

The 2018 Report to the EC on the Football Transfer Market: Fascinating data but flawed conclusions

In March 2018, the Final Report to the European Commission on the Football Transfer Market was published, which makes for important and interesting reading. Nick De Marco QC, Barrister at Blackstone Chambers, scrutinises the 70 page Report, called 'An update on change drivers and economic and legal implications of transfers of players'¹ which has been produced by external consultants and is described as a 'Final Report to the DG Education, Youth, Culture and Sport of the European Commission.'

The Report contains an important disclaimer: it is prepared for the European Commission and reflects the views only of its authors, not the Commission. Readers should not mistake the policy recommendations as representing the views or likely new regulations of the Commission, and given the controversial nature of some of them, it is important to state this at the outset.

For a detailed economical analysis of the developments of the football transfer market since 2013, the Report is invaluable. It provides a treasure trove of useful statistics charting the commercial growth of football in the last few years, in particular with respect to the increased revenue, investment and spending in European football. As we discuss in the introduction to the new book, *'Football and the Law'* (De Marco, et al, Bloomsbury, 2018), it is this increased commercialisation of the world's biggest sport that has led to the development of what might now be described as 'football law' in the same way we speak of 'sports law.'

Some of the most significant data is summarised at the beginning of the Report², which states that the 'European football market is growing sharply, reaching a total of €24.6 billion for 2015/2016, and this growth is reflected across all aspects of the transfer market:

- International transfer fees have grown from USD2.71 billion in 2012 to USD4.79 billion in 2016.
- Transfer fees (including domestic transfers) in the big five leagues have grown significantly from €2 billion in 2012 to €5.9 billion in 2017.
- Revenues stemming from broadcasting

rights have more than doubled [since 2003] for the big five leagues, with a cumulated amount totalling €8.518 billion 2017/2018 compared to €4.238 billion in 2011/2012.'

Despite this growth, the authors go on to note, quite rightly, the 'increasing gap between top clubs within the top leagues, but also between the different leagues in terms of economic and sporting performances.' The Report goes on to consider a number of key changes in the transfer market that have taken place over the last few years, focusing on Financial Fair Play ('FFP'), the ban on Third Party Ownership ('TPO'), the newly implemented FIFA Regulation on Working with Intermediaries, as well as discussing a number of other areas such as the youth protection and development, the 'lack of transparency' in the transfer market and the regulation of the loan market.

Financial Fair Play

With respect to FFP, the authors conclude that the core objective of improving financial stability for clubs has been met³. They acknowledge the criticism of FFP, that it may 'increase the unbalances between global top clubs and the rest since a successful club is able to yield more revenues, acquire more talents and then widen the gap across clubs.'

However, they fail to really answer this point, suggesting, somewhat curiously, that UEFA's scheme whereby clubs can demonstrate their ability and commitment to meet break-even requirements during a voluntary agreement period 'shall be considered as a crucial step towards a more balanced system' yet then admitting that it shall still not 'fix

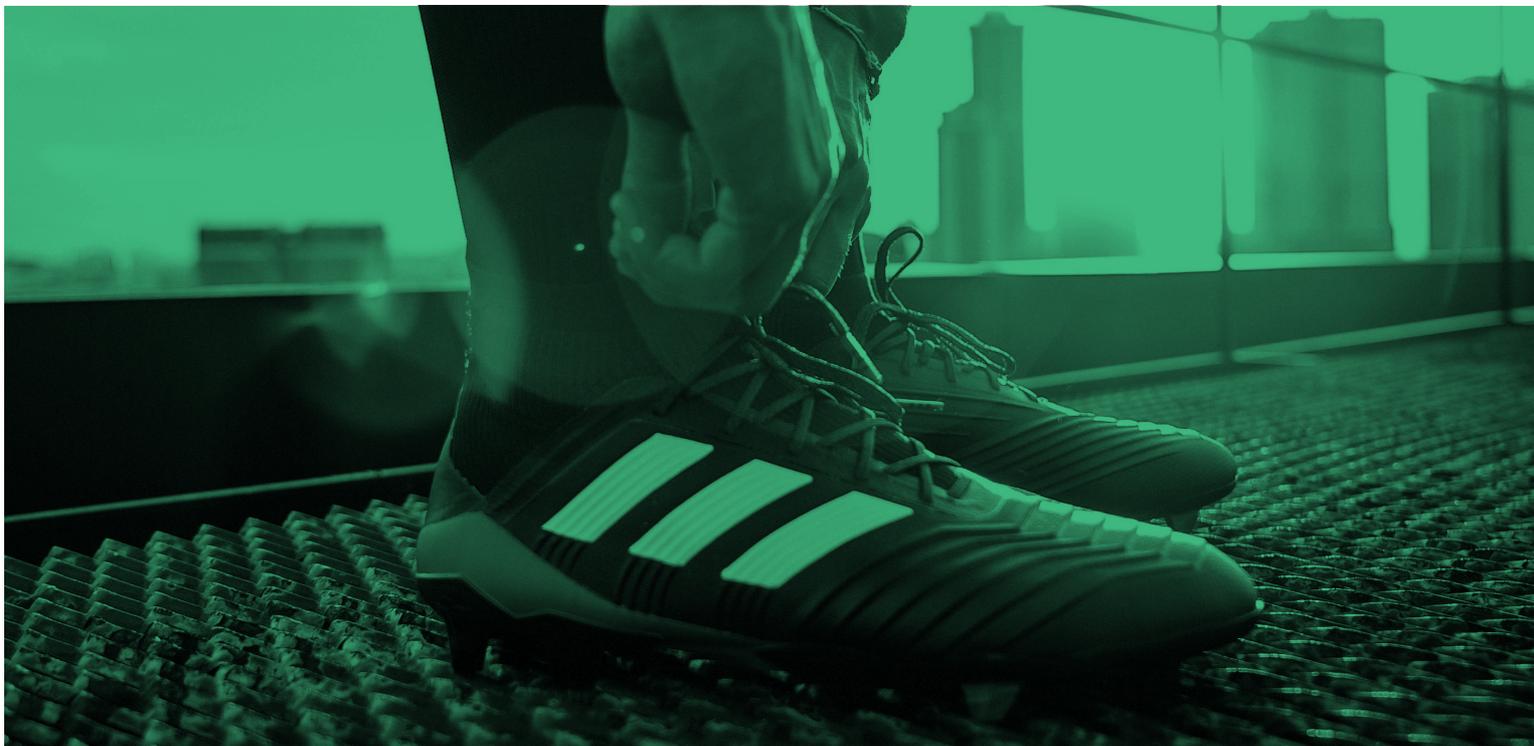
all imbalances in the short period' but apparently dismissing this objection by pointing out (correctly) that fixing imbalances is not the main aim of FFP.

In England, which from every data perspective is the richest and biggest football market, FFP including 'domestic FFP,' i.e. the Premier League and English Football League ('EFL') Regulations, inevitably make it more difficult for smaller clubs to compete with bigger ones. Whereas in the past an investor could turn a Manchester City or Chelsea into a real competitor to a Manchester United or a Liverpool, caps on investment in football make that much more difficult today, as it is also more difficult for a smaller Championship club to compete for promotion with a bigger one.

FFP is fundamentally about restraining clubs to spend within their means, so a bigger richer club (with a greater revenue) is allowed to spend more on players than a smaller club, even if the smaller club's spending is backed by ambitious investors. Given that most Premier League clubs receive the majority of their revenue from the sale of broadcasting rights, the gulf between Premier League and Championship clubs is further exaggerated. This increases competitive imbalance, and the Report fails to properly engage with this issue.

Third Party Ownership and 'bridge transfers'

As to FIFA's worldwide ban on TPO the authors of the Report acknowledge that it 'might actually worsen the current unbalances of the system, because of the difficulties for smaller clubs to receive external forms of investments.'



Yet, despite this, the authors come out clearly in support of the ban on TPO primarily for ethical reasons⁴. The Report acknowledges the arguments made by the Spanish and Portuguese football associations suggesting that a ban on TPO interferes with EU competition law and free movement of labour and capital. They have argued for a 'proportionality criteria, such as the limitation of the third-party ownership to a minimum percentage.' Others, the Report notes, have warned of a 'black market' in which agents and others 'search for loopholes to avoid the ban.'

Yet rather than engage with the competition law arguments about the ban on TPO the authors of the Report focus on one of the ways in which they say the ban has been circumvented - so-called 'bridge transfers,' whereby 'clubs collaborate to transfer players through a 'bridge' club to a destination club where the player was never fielded by the bridge club⁵.'

One of the Report's recommendations is to 'prevent and counter the growing employment of this fraudulent and unethical behaviour which could significantly affect the integrity and fairness of the game, and might also be used as a system to potentially circumvent the ban on Third Party Ownership. In this sense, it could be necessary to take into account the possibility to strengthen the investigative tools of the FIFA Disciplinary Committee [...].'

This fails to appreciate that there is no legal or regulatory definition of 'bridge clubs' or 'bridge transfers' and no actual prohibition under FIFA Regulations of

the practice that the authors say more resources should be dedicated to policing.

Indeed, this very point was made by the Court of Arbitration for Sport ('CAS') in reviewing the decision of the FIFA Disciplinary Commission ('DC') relied on in the Report for the definition of a 'bridge transfer.' In CAS 2014/A/3536⁶, the CAS found that the FIFA DC has a wide discretion in interpreting its own Regulations as to so-called bridge transfers, and "that measures should be applied against bridge transfers when such transfers are conducted for the purpose of engaging in unlawful practices, such as tax evasion, or to circumvent the rules concerning, for instance, the payment of training compensation or solidarity contributions, or to assure third party's anonymity in relation to the relevant authorities⁷."

However, it went on to find that FIFA Regulations represented "neither an appropriate nor an effective tool for combating and/or sanctioning bridge transfers" and "no legal grounds apparently exist for sanctioning the Appellant for its 'direct' participation in the bridge transfer⁸." The Club had been involved in a 'bridge transfer' according to the CAS, but FIFA had failed to establish this was an act of bad faith and its sanction against the Club was quashed (being substituted by a reprimand)⁹.

The transfer of players for economic, as opposed to purely sporting reasons is a common feature of international football, regardless of TPO or so-called 'bridge clubs.' Unless a specific rule is engaged and breached, there is nothing 'fraudulent' about this. Unless

a so-called bridge transfer is used to circumvent another legal obligation, such as payment of taxes, then there is nothing FIFA can or should do about it.

FIFA Regulations on Working with Intermediaries

Readers of this article will be aware of FIFA's controversial decision to scrap its previous licensing regime for football agents and its associated regulations and replace it with the Regulations on Working with Intermediaries ('RWI'). Many of us at the time predicted this de-regulatory move would lead to a rise in malpractice in the sector, as well as a significant increase in legal disputes¹⁰. That has happened, and others in football, many of whom (like FIFA) failed to heed the warnings of those representing agents and other industry experts at the time, have now woken up to the problem.

There now exists a mood to consider tighter regulations of intermediaries, including considering the re-introduction of some kind of licensing scheme. That is reflected in many quarters, including amongst the EU Social Dialogue Committee¹¹ as well as the authors of the Report. However, early signs suggest there may be a repeat of the mistakes made by FIFA in introducing the RWI, in particular by those influenced by headline (and unrepresentative) figures about intermediaries' commission rushing to bring in unworkable and potentially unlawful solutions.

The Report finds that the FIFA RWI has not worked. It acknowledges much of the problems with de-regulation and suggests consideration should be given to adopting a model similar

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to that developed by the National Basketball Players Association ('NBPA'), including a licensing system and entry examination (which existed under the old FIFA Agents Regulations). Many of these suggestions shall be broadly welcomed, including by most intermediaries themselves who like the European Football Agents Association ('EEFA') and the English Association of Football Agents ('AFA') were at the forefront of opposing FIFA's RWI and the de-licensing of football agents.

However, it is in respect to the controversial topic of intermediary fees that the Report is most seriously flawed. In its analysis¹², it records the criticism made by the AFA and others about the recommended (as opposed to mandatory) 3% cap on intermediary commissions contained within the RWI: the suggestion that this would destroy many agents' businesses, have a negative effect on players (who would have less choice in terms of their representation in contractual negotiations) and breach European competition law.

The author of this article, along with Lord Pannick QC and Tom Richards of Blackstone Chambers, commenced a complaint under competition law to the European Commission against the RWI's recommended 3% cap on behalf of the AFA. The complaint was only compromised because it became obvious the football industry was ignoring the recommendation, and intermediaries, clubs and players continued to broadly agree commission freely between themselves.

Recent figures suggest the industry standard, internationally, remains that intermediary fees are based on just over 6% of a player's remuneration; most English intermediaries have contracts that entitle them to 5%, some up to 10%, rarely more. The figure of 3% is not one that has taken off anywhere. Yet despite considering these objections and quite properly concluding that before any further reform takes place 'representatives of players (FIFpro) and agents (e.g. EFAA) should be involved in improving this regulation in the future' (something the intermediary associations have repeatedly requested), the authors of the Report then jump to the following recommendation:

'Make the 3% voluntary cap on intermediary fees mandatory for all the

transactions, or in case of potential non-compliance with the European Law, making the cap mandatory over a certain threshold. Such a cap should however be properly discussed with agents to reflect market practices¹³.' No explanation or justification is given for the making of this radical proposal - one that FIFA itself wisely avoided when considering a cap. Why should regulators restrain the freedom of parties to agree how much commission they wish to pay their professional representatives? What other industry requires such an intrusive approach? In other sectors of the entertainment industry, including among highly paid Hollywood stars, agents commission of 20% is not unusual. While some North American sports regulate the maximum amount an agent can earn¹⁴, they are usually arranged on an entirely different model to football - many with salary caps or collectively agreed minimum salaries, with often little or no transfer activity between clubs (certainly nothing on the scale of football), and of course they are not subject to EU law.

The Report acknowledges, but does not begin to engage with, the legal arguments that such a mandatory cap would be in breach of competition law and amount to little more than price fixing. It is most unlikely the suggested mandatory cap shall be adopted by the regulators and if it is then it shall inevitably face serious legal challenge.

The Report makes two other main recommendations in relation to intermediaries. First it recommends 'dividing the payment of fees into installments to be paid along the duration of the contract to incentivise the players' contractual stability.' This suggestion is also not well thought through. If an intermediary is acting for the player he or she has a duty to put the player's interests first, even before his or her own financial interests. That interest may include arranging an early transfer to another club, for example because the player could secure a better salary, a longer contract, or the ability to play at a higher level. To 'incentivise' the intermediary to only be paid if the player remains at the first club is to encourage him or her to potentially act against the player's best interest and thus be in breach of his/her legal duties to the player.

Second, they recommend the consideration of a centralised and harmonised mandatory licensing system,

following the example of the NBPA system for agents in US basketball and including a uniform mechanism for legal proceedings and sanctions. This is a more sensible suggestion but is what actually existed before FIFA tore up its Regulation of Agents and brought in the RWI. It is not necessary (but might be helpful) to look to the less developed sport of basketball - FIFA had an effective harmonised system in the first place but chose to walk away from it.

The Report contains some other interesting suggestions, including a 'luxury tax' on high transfer fees. If properly thought through such a tax might be used to help smaller clubs, and could be positive. Overall, the Report makes most interesting reading for anyone involved in the business of football - but unfortunately many of the conclusions are flawed, from both a legal and practical perspective. It is hoped the Commission treads carefully, and seeks expert advice before seeking to act on any of the recommendations.

Nick specialises in Sports Law, in particular in international and domestic football. He is the Editor of 'Football and the Law' (Bloomsbury, May 2018), the first comprehensive guide to legal issues in football to be published worldwide.

1. <https://ec.europa.eu/sport/sites/sport/files/report-transfer-of-players-2018-en.pdf>
2. Executive summary of the Report, pp. 6-7.
3. See Section 3.2.1 of the Report.
4. Section 3.3.3 of the Report.
5. See footnote 89 of the Report. The definition is taken from a FIFA press release: 'Argentinian and Uruguayan clubs sanctioned for bridge transfers,' <http://www.fifa.com/governance/news/y=2014/m=3/news=argentinian-and-uruguayan-clubs-sanctioned-for-bridge-transfers-2292724.html>
6. Racing Club Asociación Civil v. FIFA, Award of 5 May 2015.
7. Paragraph 9.17 of the Award.
8. Paragraph 9.19 of the Award.
9. Paragraphs 10.1-10.3 of the Award.
10. See, e.g. 'The new FA Football Intermediaries Regulations and the disputes likely to arise,' Nick De Marco, 1 April 2015, https://www.blackstonechambers.com/news/analysis-the_new_fa_football/
11. See the EU Sectoral Social Dialogue Committee for Professional Football Resolution on intermediaries/agents, 17 November 2017.
12. See, Section 3.3 of the Report.
13. Section 4.3, Policy Recommendations, part 2.
14. Section 4B of the NBPA Regulations 1991, for example, provide that agents shall receive a maximum of 2% commission where the player receives 'only the minimum compensation under the NBA-NBPA Collective Bargaining Agreement' and 4% if the player receives 'in excess of the minimum compensation applicable under the [...] Collective Bargaining Agreement.'