 2009 into revisiting their TPPO rules. These two organisations now have the most stringent TPPO rules in place. It is important to stress that the rules governing TPPO are only relevant for players transferring into a PL or FL club. They do not cover situations where a player is leaving a PL or FL club. 2

In the post-Tevez arbitration climate, there are bound to be clubs fearing reprimand for any third party player agreements (TPPAs) that they have entered into. This briefing paper aims to tease out some of the difficulties that clubs may encounter in adhering to the new PL, FIFA and FA rules and current FL and UEFA rules. This article relates to the regulatory 3

framework in place governing this issue for the 2009/10 season.

BACKGROUND: THIRD PARTY PLAYER AGREEMENTS IN FOOTBALL

A TPPA in the football industry is where a football club does not own, or is not entitled to, 100% of the future transfer value of a player that is registered to play for that team. There are numerous models for TPAs but the basic premise is that companies, businesses and/or individuals provide football clubs or players with money in return for owning a percentage of a player's future transfer value. This transfer value is also commonly referred to as a player's economic rights. 4

There are instances where entities will act as speculators by purchasing a percentage share in a player directly from a club in return for a lump sum that the club can then use as it wishes. Another instance is where an entity provides financial support for a young, up and coming player. This support can take the form of housing costs being met, monthly payments given to the player and his family, as well as training, travelling, equipment and educational expenses. In return the entity agrees with the player that when signing a professional contract with a football club, the entity that has invested in the development of the player will be entitled to a percentage of any future transfer fee. 5

A newer scheme espoused by the Hero Fund appears to involve the fund paying money to clubs to purchase a new player (or retaining the services of a player whose wages may be beyond a club's means). The fund would then take an ownership stake of between 10-40% in that player who, if he is then transferred for a fee, would take a predetermined percentage of the transfer fee agreed with the purchasing club. Hero has also based a funding model around the premise of taking a percentage interest in a pool of selected players. The PL has previously assessed that such a scheme would still be in breach of the relevant PL rules. 6

REGULATORY BACKGROUND: PL, FA, FL, FIFA AND UEFA RULES

Prior to the Tevez affair, the PL, FA, FL, FIFA, and UEFA rules did not make any explicit reference to TPPO. The majority of these organisations' rules still do not. This section sets out the 2009/10 season TPPO regulatory framework. 7

In summary, the PL and FA before the 2008/9 and 2009/10 seasons respectively, had similar "material influence" clauses. However, due to the Tevez fiasco, although both still retain the material influence clauses, they both now have additional, more restrictive rules in place. 8

The FL rules outlaw situations where an entity (either an individual or a company for example) can have an interest in more than one FL club. Such FL dual interest clauses prohibit a third party owner having influence at more than one FL club. The FL guidelines on this topic however give some leeway for investments in a clubs entire squad to take place. 9

The FIFA rules ensure that no entity can influence any club's autonomy to make decisions. These rules are governed by a generic "material influence" clause. Additionally, the UEFA rule stipulates that both national and FIFA rules must be adhered to. 10

Below we review the regulatory framework starting with the PL rules, because the PL was the first organisation to significantly strengthen its rules on third party ownership. The FA rules cover all PL and FL clubs. 11

PAST AND PRESENT PL RULES

KEY POINTS SUMMARY

The PL rules on TPPO were amended in 2008. Before 2008, TPPO was regulated in the PL through a generic material influence clause. This forbade any entity having the ability to affect the behaviour of a PL club. The new PL rules from the 2008/9 season prohibit a third

party owner having any economic rights in a player registered to a PL club.

With the furore surrounding the Tevez affair and the complications that such TPPO has brought to the PL, the PL voted to change its rules in the summer of 2008. The relevant PL rules were, prior to the recent rule change, PL rule V.20 (and formerly PL rule U18) which stated that no club may enter into a contract that enables a third party,

“to acquire the ability materially to influence its policies or the performance of its teams.”

A common misconception at the time was that any third party player owner would have been in breach of the PL rules when in fact it was the clause giving the owners of Tevez influence over West Ham which incurred the PL’s wrath (plus the non disclosure of the agreement itself). It was for this reason that West Ham was judged to have breached the old PL rule - Rule U18 and fined £5.5 million by the PL.

There was therefore no express clause prohibiting TPPO; only the act of influencing a club’s policies or performance was forbidden. Tevez’s third party contract contained a clause giving exclusive power to the third party owners, MSI and Just Sports, to facilitate the transfer of the player. West Ham did not have a veto over this right and such a stipulation breached the above PL rule as it meant that outside parties had material influence over the decision making of West Ham.

The PL decided that from the beginning of the 2008/9 season an absolute ban on third party ownership was required. A PL spokesman stated:

“The clubs decided that third-party ownership was something they did not want to see. It raises too many issues over the integrity of competition, the development of young players and the potential impact on the football pyramid. It was felt the Premier League was in a position to take a stand on this. No one wants to see what has happened to club football in South America repeated over here”
(<http://www.guardian.co.uk/football/2008/dec/10/premierleague>)

New PL rules L34-35 govern this prohibition. It appears that PL rules L34-35 do not have retroactive effect. This means any TPPO contracts entered into before the 2008 rule change are presumably still valid. As has been widely reported, Manchester United signed Tevez on a two year loan deal whereby the third party owners still owned the economic rights for Tevez. This was acceptable because the agreement was entered into before the new PL rules L34-35 were brought into force. In order to comply with PL rules L34-35, Manchester City, in the 2009 summer transfer window, paid out Tevez’s third party owners so as to ensure no breach of the PL rules. Any TPPOs already in place before the new PL rules entered into force in 2008, should still be valid.

PL Rule L34 is the exemption rule which covers scenario’s where clubs are allowed to receive money from a third party. Such instances includes stipulations allowing clubs to receive: 1. payments or incur a liability for transfers to, or from, other football clubs; 2. enter into loan arrangements or bank loans to finance a player purchase; or 3. payments to agents. This list is not exhaustive. The definitive list can be found at Rule L34, p150-151 at <http://www.premierleague.com/staticFiles/bd/3b/0..12306~146365.00.pdf>

PL rule L35 is the mechanism to enable a third party owned player to transfer to a PL club. This can occur so long as the PL club purchases the third party’s economic interest in the player. It states:

“In respect of a player whom it applies to register as a Contract Player, a Club is permitted to make a payment to buy out the interest of a person or entity who, not being a Club or club, nevertheless has an agreement either with the club with which the player is registered, or with the player, granting it the right to receive money from a new Club or club for which that player becomes registered.”

This ensures that any future transfer sums, should the player be subsequently sold, would be kept by the selling PL club. This eliminates any third party element to any future sale

transaction.

PAST AND CURRENT FA RULES

KEY POINTS SUMMARY

The FA rules on TPPO were amended in 2009. Before 2009, TPPO was regulated by the FA through a generic material influence clause. This forbids any entity having the ability to affect the behaviour of an FA affiliated club. The new rules from the 2009/10 season appear to prohibit a third party owner having any economic rights in a player registered to any FA affiliated club.

FA Rule A.1 states that, 20

“All Clubs and Affiliated Associations shall play and/or administer football in conformity with these Rules.”

PL and FL clubs fall within the definition of “any football club”. There is therefore overlap between the FL, PL and FA rules. This rule indicates that all clubs regardless of which league they play in must adhere to all FA rules, including the new FA rules on third party player ownership. Therefore, it does not appear to matter that there is no equivalent FL rule because the FA rules govern each and every football club. It may be the case that as the FA rules on third party ownership bind “any football club” from the 2009/10 season it was decided unnecessary by the FL to draft similar provisions. But, as the FL rules effectively permit TPPO there would appear to be tension between the jurisdiction of the FA and the rules of the FL. 21

Until 4 August 2009, the solitary FA rule governing TPPO was Rule C 1 (b) (iii). It stated that, 22

“No Club shall enter into a contract which enables any other party to that contract to acquire the ability materially to influence the Club’s policies or the performance of its teams in Matches and/or Competitions.”

This rule is still in place but has now been supplemented by the “FA Third Party Ownership Regulations” which came into force on 4 August 2009. (This can be accessed at <http://www.thefa.com/TheFA/~media/Files/PDF/TheFA/FA%20Handbook%20200809/Third%20Party%20Investment%20-%20FA%20Regulations%20JUNE%2009%20FINAL.ashx/Third%20Party%20Investment%20-%20FA%20Regulations%20JUNE%2009%20FINAL.pdf>.) As will be highlighted below, the new FA rules appear to be without retrospective effect because they only relate to newly registered players signed after 4 July 2009. 23

FA rule A.2 states that before a club may register a player, the FA must be satisfied that no third party will own or continue to own the economic rights of that player. The rules require clubs to submit to the FA any agreements related to a player, oral or written, involving a third party selling or acquiring rights, or making or receiving payments, for a player. 24

FA rule B.2 sets out the mechanism where a club can buy out a third party interest in a player so as to ensure compliance with the regulations. The rule stipulates that any sums payable have to be made through a designated FA account and that the agreement then has to be lodged with the FA for final approval. 25

The new FA rules are similar in many ways to the PL’s stipulations which came into force in time for the 2008/9 season. Rule B.1 and B.2 appear to have similarities with PL rules L34 and L35. The regulations also apply to clubs wishing to use any third party investment which is linked to the future transfer value of a player or a pool of players (FA Third Party Ownership Regulations B.8). 26

CURRENT FL RULES

KEY POINTS SUMMARY

The FL rules make no express reference to TPPO. The provisions relating to dual interests were previously seen as regulating a third party owners' ability to own the economic rights of more than one FL player. However, the FL has this year issued guidance enabling third party owners to have more than one interest in a FL club.

The FL rules make no explicit reference to TPPO. Rule 81 prohibits any person or entity 27 having an interest in more than one FL club. Such an interest could be a loan from a financial institution secured against future gate receipts or future player sales. Under the FL rules, an interest is defined under rule 81 as directly or indirectly being, "involved in any capacity whatsoever in the management or administration of that football club; or has any power whatsoever to influence the financial, commercial or business affairs or the management or administration of that football club (FL rule 81.1)."

The purpose of prohibiting multiple interests in FL clubs, is to safeguard the integrity of the 28 FL competition. No third party investment vehicle can own an economic stake in more than one FL player, since no entity can have an interest in more than one FL club. The FL Board has the power to disapply, relax or vary this rule at any time (FL rule 88.1).

At the beginning of the 2009/10 season, the FL issued guidance on permitted finance 29 agreements under FL rule 81. The FL guidance document clarifies that third party owners can have interests in more than one FL club. The objective of the FL Board in the guidance document appears to be attracting "finance in a challenging credit market" whilst needing "to ensure that the reputation of the League is maintained" (Preamble, A4, The Football League Board Policy on Finance From Investment Funds).

There are a number of stipulations in the guidance document that any player finance 30 agreement has to adhere to in order to be signed off by the FL Board. They include that a TPPO deal entered into with a FL club:

- can only be entered into with one third party investor at a time; and
- must relate to the entire clubs' playing squad and cannot cover the sale of an specific player/s (this may be to ensure any undue influence to sell specific valuable players is negated);

The underlying message from the FL is that any third party investor, in order to avoid a 31 repeat of the Tevez fiasco, must not have the ability to influence the decision making ability of a club (Thorpe, 2009). Although this is no doubt the aim of the FL's provisions, questions may be raised as to whether influence may still arise in practice. What happens in the following scenario?

A third party offers £750,000 to enter into a player securitisation agreement with a FL club. 32 A charge is taken over the club's entire playing squad and the commercial terms agreed upon include that the contract will be in place for 3 years and a guaranteed minimum return for the third party finance is £1m. The FL club use its cash windfall as they chose and sell no players for 2.5 years. Some may believe that the third party owner now has an indirect influence over the FL club because the club knows that in 6 months time, they have to pay a minimum of £1m to the third party owner, preferably through selling a number of players to raise the money. Some may argue that this process is not too dissimilar to a third party having a direct say in a club having to sell its players so that the third party owner can realise its investment.

Contrary to what FL rule 81 prohibits, it would appear that the Hero Fund for example, 33 should consent be received from the FL for each transaction, would be able to have a third party player finance deal in place with a number of FL clubs.

DISPARITIES BETWEEN FA, PL AND FL RULES

The FA, PL and FL have given much thought to the parameters of their TPPO rules. Whilst the FA and the PL's rules appear quite similar in practically outlawing TPPO, the FL rules and in particular, the FL Board's policy document, does allow TPPO in the FL, subject to certain caveats. There appears to be an inherent conflict between FA and FL rules on this subject. As described above, the FA's rules bind every PL and FL club (FA rule 1a) but the FL has placed itself at odds with the FA and PL's position. An interesting question remains how to reconcile the FA prohibition with the FL's acquiescence on TPPO, given that every FL and PL club has to adhere to the FA's rules. This question may be answered in understanding how the FA's disciplinary mechanisms work in practice. 34

In order to assess how the FA rules will be applied, FA rule G.3 states, "Facts or matters giving rise to alleged Misconduct under Rule E1(b) to (f) inclusive, which also give rise to an alleged breach of the rules and/or regulations of The FA Premier League or The Football League, may be dealt with by The Association under the Rules and regulations of The Association, unless The Association and either The FA Premier League or The Football League as appropriate, agree that either league shall act." 35

FA rule G.3 has the effect that, in this current scenario, because the FL and the FA have rules in relation to TPPO, FA consent will be required to allow the FL to regulate its league as it sees fit. Therefore although the FA rules on TPPO appear more stringent than the FL's provisions, should the FA agree with the FL, that the FL will act to safeguard all FL TPPO issues, the FA rules on TPPO may be deemed somewhat redundant. For the rest of this article, it will be presumed that TPPO is permitted in the FL even though it may be the case that FL provisions may be in breach of the FA's TPPO rules. 36

Some may find the situation odd that the FA has the power to punish a FL club with a sporting sanction like a points deduction even though the FL rules governing this topic make no mention of such a prohibition. FA rule E gives the FA full discretion to impose a raft of sanctions. Whilst some may argue that the FL should be the only entity with the power to dock points from one of its members, the FA as the national association has the authority to sanction any FL or PL club. The significance of this is that every PL, FL and non-league club must ensure that they comply with the FA regulations or could risk FA disciplinary action. The FA's jurisdiction is not limited to FA cup matches either. The FA's ambit encompasses every competition a football club enters. A prime example is Luton Town who were docked 10 points by the FA for financial irregularities. 37

CURRENT FIFA AND UEFA RULES

Article 18 of FIFA's Rules on the Status and Transfer of Players states that: 38

"No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer related matters its independence, its policies or the performance of its teams."

UEFA Rule 18.02 ensures for all teams entering the Champions League or Europa League that: 39

"Players must be duly registered with the national association concerned in accordance with the national association's own rules and those of FIFA, notably the FIFA Regulations for the Status and Transfer of Players."

The probable reason why FIFA or UEFA do not implement more restrictive rules is because in Spain and Portugal for example and especially South America TPPO is prevalent. Outlawing such a practice would be both politically and practically difficult. This is in contrast to the FA and PL's position which prohibit any TPPA regardless of whether there is external material influence or not. The rationale is that it is evidently easier for national associations to implement TPPO prohibition rules with narrower scope, than it would be for FIFA or UEFA. 40

CONCLUSION

As is evidenced from the above, there is a real mixture of rules governing TPPO for PL and FL clubs. Whilst the FL rules do not expressly prevent a team from signing a player whose registration is at least partly owned by a third party, such action appears at odds with the FA and PL rules which impose stricter obligations on clubs. 41

Regulating TPPO is a relatively new phenomenon. Whilst many stakeholders in the game will no doubt praise the reforming steps taken especially by the FA and PL in order to safeguard the integrity of the game. Third party owners may feel somewhat aggrieved that an investment in a player must be divested as soon as that player becomes registered as a PL player. Some clubs urgently in need of outside investment may feel they are unduly restricted from utilising TPPO financing. Whether the more stringent FA rules impact on FL club dealings at this time remains unanswered. Similarly, only time will tell as to whether UEFA or FIFA further regulate this tricky area or whether a third party owner challenges the legality of the football authorities' third party clauses. 42

TRANSPARENCY, UNCERTAINTY OF RESULTS AND INTEGRITY OF COMPETITION

This author is of the opinion that the rationale for the Tevez decisions, whilst avoiding the thorny punishment issues of fines and points deductions, was correct. An outside entity had the ability to materially influence the autonomy of a PL club. The rules quite rightly prohibited a club being straight jacketed by external pressures that could compromise the integrity of the PL competition. The rationale being that decisions, in this instance on selling Tevez and Mascherano, were taken out of West Ham's hands. 43

In the ENIC (CAS 98/200) decision decision, the transparency argument put forward by CAS, that the rule preventing one entity owning shares in several European football clubs, was: 44

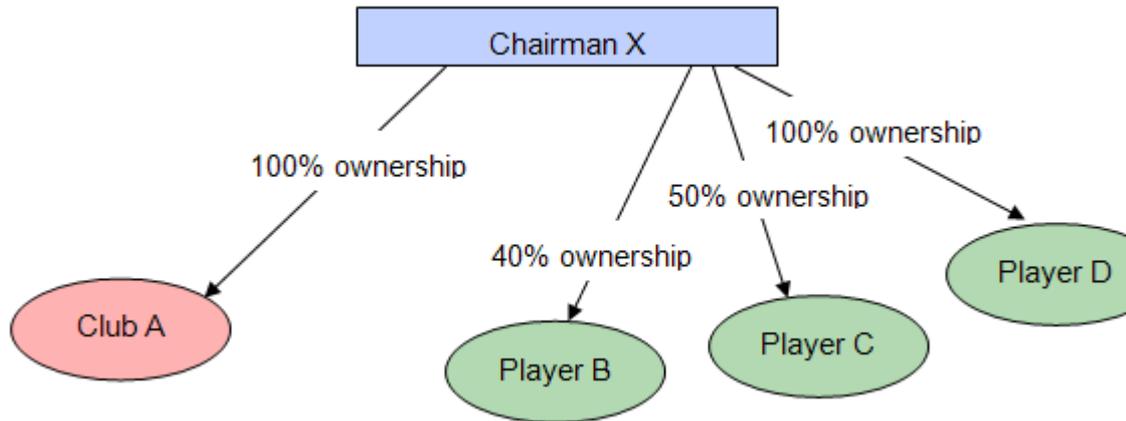
"an essential feature for the organization of a professional football competition and is not more extensive than is necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and thus the uncertainty, of results in (UEFA) competitions." (CAS 98/200 para 136)

The interesting section of the above quote relates to publicly perceived conflict prevention and inherent need to protect the unpredictability of outcome. By analogy, similar public perception of third party owners having power to influence and dictate club policy will generally be seen as unattractive by fans and administrators alike. Just as it was vital in the Tevez tribunal and arbitration decisions for the PL to maintain the game's integrity and transparency through adherence to the PL Rules by the PL clubs, it was vital to stem any accusations of conflict of interest where notions of fair play could be eroded. 45

This appears to be the fundamental basis for why the PL and the FA have taken what they consider are appropriate and proportionate steps to outlaw such situations reoccurring. Their mantra being, the greater transparency that is available, the greater confidence all stakeholders will have in the system. The 2009/10 PL rule change allowing for the public disclosure of any holdings of 10% or more is one example of such commendable transparency in action. 46

IS A PUBLICLY AVAILABLE LIST OF THIRD PARTY PLAYER OWNERS REQUIRED TO AVOID ANY PERCEIVED UEFA CLUB COMPETITION CONFLICT?

Now that at least PL clubs are prohibited from entering into TPPAs there may be a wider European context for this TPPO issue. For PL and FL clubs entering UEFA's European club competitions, there appears to be a pan-European conflict issue relating to TPPO. The basic premise is whether an individual should have an ownership stake in Club A and an economic stake in a player competing against Club A? The below diagram illustrates such a scenario. 47



WHAT IF PLAYER D, WHO IS 100% OWNED BY CHAIRMAN X, PLAYS AGAINST CLUB A, WHICH IS 100% OWNED BY CHAIRMAN X?

DOES UEFA NEED TO ADD ADDITIONAL MEASURES TO ENSURE THE HIGHEST LEVELS OF TRANSPARENCY TO FEND OFF ACCUSATIONS OF CONFLICTS OF INTEREST?

There is currently no UK or European wide register highlighting any potential conflicts of interest. Just as the PL has recently stated that information on any person or company owning 10% or more in a PL club will be publicly available from the 2009/10 season, perhaps every club owner whose club plays in a UEFA tournament should be required to disclose their connections or affiliations with any entities that own directly or indirectly any type of economic interest in a football player playing in a UEFA club tournament. FL rule 83 makes reference to a Register of Interests for any FL person interested in a club but it is doubtful this extends to interests in non-English and Welsh clubs. 48

As mentioned above, transparency was highlighted by the ENIC decision as a prerequisite for ensuring fair competition, but there appears to be few safeguards in place to inform the general public and prevent conflicts between player and club ownership from occurring. Paragraph 129 of the ENIC decision stressed that: 49

“among the myriad of rules needed in order to organize a football competition, rules bound to protect public confidence in the authenticity of results appear to be of the utmost importance. The need to preserve the reputation and quality of the football product may bring about restraints...” (CAS 98/200 para 129)

The ENIC case only highlighted instances where an individual could not own more than one club, and crucially not where a club owner had a TPPA in place. Whether there is such a substantive logical distinction between the two types of ownership is debatable. However, bearing in mind CAS’s forceful words in needing to protect football fans from any potential conflict and the “need to preserve the reputation and quality of the football product” (CAS 98/200, para 129) perhaps UEFA should consider taking a lead in order to maintain confidence in European club competitions. 50

COMPETITION LAW CONCERNS: COULD THE PL AND FA RULES BE CHALLENGED BY THIRD PARTY RIGHTS OWNERS?

Should a third party owner wish to market its players to PL or FL clubs and retain an economic interest, they may decide that the courts are the most suitable avenue to enforce any rights they feel may have been encroached upon. One option is competition law and Article 101 of the Treaty on the Functioning of the European Union (previously Article 81 of the EC Treaty) or Chapter I of the Competition Act 1998. Take the PL rules as an example. When its constituent owners (its 20 football clubs) voted to effectively ban third party ownership in the PL, such a decision could be construed as an agreement between undertakings which has as its object or effect, the prevention, distortion or restriction of 51

competition.

A further distinction would be whether an action would be brought under Article 101 which would then mean a claimant would need to demonstrate that the agreement would affect trade between Member States and distort competition within the common market. If the Competition Act was used, it would be necessary to show that domestic trade would be affected. 52

In again referring to the ENIC decision (paragraphs 124-145), competition law arguments were used by both parties in relation to Article 81 and 82 of the EC Treaty. UEFA claimed, just as football associations like the PL or the FA would argue with regard to third party ownership prohibition, that the clause is inherently necessary for, among other things, the legitimate aim of protecting the solidarity structure of football through the circulation of transfer fee's whilst also having the effect of prohibiting perceived conflicts of interest. CAS deemed it; 53

"that the EC Court of Justice has held in several judgements that restraints on competitors' conduct do not amount to restrictions on competition within the meaning of Article 81.1 (ex 85.1), provided that such restraints do not exceed what is necessary for the attainment of legitimate aims and remain proportionate to such aims." (paragraph 124)

Whilst the CAS quote is consistent with Article 101 case law related to ancillary restraints (see Remia, Pronuptia and Gottrup-Klim) each case is decided on its own merits. Thorny issues of market definition, i.e. whether the correct market is that of any player wishing to transfer into a PL club, may also be difficult to characterise. But substantively, third party owners may argue that the PL's restriction prohibits their ability to transfer a player into the PL. The PL would retort that the clause does no such thing and only prohibits the third party owner's continuing entitlement to any future transfer fee. 54

CAS decided in the ENIC case that the rule prohibiting one company owning more than one club competing in the same UEFA club competition was proportionate. This was because, among other reasons, it still allowed an entity to purchase more than one European club. The prohibition was that two commonly owned clubs could not compete in the same competition. CAS explained that the UEFA rule was proportionate because there was not an absolute prohibition on a company's ability to buy two European football clubs. It just meant both could not play in the same European competition. 55

By analogy, the PL and FA would no doubt argue that the third party prohibition clauses in both sets of rules only restrict the retaining of an economic interest by a third party and do not prohibit a third party owned player transferring into the PL or FL. 56

The Hero model of TPPO would appear to be outlawed completely under the new FA and PL rules, because Hero wishes to retain an interest in a PL or FL player. The rules could be viewed as discriminating against investors having an ownership stake, in FA or PL registered players. This is because a third party owner can transfer a foreign registered player into the PL. In order to comply with the new regulations, the foreign registered player would then be bought out by the PL club purchasing the player. At this point any third party right would be extinguished on registration with the PL club. Only non-registered FA players (e.g. players in Portugal or Spain) can now be third party owned before transferring in to the PL or FL. The question remains as to whether an FA registered player could challenge the FA and PL rules on the basis that they are being discriminated against based on the country where they are registered. 57

TPPO OR A DISGUISED SELL-ON CLAUSE: A MARGINAL DISTINCTION?

As stressed above, if the third party owners MSI and Just Sports had not inserted the clause which stipulated that they and not West Ham had control over when West Ham were to sell Tevez and Mascherano, there may not have been a breach of the then PL rules (ignoring the breach of the PL Rules for non-disclosure of the secret third party agreements). Third party ownership without the ability of the entity who owns a player's future economic rights to control, influence or pressure a club, effectively shares many of the characteristics of a 58

standard sell-on clause. Typically, sell-on clauses appear to be acceptable stipulations in many player transfer agreements between clubs. The distinction between a sell-on clause and a third party agreement is that one (the sell-on clause) is inter-club in nature and therefore permissible whilst the other (the third party agreement) regulates the relationship between club and the third party owner. The sell-on clause maintains the circulation of transfer monies exclusively within the football club family (and agents to a lesser extent). Third parties will no doubt claim that such protectionism is unwarranted.

Even a TPPA, which contains no contractual obligations imposed on a club, by a third party owner, to sell or otherwise recoup a transfer or loan fee for the player is now outlawed by the FA and the PL. Authorities would certainly argue that third parties would look to influence clubs' strategic and transfer policies regardless of whether there was a contractual provision giving them control over a player's transfer or not. 59

ARE FOOTBALL CLUBS LOSING OUT?

Many may well question what the benefit may be for a third party who does not retain the ability to maximise their investment potential; but that appears to be precisely what the Hero Fund is purportedly doing. Interestingly Nick Hely-Hutchinson and Damian Roberts, the city fund managers who front the Hero Fund clarified that a club does not have to accept an offer from another club for one of its partly owned players. Presumably the fund will consequently make a loss on fund players that do not transfer to another club for a profit. Perhaps because the fund only partly owns the players' future economic rights, there remains enough incentive for the club to make a profit from selling the player. It was also explained by Hely-Hutchinson and Roberts that any amount given to football clubs by the Hero Fund will be secured against the squad of players as a whole and not just against one player's transfer value. FA rule B.8 appears however to expressly forbid the reported financing model used by Hero which is secured against the value or future value of a pool of players. 60

"The club decides what to do with the money," Hely-Hutchinson said. "We have no say in their buying and selling. There is no third-party ownership. Any players bought with our funding belong to the club and the club makes all the decisions." (http://www.timesonline.co.uk/tol/sport/football/football_league/article6175889.ece)

Supporters of the fund argue that its arrangement allows clubs to field players it would otherwise not have been able to afford. West Ham could not have afforded the transfer fees and wages of Mascherano and Tevez. It also incentivises the club to sell the player if the fund only has a minority economic interest, because the selling club can still make a profit from the transfer. It also shields the club from the risk of poor player investment which is at least partly shouldered by the investor and not the club. It means underperforming players can be moved in or out without significant capital outlay or loss for the club. 61

Commentators and football associations are more sceptical. Of particular concern to the FA, FL and PL is the impact TPPOs would have on smaller clubs. Despite all the training and coaching a club may give a player, an increase in the value of the player could not be realised by the training club if they cannot be adequately compensated for a player they have developed. The delicate existence of many clubs from the FL down to the non-leagues in the UK relies on clubs being able to develop players from the grassroots levels and then sell their brightest prospects on to bigger, richer teams. Without the right to receive financial reward for this, many clubs may go out of business. 62

QUESTION OF FL CLUB COMPLIANCE WITH THE REVISED 2008 PL AND 2009 FA RULES

TPPO was not outlawed in the FL before the FA rules came into force in time for the 2009/10 season. If, as was permitted, FL clubs entered into TPPAs, so long as the relevant player was registered before 4 July 2009, it would appear that FL TPPAs would not fall foul of the FA regulations. This assumption is based on FA rule A.2 which stipulates that "before registering a player for a club, the FA must be satisfied" that no third party arrangement exists. It appears therefore that FA rule A.2 does not have retroactive effect as it is only triggered once a player transfer is registered with the FA. 63

For a FL club that is promoted to the PL, that has entered into a TPPA whilst in the FL and before the more stringent FA rules were implemented, a number of issues come to the fore. This is because PL rule L35 states in the context of buying out the third party interest that it is possible,

“[i]n respect of a player whom it applies to register as a Contract Player, a Club is permitted to make a payment to buy out the interest.” (Underlining added)

Just as with FA rule A.2, this suggests that PL rule L35 only applies when the player is initially registered with the club after the transfer and therefore only relates to existing PL clubs buying out the economic rights of any third party owner. The rationale being that as the TPPA was entered into in the FL, the player must have been initially registered to play in the FL.

The question still remains however if a TPPA is in place when a promoted club enters the PL. It would seem necessary to disclose the agreement to the authorities but what if the agreement was entered into after the rule L34-35 were made enforceable? As there was no FA or FL rule prohibiting such an agreement at the time, so long as the contractual clause did not breach FA rule C 1 (b) (iii), it would seem unfair to punish a club for an indiscretion that was seemingly authorised at the time the agreement was entered into.

The FL Board policy document on finance from investment funds however, specifically states that, “in the event of promotion to or relegation from the League, the Club must repay any loans from Permitted Investors in place at that time if the League they are joining prohibits such arrangements” (Preamble, A8, The FL Board Policy on Finance from Investment Funds, 26 August 2009). Whilst most standard securitisation deals (i.e. on future gate receipts or television money) are not outlawed by the PL, this reference would appear to be of relevance for any third party finance agreement entered into by a FL club which then gets promoted to the PL. Therefore the agreement would need various break-provisions to ensure that money owed by the club would be repaid before it took its place in the PL.

THE PRACTICALITIES OF BUYING OUT A THIRD PARTY OWNER

As mentioned above, there is only limited guidance in the FA and PL rules should a club default on its payment obligations in buying the economic rights of a player from a third party owner. The remainder of PL rule L35 states that:

“Any such payment which is not dependent on the happening of a contingent event may be made either in one lump sum or in instalments provided that all such instalments are paid on or before the expiry date of the initial contract between the Club and the player. Any such payment which is payable upon the happening of a contingent event shall be payable within 7 days of the happening of that event.”

Similarly, FA rule B.2 stipulates that:

“A payment by a Club, either in one lump sum or in instalments, to buy out the interest of a Third Party who has an agreement either with an Overseas Club with which an Overseas Player is registered, or with an Overseas Player, granting the Third Party the right to receive money from a new club for which that Player signs, is only permitted in the following circumstances:

- (a) the Club is seeking to register the Player; and
- (b) all sums payable by the Club to the Third Party will be paid prior to the expiry of the initial contract between the Club and the Player; and
- (c) all sums payable by the Club to the Third Party are paid via The Association using the relevant designated account as prescribed by The Association from time to time; and
- (d) the Club does not grant any right, commit to any payment or confer any benefit whatsoever, whether contingent or otherwise, to the Third Party in relation to the

future sale of the Player; and

(e) any proposed contract or agreement is disclosed to The Association in accordance with Regulation A.2 and The Association gives its approval; and

(f) any such contract is disclosed to The Association in its final form.”

Reference is made in both rules to clubs paying third party owners in instalments or in one lump sum but presumably a third party owner would demand a right to sell the player or request full repayment of the relevant sum should a club default. There appears scarce guidance as to the avenues open to third party owners in such instances. 70

Interestingly, the 2009/10 season is the first year that the three FL clubs promoted to the PL, will have to ensure compliance with the amended 2008/9 season PL rules. Whilst certain third party arrangements may have been permissible in the FL, it is highly unlikely that such agreements are permissible in the PL. One question remains however. If a FL club is promoted to the PL, would previously entered into TPPAs still be valid, and if so would these contracts have to then be registered with the PL? 71

Such a question poses a few tricky issues and no particularly straightforward answers. Some may argue that so long as the TPPA was entered into in the FL, was in compliance with FL rules, and was signed before the PL rules came into force, then there should be no subsequent PL breach. Others may argue that as soon as you enter the PL and become bound by its rules, it would be necessary to comply with the rules. This would mean disclosing any offending agreements and going through the L35 procedure of buying out the third party interest. The FL guidance document suggests that the buy-out will have to take place before promotion to the PL. The problem remains that such a rule leaves a club in a poor negotiating position, in having to agree a suitable buy-out amount, especially if they have to do this before they can accept their position as a PL club. As examined in the Tevez arbitration decisions, not acting in good faith towards the PL and its other clubs by not disclosing the existence of a TPPA, is a separate breach of the PL rules which could leave a promoted club exposed to punishment (PL rule B.13). 72

Perhaps the paths available are in actions for breach of contract. Questions may be raised about whether that would effectively give the third party owner the very power over the club that the authorities are keen to outlaw. 73

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