**Arbitration CAS 2021/A/8076 Sport Lisboa e Benfica SAD v. Fédération Internationale de Football Association (FIFA), award of 10 October 2022**

Panel: Mr Alexander McLin (Switzerland), President; Prof. Massimo Coccia (Italy); Mr Ricardo de Buen Rodríguez (Mexico)

*Football*
*Disciplinary sanction for violation of Art. 18bis RSTP*
*Predictability and binding nature of Art. 18bis RSTP*
*Principles of interpretation of statutes and regulations*
*Purpose and narrow interpretation of Art. 18bis RSTP*
*Context and impact of the "influence"*
*Art. 4(3) of Annexe 3 RSTP*
*Proportionality of the sanction*

1. **Article 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) is sufficiently clear and precise in prohibiting clubs from entering into contracts which enable other parties to acquire the ability to influence, in employment and transfer-related matters, the independence, policies or team's performances of those clubs. It does not breach the predictability requirement enshrined in the principle of *nulla poena sine lege clara*, despite its ability to catch an unspecified variety of contracts. It is clearly binding, regardless of its lack of enforcement during several years and the doctrine of estoppel.**

2. **Article 18bis RSTP must be interpreted in light of the statutory methods of interpretation under Swiss law. Any statutory interpretation begins with the letter of the law (literal interpretation), but this is not decisive: the interpretation still has to find the true scope of the norm, which also derives from its relationship with other legal provisions and its context (systematic interpretation), the aim pursued, particularly the protected interest (teleological interpretation), as well as the will of the legislator as it may be understood from the drafting history (historical interpretation).**

3. **Article 18bis RSTP is aimed at (i) protecting the sporting policies and operations of football clubs from being unduly influenced by other parties and (ii) avoiding conflicts of interests that might lead to practices affecting the integrity of the competition. It encompasses a prohibition related to the club's conduct when entering into a contract. It has the potential to significantly restrict the parties' freedom of contract, which is a fundamental principle of Swiss Law and market-economy legislation. Accordingly, it must be construed narrowly and applied on case-by-case basis bearing in mind that, in case of doubt, the adjudicating body must favour the principle of freedom of contract.**

4. **An infringement of Article 18bis RSTP can occur if the influence is effective and has the potential to actually impact the club's determination in a meaningful way, regardless of its practical materialisation and the number of agreements at stake. In this context, the circumstances of each case are crucial and must be carefully considered. Principal among those are (i) the sporting and financial situation and weight of the contracting club as opposed to the sporting and financial situation and weight of the other contracting party or parties, and (ii) the number and economic value of the players for which the club entered into a contractual relationship.**

5. **Article 4(3) of Annexe 3 RSTP requires clubs to report in the FIFA Transfer Matching System for international player transfers (TMS) any agreement that may violate Article 18bis RSTP. It thus targets a different offence, which prevents the application of the principle of *ne bis in idem*.**

6. **A CAS panel should not easily tamper with the sanctions imposed by an appealed decision, but it can, when necessary, rely on its *de novo* power of review to find that the sanctions are disproportionate and determine more appropriate sanctions. When deciding the level of a pecuniary sanction, it should take into account all aggravating and mitigating circumstances, including the assistance of the offender in uncovering a breach and its degree of guilt.**

## I. INTRODUCTION

1. This appeal is brought by Sport Lisboa e Benfica SAD ("Benfica" or the "Appellant" or the "Club") against the *Fédération Internationale de Football Association* ("FIFA" or the "Respondent"). It aims to challenge FIFA Appeal Committee's decision of 8 April 2021 to sanction Benfica with a fine of CHF 40,000 and a warning for breaching Article 18bis of the FIFA Regulations on the Status and Transfer of Players ("RSTP") (third-party influence), and Article 4 (3) of Annexe 3 RSTP (clubs' duty of information during transfers).

## II. PARTIES

### A. The Appellant

2. The Appellant, Benfica, is a professional Portuguese football club based in Lisbon, Portugal. The Club plays in the top tier Portuguese league, the *Primeira Liga*, and is affiliated to the *Federaçao Portuguesa de Futebol* ("FPF").

### B. The Respondent

3. The Respondent, FIFA, is the international governing body of football at worldwide level, headquartered in Zurich, Switzerland.

## III. FACTUAL BACKGROUND

4. Below is a short summary of the relevant facts and allegations based on the Parties' written and oral submissions and evidence. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 30 January 2020, the Appellant and the Brazilian club Avaí FC ("Avaí") concluded a transfer agreement ("the Agreement") in relation to the transfer of the player Vinicius de Lima Ferreira ("the Player"), who was transferred from Benfica to Avaí. In particular, the Agreement, contained the following clauses (in a translation into English provided by FIFA that was not disputed by the Appellant):

Clause 1:

*"By this contract BENFICA SAD gives the title final to AVAÍ FC, free of any charge or charges, sporting registration rights (eg. "Federative Rights") of professional football MORAES FERREIRA DE LIMA, with effect immediate".*

Clause 2.1:

*"As a counterpart to the transfer of rights agreed herein, AVAÍ FC expressly recognises, without reservation and irrevocably, that BENFICA SAD remains the holder of the right to 50% of the total value of a future definitive or temporary transfer of the player's sporting registration rights to another national or foreign sporting entity (the economic rights) or any revenue arising from one of the situations provided for in the provision".*

Clause 2.3:

*"If the transfer PLAYER is for Futebol Clube do Porto - Futebol, SAD, for Sporting Clube de Portugal - Futebol, SAD or the Sporting Clube de Braga, Futebol, SAD, is hereby expressly agreed that the BENFICA SAD will be due the amount corresponding to the ownership of the right to 50 % (fifty percent) of the total value of the transfer, plus an additional compensation of €10.000.000 (ten million), plus the VAT due to rate legal, all to be settled within 30 (thirty) days from the registration of the PLAYER's employment contract with one of the sports companies identified here".*

Clause 4.1:

*"AVAÍ FC and the player commit themselves, regarding a future definitive or temporary transfer of the player, to grant to BENFICA SAD a preferential right in the acquisition of the player's sporting rights and economic rights".*

Clause 4.2:

*"In order for BENFICA SAD to exercise the right of preference mentioned above, AVAÍ FC and the player are obliged to notify BENFICA SAD in writing within 2 working days of any offer or any negotiations*

*or discussions that are being concluded or carried out (by AVAÍ FC, by the player, by the respective intermediaries or by others), for any and all cession, temporary or definitive, of the player's sporting and/or economic rights, sending a copy of any proposal received".*

Clause 4.4:

*"In the event that AVAÍ FC* […] *agrees to terminate by mutual agreement the sports employment contract that it celebrates on this date with the PLAYER , or allow the latter to operate the termination with just cause of the sports employment contract, or in addition, it in any way removes the PLAYER'S federative and / or economic rights without granting BENFICA SAD the aforementioned right of preference, it will be obliged to pay BENFICA SAD, as a penal clause, which the parties freely adjust and clarified, compensation of €10.000.000 (ten million), plus the VAT due at the legal rate".*

Clause 10:

*"1. This contract must be interpreted in accordance with FIFA regulations, namely the "FIFA Regulations on the Status and Transfer of Players" and in the alternative by the Swiss Civil Code.*

*2. The parties hereby agree to elect, as the case may be, the Player Status Committee, the Dispute Resolution Chamber and the Court of Arbitration for Sport, renouncing any other jurisdictional body, however privileged it may be, as the competent body to resolve any doubts, divergences or controversies arising from this contract.*

***Sole Paragraph** - If any procedure is initiated, the final decision will be issued by the Sports Arbitration Court (CAS), whose panel will be composed of 3 (three) referees and the adopted language will be the English language. Once the unsuccessful party has not complied with the decision handed down by this Sports Arbitration Court, this non-compliance gives the winning party the right to immediately communicate to the FIFA Disciplinary Committee ("FIFA Disciplinary Committee") so that it impels the execution of said decision".*

6. On 31 January 2020, Benfica entered a transfer instruction in the Transfer Matching System ("TMS") to release permanently the Player to Avaí.

7. In this context, the Appellant indicated that it had not entered into a contract which enabled a counter club/counter clubs, and vice versa, 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 team.

## IV. FIFA DISCIPLINARY PROCEEDINGS

8. On 21 July 2020, following an investigation conducted by FIFA's TMS Global Transfers & Compliance Department ("FIFA TMS"), disciplinary proceedings were opened against Benfica. FIFA TMS analysed whether, *inter alia*, Clauses 2.3 and 4.4 of the Agreement potentially breached Article 18bis (1) of the RSTP and Article 4 (3) of Annexe 3 of the RSTP.

9. On 24 September 2020, the FIFA Disciplinary Committee issued a decision – with grounds subsequently notified on 22 October 2020 – whose operative part read as follows:

*"1. The FIFA Disciplinary Committee found the club SL Benfica responsible for the infringement of the relevant provisions of the* Regulations related to third-party influence *(art. 18bis par. 1) and the failure to declare mandatory information in TMS (art. 4 par. 3 of Annexe 3).*

*2. The FIFA Disciplinary Committee orders the club SL Benfica to pay a fine to the amount of CHF 40,000.*

*3. In application of art. 6 par. 1 lit. a) of the FIFA Disciplinary Code, the club SL Benfica is warned on its future conduct.*

*4. The above fine is to be paid within thirty (30) days of notification of the present decision".*

10. In its decision, the FIFA Disciplinary Committee made, *inter alia,* the following considerations:

(i) With respect to Article 18bis RSTP and Article 4 (3) of Annexe 3 RSTP:

- Article 18bis (1) of the RSTP establishes a prohibition on so-called "third-party influence". It explicitly provides that *"No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, 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".*
- This provision aims at avoiding that a club concludes any type of contract that influences another club's independence, policy or performance of its teams in employment and transfer related matters. In particular, there should be no influence on the club's ability to determine independently the conditions and policies concerning purely sporting issues such as the composition and performance of its teams. This applies to the influencing club as well as to the influenced club.
- Article 4 (3) of Annexe 3 of the RSTP imposes the obligation on clubs to declare different information within the framework of an international transfer of a professional player. More specifically, *"Clubs must provide the following compulsory data when creating instructions, as applicable:* […] *Declaration on third-party payments and influence* […]*".*
- This provision mandates clubs to indicate any influence from a counter club and/or third-party on a club (as per Article 18bis of the RSTP) in TMS when entering the relevant transfer instruction.

(ii) With respect to the clauses of the Agreement:

- Clause 2.3 limits the freedom of Avaí in transfer-related matters. Avaí would have to pay Benfica a significantly high additional compensation (EUR 10,000,000), besides the agreed 50% sell-on fee, should it decide to transfer the Player to Futebol Clube do Porto, Sporting Clube de Portugal or Sporting Clube de Braga. Therefore, if Avaí receives two similar offers for the transfer of the Player, it

would be more inclined to accept the one not coming from one of the 3 abovementioned clubs, in order to make the most profitable operation.

- Clause 2.3 undeniably grants Benfica the ability to exert pressure on Avaí and influence its independence in employment and transfer-related matters.

- Clause 2.3 breaches, by its mere existence, Article 18bis RSTP, irrespective of whether or not such influence materialises and irrespective of who imposed such clause.

- Clause 4.4 equally enables Benfica to influence Avaí's independence in employment-related matters, since Avaí will have to pay a "compensation" of EUR 10,000 to Benfica if it mutually agreed with the Player the termination of its employment contract.

- Clause 4.4 thereby infringes Article 18bis RSTP.

(iii) With respect to the information provided in TMS:

- Benfica, by declaring in TMS that there was no third-party influence, failed to disclose complete and correct information in TMS, and thus breached Article 4 (3) of Annexe 3 of the RSTP.

(iv) With respect to the proportionality of the sanctions:

- Benfica was sanctioned with a fine, amounting to CHF 40,000 considering that (a) it was the influencing Club, which had imposed detrimental conditions on Avaí; (b) it had signed an Agreement which contained two clauses violating Article 18bis of the RSTP; and (c) it had already been sanctioned on several occasions for violating this article.

- Benfica also received a warning pursuant to Article 6 (1) lit. a) of the Disciplinary Code (FDC) with a view to guarantee future compliance with FIFA regulations.

11. On 30 October 2020, Benfica filed an appeal against the FIFA Disciplinary Committee's decision with the FIFA Appeal Committee.

12. On 8 April 2021, the FIFA Appeal Committee issued its decision, the grounds of which were notified on 3 June 2021.

13. The FIFA Appeal Committee's decision confirmed the findings of the FIFA Disciplinary Committee in their entirety, ruling as follows:

*"1. The appeal lodged by the club Benfica SL is rejected and the decision of the FIFA Disciplinary Committee passed on 24 September 2020 is confirmed in its entirety.*

2. *The costs and expenses of the proceedings amounting to CHF 1,000 are to be borne by the club Benfica SL. This amount is set off against the appeal fee of CHF 1,000 already paid by the club Benfica SL".*

14. The FIFA Appeal Committee fully concurred with the FIFA Disciplinary Committee's analysis of the case and, *inter alia*, set out the following considerations:

(i) With respect to the prohibition foreseen in Article 18bis RSTP:

- Article 18bis RSTP prohibits any club from entering into an agreement with third parties *"which enables"* the latter to have the *"ability to influence"* the club's sporting activity. Benfica argued that Article 18bis RSTP should be interpreted narrowly and thus only covers cases of "*real and effective influence"*. However, a correct interpretation of such provision shall consider its true meaning and thus *"any kind of influence on the counter club"*. In other words, this prohibition aims at avoiding that a club concludes *"any type of contract"* by means of which it is in a position to influence another club's independence in employment and transfer-related matters, its policies or the performance of its teams. In particular, there should be no influence on the other club's ability to independently determine the conditions and policies concerning purely sporting issues such as the composition and performance of its teams.

- Furthermore, in a previous case (TAS 2017/A/5463) a panel of the Court of Arbitration for Sport (the "CAS") ruled that the prohibition enshrined in Article 18bis RSTP applies in case a third party is granted a *"real ability"* to impact the behaviour of a club. Likewise, more recent case law (CAS 2020/A/7158) emphasises that *"due consideration should be given to whether such impact genuinely jeopardises the integrity of competitions. This could be the case, for example, when a contract is negotiated amid threats, coercion or even under pressure – of any nature – such that the club agreeing to be influenced is insufficiently free (or able) to counteract its counterparty's authority, which ultimately means that it is required to accept all of the conditions imposed upon it by the latter".*

- Consequently, Article 18bis is breached every time a club enters in an agreement with another club that grants it the real ability to impact the other club's independence, and that this impact genuinely jeopardises the integrity of competition. The infringement occurs *per se* every time a clause in violation of Article 18bis RSTP is included in a contract, regardless of its actual exercise.

(ii) With respect to the applicability of Article 18bis RSTP:

- It is undisputed, from the information provided by the Parties in TMS, that Benfica entered into a transfer agreement with Avaí to transfer the Player on a permanent basis. Therefore, Benfica can be considered the counter club to Avaí pursuant to Article 18bis RSTP.

- Article 18bis of the RSTP is very clear and leaves no room for interpretation. In particular, this article is aimed at avoiding the influence of external stakeholders or third parties in a club's independence as well as, as it is clearly written in the provision, at preventing the influence of the counter clubs, meaning those clubs with which a transfer agreement is concluded.

- The Appellant's allegations, according to which the relevant clauses do not amount to a sufficient level of influence that would trigger the application of Article 18bis RSTP, are irrelevant. This article applies to both clubs and hence, to the present matter.

(iii) With respect to the clauses of the Agreement:

- Clause 2.3 limits the freedom of Avaí in transfer-related matters, as it would have to pay to the Appellant a significantly high additional compensation (EUR 10,000,000), besides the agreed 50% sell-on fee, should it decide to transfer the Player to Futebol Clube do Porto, Sporting Clube de Portugal or Sporting Clube de Braga.

- Clause 2.3 breaches Article 18bis RSTP, which prohibits the transfer of players to a competitor club, or make it conditional upon a high penalty fee.

- Clause 2.3 is similar to previous cases, which the FIFA Disciplinary Committee held to contravene Article 18bis RSTP.

- Clause 2.3 is all the more open to criticism in view of the unbalanced situation between Benfica and Avaí. Benfica is one of the top-revenue-generating clubs in Portugal and one of the most decorated clubs in Europe, whereas Avaí plays in Brazil's second tier. The latter would struggle to pay a penalty of EUR 10,000,000, which clearly jeopardises the integrity of competitions.

- Clause 4.4 is a penalty clause by means of which Avaí FC is obligated to pay to the Appellant a penalty of EUR 10,000,000 if it fails to grant the Appellant the right of preference set out in Clause 4.1. It would notably apply if the player and Avaí FC mutually terminate the employment contract and/or the player terminates the contract with just cause.

- Clause 4.4 does not give any chance to Avaí to avoid the penalty of EUR 10,000,000 in case of a termination through mutual agreement or by the Player with just cause. The Player would become a free agent and the preferential right would automatically cease.

- Clause 4.4. also aims to protect the Appellant's right to 50% of a future transfer sum following the transfer of the Player from Avaí to a third club. It goes beyond

the sell-on clause provided for in Clause 2.1, which would not apply in in the event of a termination through mutual agreement or by the Player with just cause.

- Clause 4.4 grants the Appellant the ability to influence the independence of Avaí in both employment and transfer-related matters. The ability to influence Avaí employment-related matters is acquired because it would want to avoid mutually terminating the employment contract with the Player or would have to extend that contract in order to avoid the Player becoming a free-agent and thus avoid paying EUR 10,000,000. Meanwhile, the ability to influence Avaí's transfer-related matters is acquired because it would be inclined to transfer the Player to a third club before the expiry of the employment contract against a transfer sum so as to avoid that the Player becomes free agent, in order to escape paying the penalty fee to the Appellant.

- Clause 4.4 includes a penalty that is exorbitantly high for a club such as Avaí. This penalty indirectly forces Avaí to notify any offer for the transfer of the Player, which is disproportionate and genuinely jeopardises the integrity of competitions.

- Clause 4.4 thereby contravenes Article 18bis RSTP.

(iv) With respect to the information provided in TMS:

- Clubs have the obligation to declare in TMS whether they have entered into any agreement enabling them to influence the counter's club independence in employment and transfer-related matters.

- The Appellant breached Article 4 (3) Annexe 3 RSTP by wrongly declaring in TMS that there was no party influence in scope of the transfer of the Player.

(v) With respect to the proportionality of the sanction:

- The Appellant did not contest the amount of the fine imposed by the Disciplinary Committee, since it merely requested that the Appealed Decision be set aside and that no sanction be imposed on it.

- The amount of the fine shall therefore not be reviewed.

## V. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 24 June 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport against FIFA by which it challenged the Appeal Committee's decision of 8 April 2021 (the "Appealed Decision") in accordance with Article R48 of the Code of Sports-Related Arbitration (the "CAS Code"). In its Statement of Appeal, the Appellant nominated Mr Massimo Coccia, Law Professor and Attorney-at-law in Rome, Italy, as arbitrator.

16. On 8 July 2021, the Respondent nominated Mr Ricardo de Buen Rodríguez, Attorney-at-law in Mexico City, Mexico, as arbitrator.

17. On 14 July 2021, the Appellant filed its Appeal Brief within the extended time-limit, in accordance with Article R51 of the Code.

18. On 24 August 2021, the Respondent filed its Answer within the extended time-limit. The CAS Court Office notified such Answer to the Appellant and informed the Parties that the Panel appointed to decide on the present matter was constituted as follows:

    President: Mr Alexander McLin, Attorney-at-law in Lausanne, Switzerland,

    Arbitrators: Mr Massimo Coccia, Law Professor and Attorney-at-law, Rome, Italy,

    Mr Ricardo de Buen Rodríguez, Attorney-at-law in Mexico City, Mexico.

19. In the same letter, the CAS Court Office invited the Parties to indicate whether they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions.

20. On 25 August 2021, the Respondent stated that a hearing was unnecessary and requested the Panel to decide based on the Parties' written submissions only.

21. On 30 August 2021, the Appellant informed the CAS Court Office that it preferred a hearing to be held. Alternatively, it requested a second round of submissions.

22. On 6 September 2021, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in this matter, by videoconference, and consulted the Parties about possible hearing dates.

23. On 8 September 2021, the CAS Court Office apprised the Parties that, in view of their respective availabilities, a hearing would take place on 17 November 2021. It also invited them to provide a list of their hearing attendees.

24. On 17 September 2021, the CAS Court Office informed the Parties that the Panel shall be assisted by Ms Alexandra Veuthey, Clerk with the CAS.

25. On 23 September 2021, the Respondent provided the CAS Court Office with the names of its hearing attendees. The Appellant did likewise six days later.

26. On 26 October 2021, the CAS Court Office issued an order of procedure (the "Order of Procedure") and invited the Parties to return a signed copy of it, which they did.

27. On 17 November 2021, a hearing was held by videoconference. In addition to the Panel, Ms Alexandra Veuthey, CAS Clerk, and Mr Fabien Cagneux, Managing Counsel, the following persons attended the hearing remotely:

For the Appellant: Mr Martin Páez, Attorney-at-law
Ms Celia Falé, In-House Counsel
Mr Miguel Lopes Lourenço, In-House Counsel

For the Respondent: Mr Jaime Cambreleng Contreras, Head of Litigation
Mr Roberto Nájera Reyes, Senior Legal Counsel

28. At the outset of the hearing, the Parties declared that they had no objections as to the constitution of the Panel.

29. The Parties thereafter were given a full opportunity to present their case, submit their arguments and submissions and answer the questions posed by the Panel.

30. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and confirmed that their right to be heard has been fully respected.

## VI. SUBMISSIONS OF THE PARTIES

### A. The Appellant

31. In its Appeal Brief, the Appellant requests the following relief:

*"(a) To uphold the present Appeal in its entirety;*

*(b) To annul and set aside the Decision passed on 8 April 2021 by the FIFA Appeals Committee, and to replace it with a new decision which determines that no violation of art. 18bis and art. 4 par. 3 of Annexee 3 was committed by the Appellant;*

*(c) Subsidiarily, to reduce the fine set in the Decision in a way that is proportional to the infringement in question;*

*(d) To order FIFA to reimburse the Appellant for the payment of the FIFA appeal fee in the amount of CHF 1.000 (one thousand Swiss francs),*

*(e) To order FIFA to reimburse the Appellant for the payment of the CAS Court Office fee in the amount of CHF 1.000 (one thousand Swiss francs), and;*

*(f) To order FIFA to pay the Appellant a contribution towards its legal and other costs within this arbitration, in an amount of CHF 5.000 (five thousand Swiss francs)".*

32. The Appellant's submissions, in essence, may be summarised as follows:

(i) Article 18bis RSTP was unclear until CAS recent jurisprudence.

- Article 18bis RSTP was introduced in 2008 as a response to the issues related to the "Tevez Case", in which an agreement between an investment fund and a club allowed the former to decide on Tevez's transfer regardless of the club's choice.

- A that time, there was a "lack of clarity" regarding the definition of "influence" and FIFA, in violation to the principle of legality and predictability, did not clearly address the types of clause that would fall under the scope or Article 18bis RSTP.

- However, the methods of interpretation seemed to show that this Article only prohibited "direct" or "determinative" influence; other types of influence were also not sanctioned in the period between 2008 and 2015.

- Around 2015, FIFA abruptly modified its interpretation of Article 18bis RSTP, drastically expanding its scope of application, without modifying the article's wording to that effect; it started to sanction other types of influence, while sometimes renouncing to open investigations in cases similar to that of the Appellant.

- Various recent CAS awards have shed light upon the concept of "influence" (CAS 2017/A/5463; CAS 2019/A/6301; TAS 2020/A/7158; CAS 2020/A/7008 & 7009); they interpret this concept very narrowly and restrictively, and maintain that only a high threshold can trigger the application of sanctions.

- This restrictive interpretation is justified, since Article 163 of the Swiss Code of Obligations (CO) already allows judges to reduce excessive sanctions when needed.

(ii) In accordance with CAS recent jurisprudence, the Agreement cannot generate an influence that would breach Article 18bis RSTP.

- According to CAS, one single agreement is not sufficient to generate an influence that could violate Article 18bis RSTP, unless the player is exceptionally important; there must be a network of similar agreements for various players that, aligned together, can truly influence the independence, policies or performance teams of a club (CAS 2019/A/6301, §177).

- In the same vein, the circumstances of the case, such as the sporting and financial situation of the parties, and the number and economic value of the players for which the club entered into a contractual relationship, must be considered (CAS 2020/A/7008 & 7009, §76).

- In the case at stake, the Agreement is limited to one single Player and cannot lead to a situation of influence. In particular, there is no network of similar agreements with Avaí; and the Player was transferred *"free of any fee agreed between the parties"*.

- Additionally, Article 18bis RSTP *"must be interpreted very restrictively"* and, in case of doubt, the adjudicatory body must favour the principle of freedom of contracts. Thus, a sanction should only be imposed in situations in which the other party has been granted *"a real ability to exert effective influence, rather than a hypothetical or*

*theoretical one"*. Likewise, the integrity of competition must be undermined (CAS 2017/A/5463, §92; CAS 2020/A/7008 & 7009, §§ 66 and 72; CAS 2020/A/7158, §§116 and 128).

(iii) In the present case, these conditions are not met. Clause 2.3 of the Agreement does not breach Article 18bis RSTP.

- Clause 2.3. would only be triggered if the Player is transferred to Benfica's main rivals and, considering that the anti-competitor clause is limited to three out of thousands of clubs in the world, there is no real influence on Avaí's decisions.

- The situations in which Benfica could exert influence over Avaí by means of Clause 2.3 are too limited in order to fulfil the criteria as stipulated in the abovementioned CAS awards.

- In particular, Clause 2.3 does not undermine the integrity of competitions, and is even less restrictive than other sell-on clauses recently admitted by CAS (TAS 2020/A/7158); it is lawful, and in line with the principle of contractual freedom (ibid, § 96; CAS 2020/A/7008 & 7009, § 66).

- At the time of signing the Agreement, there were no guidance from FIFA, nor legal precedents found in FIFA nor CAS jurisprudence, that would indicate that Clause 2.3 could lead to sanctions. On the contrary, such a clause was a very commonplace in clubs with big domestic rivals.

- FIFA only started to sanction these clauses more than 10 years after the introduction of Article 18bis RSTP, which contravenes the principle of legality and predictability of sanctions; it is now estopped from applying this rule in a different way. In any case, inconsistencies in its rules shall be construed against it, according to the *contra proferentem* principle (CAS OG 08/002; CAS 2014/A/3832 & 3833).

(iv) Clause 4.4 of the Agreement does not breach Article 18bis RSTP.

- FIFA has misunderstood the meaning of Clause 4.4; this clause is by no means there to protect the Appellant's sell-on right. Such interpretation lacks contractual or legal basis and goes against all principles of interpretation. It also starts from the erroneous premise that any termination with just cause by a player would lead the old club to miss out its share of transfer sum.

- Clause 4.4 aims to avoid a situation in which a mutual termination, or any other way of removing Avaí's rights over the Player's registration, is put in place as a way to circumvent the Appellant's preferential right.

- FIFA wrongly considered that Clause 4.4 would trigger an automatic penalty in case of a termination through mutual agreement or by the Player with just cause,

on the grounds that the Player would become a free agent and that the preferential right would automatically cease.

- Clause 4.4's preferential right is meant to be exercised *before* removal or disposal of the Player's rights; afterwards, the Player will indeed become a free agent and will be able to negotiate with any club.

- Any notification from Avaí or the Player before they enter into a mutual termination or allow a termination with just cause could be easily implemented and would suffice to avoid the penalty. In addition, the termination with just cause by the Player would not lead the Appellant to miss out its share of transfer sum (CAS 2009/A/1756, §17).

- Alternatively, even if Clause 4.4 served to protect the Appellant's sell-on right in case of termination with just cause by the Player, Article 18bis would not be breached.

- Clause 4.4 is a standard and therefore a perfectly legal preferential right clause, in light of FIFA's longstanding practice and Manual on TPI and TPO (p. 185).

(v) The information declared in TMS does not breach Article 3(3) of Annexe 3 RSTP.

- As no violation of Article 18bis exists, no violation of Article 4 (3) of Annexe 3 can exist either.

- In any case, FIFA cannot sanction the Appellant for both breaches, since it would contravene the principle *ne bis in idem*.

(vi) The sanction is disproportionate.

- Subsidiarily, the sanction is disproportionate, and should be reduced on the basis of various mitigating factors and recent FIFA and CAS jurisprudence (TAS 2020/A/7158, where the sanction was a fourth of the fine imposed on the Appellant).

## B. The Respondent

33. In its Answer, the Respondent requests the following relief:

*"(a) reject the Appellant's appeal in its entirety;*

*(b) confirm the decision FDD-6372 rendered by the FIFA Appeal Committee on 8 April 2021;*

*(c) order the Appellant to bear all costs incurred with the present procedure;*

*(d) order the Appellant to make a contribution to FIFA's legal costs".*

34. The Respondent's submissions, in essence, may be summarised as follows:

(i) Article 18bis RSTP has always been clear and enforceable.

- Article 18bis RSTP, like any other legal provision in the world, is subject to the methods of interpretation of law.

- Article 18bis RSTP clearly establishes a prohibition on clubs from acquiring the capacity to influence other parties or clubs from acquiring the possibility to influence them in their independence or the performance of their teams.

- Article 18bis RSTP has the purpose of promoting *"integrity, ethics and fair-play with the view to preventing all methods of practices, such as corruption, doping or match manipulation which might jeopardise the integrity of matches, competitions, players, officials and members associations or give rise to abuse association of football"* (Manual on TPI and TPO, p. 6 [recte: p. 9]).

- Article 18bis RSTP is intentionally broad, in order to encompass all possible types of undue influence on clubs and, therefore, be in a position to tackle the objective sought by FIFA. This objective cannot be left to the outcome of a hypothetical dispute and possible sanction reduction under Article 163 CO.

- Benfica was fully able to foresee the potential consequences when it included the undue clauses in the Agreement, especially considering the purpose and aim of Article 18bis RSTP.

- CAS recent awards, quoted by the Appellant, already dismissed the arguments of the Appellant regarding the alleged "legal uncertainty" and "definition of influence" of Article 18bis RSTP. They stated that the absence of sanctions based on Article 18bis RSTP during several years did not detract from its mandatory application and enforceability. They also confirmed the *ratio legis* behind this article, and emphasised the importance of the context in which the influence is exercised, such as the sporting and financial means of the parties and the amount at stake (CAS 2020/A/7008 & 7009, §§54-59 and 76; CAS 2017/A/5463, §§86-87 and 98; CAS 2020/A/7414, §196).

- In this context, the integrity of competitions should not be considered as a standalone criterion to recognise the existence of influence. It merges with the assessment of the sporting and financial means of the clubs (TAS 2020/A/7158, §§143-144, where the Panel concluded that the integrity of competition was not jeopardised because the two clubs involved had equal bargaining powers).

(ii) In accordance with CAS recent jurisprudence, the Agreement can generate an influence that would breach Article 18bis RSTP.

- The acquisition of undue influence over one single transfer of one single player constitutes a breach of Article 18bis RSTP (CAS 2017/A/5463, §4; CAS 2018/A/6027, §4; CAS 2020/A/7016, §4; CAS 2020/A/7414, §171; CAS 2020/A/7158).

- The award quoted by the Appellant (CAS 2019/A/6301) is taken out of its original context (transfer and registration of minor players, where Article 18bis was only discussed on an ancillary basis, in light of clubs' policies). It cannot be used to introduce additional or inexistent requirements to the applicable regulations (CAS 2018/A/5546 & 5571, §90; CAS 2020/A/7008 & 7009, §71).

- The execution of Clauses 2.3 and 4.4 of the Agreement would seemingly lead to Avaí's bankruptcy, which demonstrates that a single transfer can condition and limit a club's independence.

(iii) Clause 2.3 of the Agreement breaches Article 18bis RSTP.

- Clause 2.3 clearly provides that Avaí would have to pay an additional EUR 10,000,000 if the Player were to be transferred to either FC Porto, Sporting Clube de Portugal or Sporting Clube de Braga. It is problematic both *per se* and in light of the specific circumstances of the case.

- Contrary to the Appellant's allegations, the fact that this clause is limited to three clubs is not relevant, since Article 18bis RSTP does not differentiate between degrees of influence. Moreover, the CAS award fallaciously invoked by the Appellant (TAS 2020/A/7158) focused on one club only, and did not decide that the influence on a club's independence would depend on the number of competitors involved.

- Clause 2.3 is aimed at influencing Avaí's decision-making process concerning the future transfer of the Player in the best interests of Benfica. It interferes with the independence of Avaí by establishing a very high penalty in order to avoid the transfer of the Player to the main and direct competitors of the Appellant at national level.

- Clause 2.3's impact is further accentuated by the abysmal difference in the Parties' sporting status and financial means. The penalty of EUR 10,000,000 represents, *inter alia*, 156 times the transfer earnings of the Brazilian club in the season 2020/2021, 10,000% the economic value of the Player and 400 times his annual salary.

- This difference shows, once again, that the Appellant's reliance on TAS 2020/A/7158 is misplaced, since the clubs involved in that case had equal bargaining powers (ibid, §§143-144).

(iv) Clause 4.4 of the Agreement breaches Article 18bis RSTP.

- Clause 4.4 provides that Avaí would pay a penalty of EUR 10,000,000 if (a) Avaí transfers the Player, (b) if Avaí and the Player mutually terminate the employment contract, (c) if the Player terminates the contract with just cause or (d) if Avaí permits the expiration of the Player's federative and economic rights without previously granting Benfica its right of preference.

- Clause 4.4 aims to influence and interfere in Avaí's independence on employment related matters, by preventing it from ending the employment contract with its Player even if this is in its best interest. It also interferes in Avaí's transfer-related matters, by forcing it to provoke the transfer of the Player in order to grant Benfica its right of preference.

- Any early termination of the Player's employment contract would automatically trigger the penalty, since the Player would *then* become a free agent and find himself in a position to negotiate with other clubs.

- The Appellant's allegation, according to which Clause 4.4 only means to respect its preferential right, does not stand. Its wording is much broader than what the Appellant alleges, and also encompasses the protection of its sell-on clause.

- Clause 4.4.'s impact is further accentuated by the abysmal difference in the Parties' sporting status and financial means (see above).

(v) The information declared in TMS breaches Article 3 (3) of Annexe 3 RSTP.

- The absence of declaration of the undue interference contained in Clauses 2.3 and 4.4. of the Transfer Agreement breaches Article 4 (3) Annexe 3 RSTP.

- The Appellant cannot rely on the principle of *"ne bis in idem"*, since Article 18bis RSTP and Article 4 (3) Annexe 3 RSTP sanction different conducts.

(vi) The sanctions imposed by FIFA are proportionate.

- CAS power of review regarding disciplinary sanctions and Article 75 of the Swiss Civil Code (CC) is limited to arbitrary situations.

- The sanctions imposed by FIFA are proportionate, in light of FIFA rules, relevant jurisprudence, and the specific circumstances of the case.

- The sanctions are in particular in line with the determining factors of culpability foreseen in Article 39 (4) FDC, as well as FIFA and CAS jurisprudence (as per the numerous references provided).
- The Appellant cannot rely on TAS 2020/A/7158, which involves a fine imposed on an influenced club.
- The Appellant's degree of responsibility is high and its conduct reprehensible and inexcusable. Despite its ample experience, it breached provisions of substantial importance, with full knowledge of the risks involved, for the third time in a row.

## VII. JURISDICTION

35. Article R47 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".*

36. Articles 53.3, 56.1 and 57.1 of the FIFA Statutes (May 2021) respectively provide:

> Art. 53.3: *"Decisions pronounced by the Appeal Committee shall be irrevocable and binding on all the parties concerned. This provision is subject to appeals lodged with the Court of Arbitration for Sport (CAS)"*;
>
> Art. 56.1: *"FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agents"*; and
>
> Art. 57.1: *"Appeals against final decisions passed by FIFA's legal bodies* […] *shall be lodged with CAS within 21 days of notification of the decision in question".*

37. In addition, the Parties have expressly confirmed the jurisdiction of the CAS by signing the Order of Procedure. It follows from all the above that CAS has jurisdiction to decide on the present dispute.

## VIII. ADMISSIBILITY

38. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".*

39. Article 57 of the FIFA Statutes (see *supra*) provides a time limit of 21 days after notification to lodge an appeal against a decision adopted by one of FIFA's legal bodies, such as the FIFA Appeal Committee.

40. The Appealed Decision was notified with grounds to the Appellant on 3 June 2021. The Appellant timely lodged its Statement of Appeal with the CAS Court Office on 24 June 2021, *i.e.* within the twenty-one days allotted under the aforementioned provision. The Respondent raised no objections as to admissibility issues. It follows that the appeal is admissible.

## IX. APPLICABLE LAW

41. Article R58 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

42. Article 56.2 of the FIFA Statutes so provides:

> *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, subsidiarily, Swiss law".*

43. Accordingly, the present disciplinary dispute must be decided in accordance with the applicable FIFA rules and regulations, such as in particular the RSTP and the FDC; subsidiarily, the Panel shall apply Swiss law.

44. Article 18bis RSTP (January 2020 edition, which was in force when the Agreement was signed) provides as follows:

> *"1. No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, 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.*
>
> *2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article".*

45. Article 4 (3) of Annexe 3 RSTP states that *"Clubs* […] *must provide the following compulsory data when creating instructions, as applicable:* […] *Declaration on third-party payments and influence* […]*".*

46. Finally, the relevant articles of the FDC (June 2019 edition, as per the same reasoning) will be discussed further, in relation to the sanction. No attention will be paid to its previous version, which seem to have been mistakenly quoted by FIFA in its written submissions, and that are not rooted in FIFA disciplinary bodies' decisions.

## X. MERITS

47. The main task of the Panel is to determine whether Benfica violated Article 18bis RSTP when it entered into the Agreement. In this respect, Benfica argues that this provision has been unclear and remained unapplied until recently, and thus cannot be held against it. In addition, it maintains that recent CAS jurisprudence shows that the Agreement is lawful. On the other hand, FIFA contends that Article 18bis RSTP has always had a clear and straightforward application and was violated by Benfica when entering into the Agreement. Therefore, in order to establish whether Benfica acted in breach of Article 18bis RSTP, the Panel should first assess the content of the prohibition enshrined in such provision and then examine whether it was violated by the Appellant. If the violation stands, even partially, the Panel then has to determine whether Article 4 (3) Annexe 3 RSTP was also infringed, and whether the sanctions imposed by the FIFA Disciplinary Committee and confirmed in the Appealed Decision remain appropriate or need amending.

### A. On the conduct prohibited under Article 18bis RSTP

48. The Parties disagree as to the reach and interpretation of Article 18bis RSTP.

49. On the one hand, Benfica submits that Article 18bis RSTP was scarcely applied by FIFA between its entry into force (2008) and the year in which Benfica entered into the Agreement (2020), thereby leaving clubs with no guidance whatsoever as to its actual scope of application and binding effect. It contends that the rule has remained unclear until CAS' recent jurisprudence, which now interprets the concept of "ability to influence" very narrowly. It argues that, as per the "predictability test" and doctrine of estoppel, an unclear or previously non-enforced provision may not lead to the application of any sanction.

50. On the other hand, FIFA insists that the rule is clear and, regardless of the fact that there was no application of the rule in its first years, it has always been mandatory on clubs and it was violated in the case at stake. It sustains that the wording of the provision is intentionally broad in order to encompass all kinds of undue influence on clubs but, in any case, its wording is clear.

51. In order to resolve that disagreement, the Panel must preliminarily establish whether the wording and application of Article 18bis RSTP are flouting the "predictability test" and doctrine of estoppel because, if this were so, the Panel should set aside right away the sanctions imposed by FIFA on the Appellant. If not, the Panel should examine this provision in more depth, and ascertain whether and to which extent the Appellant breached it, and what are the consequences thereof.

#### *a. Violation of the predictability requirement and doctrine of estoppel*

52. The Appellant challenges the applicability of Article 18bis RSTP to its conduct on the basis that such provision does not conform to the principle of predictability, is ambiguous and should be interpreted against its drafter (*"contra proferentem"*). It also suggests that the Respondent had never enforced it until recently, and is now estopped from applying it.

53. The Panel concurs with the Appellant that CAS jurisprudence requires, for a sanction to be imposed, that sports disciplinary rules be sufficiently clear and precise in proscribing the misconduct with which someone is charged, pursuant to the principle *nulla poena sine lege clara* (principle of predictability). As a matter of course, CAS panels have held that sports organisations may not impose sanctions without a proper legal or regulatory basis and that such sanctions must satisfy a predictability test (see CAS 2020/A/7008 & 7009, §53, and the references therein).

54. However, the Panel confirms, in compliance with that jurisprudence – which already involved the Appellant –, that Article 18bis RSTP is sufficiently clear and precise in prohibiting clubs from entering into contracts which enable other parties to acquire the ability to influence, in employment and transfer-related matters, the independence, policies or teams' performances of those clubs. This leaves no room for a *contra proferentem* interpretation (CAS 2020/A/7008 & 7009, §§49 and 54).

55. The Panel recalls that a rule that is broadly drawn, such as Article 18bis RSTP, does not necessarily lack sufficient legal basis because of that character. Indeed, *"disciplinary provisions are not vulnerable to the application of that rule [nulla poena sine lege clara] merely because they are broadly drawn. Generality and ambiguity are different concepts"*. Therefore, a sports governing body is certainly entitled to *"draft a disciplinary provision of a reach capable of embracing the multifarious forms of behaviour considered unacceptable in the sport in question"* (CAS 2014/A/3516, §105, quoted approvingly by CAS 2017/A/5086, §151, and CAS 2020/A/7008 & 7009, §55).

56. Thus, the possibility for Article 18bis RSTP to catch an unspecified variety of contracts as providing a party with the ability to unlawfully influence clubs' conduct does not mean that it lacks sufficient legal basis and predictability. Disciplinary sanctions imposed by sports governing bodies must only conform to civil law standards, which are often inherently vague and reveal their full meaning on the basis of judicial application (CAS 2020/A/7008 & 7009, §56, which refers to Swiss Federal Tribunal (SFT)'s Judgement of 31 March 1999, 5P.83/1999, §8b).

57. The fact, essentially undisputed by FIFA, that for some years the FIFA disciplinary bodies hardly or never prosecuted any clubs for violations of Article 18bis RSTP does not take away the binding character and enforceability of this provision, and the resulting duty of clubs not to breach it (2020/A/7008 & 7009, §§30(i)g and 57).

58. The position of the Appellant finds no support in the doctrine of estoppel, which primarily prevents sports federations from taking explicit contradictory positions, and has a very limited scope in disciplinary proceedings (CAS OG 14/002, §8.17; CAS 2016/O/4684, §83; 2017/A/5050, § 81; CAS 2020/A/7008 & 7009, §§30g and 57). The award quoted by the Appellant is a good illustration of this, since it relates to individual assurances given to an athlete by its international federation about his eligibility, which were withdrawn at a later stage (CAS OG 08/002, §§12-13; see also CAS OG 02/006, §§17 to 19). Implicit assurances may also exceptionally be considered, but should not be assimilated to the (temporary) non-enforcement of legitimate and binding provisions; otherwise, many sports and state provisions would run the risk of no longer achieving their goals due to previous unpunished violations (in the same vein, see CAS 2020/A/7008 & 7009, §§30(i)g and 57).

59. The Panel is also aware that FIFA's failure of enforcing of this rule for some time might, under certain conditions, affect the assessment of the sanction and benefit clubs that were left in uncertainty and/or expected that they would not be punished (CAS 2020/A/7008 & 7009, §55; CAS 2017/A/5463, §87).

60. Nonetheless, the Panel is of the view that this circumstance is of no avail for the Appellant in this case. Indeed, at the time of signing the Agreement under review, on 30 January 2020, the Appellant had already been sanctioned by FIFA Disciplinary and Appeal Committees for two similar violations (CAS 2020/A/7008 & 7009, §§12 et seq). While these cases were only definitely decided by the CAS on 10 May 2021, the Appellant should, at the very least, have suspected that it was engaging in reprehensible conduct, especially since other clubs had already unsuccessfully challenged their sanctions (see e.g. CAS 2017/A/5463).

61. In conclusion, the Panel finds that Article 18bis RSTP does not breach the predictability requirement enshrined in the principle *nulla poena sine lege clara*, and is clearly binding, regardless of the doctrine of estoppel.

***b. Purpose and interpretation of Article 18bis RSTP***

62. The Panel must turn to the Parties' disagreement over the correct purpose and interpretation of Article 18bis RSTP. In defending the interpretive approach of Article 18bis RTSP made by its disciplinary bodies, FIFA puts a lot of emphasis on its true meaning through the analysis of the purpose sought and the interests protected. Benfica criticises FIFA's interpretation of this provision for having changed in recent times and relying on a strict approach that is not consistent with CAS' recent jurisprudence. At the heart of this disagreement is the concept and threshold of "influence" that can trigger the application of Article 18bis RSTP and the imposition of sanctions. Other, more minor, differences of opinion concern the interaction between this rule and Article 163 CO, which governs the amount, nullity and reduction of contractual penalties.

63. The Panel notes that it is well-established under CAS jurisprudence, referring to the case law of the Swiss Federal Tribunal, that:

> *"According to the SFT, the starting point for interpreting is indeed its wording (literal interpretation). There is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review. This may result from the drafting history of the provision, from its purpose, or from the systematic interpretation of the law. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as its relationship with other legal provisions and its context (systematic interpretation), the goal pursued, especially the protected interest (teleological interpretation), as well as the intent of the legislator as it is reflected, among others, from the drafting history of the piece of legislation in question (historical interpretation) (SFT 132 III 226 at 3.3.5 and references; SFT 131 II 361 at 4.2). When called upon to interpret a law, the SFT adopts a pragmatic approach and follows a plurality of methods, without assigning any priority to the various means of interpretation (SFT 133 III 257 at 2.4; SFT 132 III 226 at 3.3.5)"* (CAS 2013/A/3365 & 3366, §139; CAS 2020/A/7008 & 7009, §61; CAS 2020/A/7414, §151).

64. As stated in a similar vein by other CAS panels:

> *"According to the jurisprudence of the Swiss Federal Tribunal* […]*, the interpretation of the statutes and rules of FIFA, a large sport association with seat in Switzerland, starts from the literal meaning of the rule, which falls to be interpreted, but must show its true meaning, which is shown by an examination of the relation with other rules and the context, of the purpose sought and the interest protected, as well as of the intent of the legislator. In this vein, CAS Panels (CAS 2008/A/1673; CAS 2009/A/1810; CAS 2009/A/1811) have held that the adjudicating body has to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax, but has further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entire regulatory context in which the particular rule is located"* (CAS 2017/A/5173, §74; CAS 2020/A/7008 & 7009, §62; CAS 2020/A/7414, §153).

65. Therefore, in keeping with those precedents, the Panel recalls that the starting point to interpret Article 18bis RSTP must be its literal meaning, complemented by the other available interpretive means to the extent needed to find its true meaning and its scope of application.

66. Thus, in starting with the language of this rule, the Panel must determine the meaning not only of the concept of "influence", but also its relationship with the literal targets of such influence, i.e. the club's "independence", "policies" or "performance of its teams" in the context of "employment and transfer-related matters".

67. Additionally, in line with the quoted CAS jurisprudence, the Panel must consider the purpose of Article 18bis RSTP, which – as made clear by FIFA and elaborated by CAS precedents – is aimed at (i) protecting the sporting policies and operations of football clubs from being unduly influenced by other parties and (ii) avoiding conflicts of interests that might lead to practices affecting the integrity of the competition (TAS 2016/A/4490, §101; CAS 2017/A/5463, §80; CAS 2020/A/7008 & 7009, §65; Manual on TPI & TPO, p. 14).

68. Moreover, in examining this rule in the context of Swiss law, the Panel observes that Article 18bis RSTP encompasses a prohibition related to the club's conduct when entering into a contract. Therefore, this provision has the potential to drastically restrict the parties' "freedom of contract", which is a fundamental principle of Swiss law, enshrined in Article 19 CO and Article 27 of the Swiss Constitution. Accordingly, as persuasively stated in several CAS precedents, such a restrictive provision must globally be interpreted narrowly and applied on case-by-case basis bearing in mind that, in case of doubt, the adjudicating body must favour the principle of freedom of contract (CAS 2017/A/5463, § 92; CAS 2020/A/7008 & 7009, §66; CAS 2020/A/7158, § 103; CAS 2020/A/7414, 157; *see also* Manual on TPI and TPO, p. 14).

69. Ultimately, the Panel wishes to clarify that, in view of Article 18bis RSTP's *ratio legis*, it would be more than random to leave problematical contractual clauses to the discretion of a judge in case of a hypothetical dispute under Article 163 CO. The Panel also observes that Article 163 (3) CO, which provides that *"the court may reduce penalties that it considers excessive"*, was primarily designed to reduce excessive contractual penalties aimed at reinforcing the main obligation and/or ensuring its proper performance. It is not intended to allow judges to review a simple contractual determination of damages, nor extensively assess the legality of all types of

contractual clauses against the background of integrity (for more details, see e.g. CAS 2018/A/5807, §65; CAS 2018/A/5738, §§34 et seq; CAS 2018/A/5697, §§85 et seq; SFT 82 II 550, §1; SFT 83 II 525, §3).

70. With this in mind, the Panel makes the following considerations.

### *c. The relevant "influence" under Article 18bis RSTP*

71. The Parties disagree as to the correct interpretation of the concept of "influence" provided in Article 18bis RSTP, and the minimum threshold that can trigger sanctions in light of CAS' recent jurisprudence.

72. Benfica interprets the concept of influence under Article 18bis RSTP very restrictively, and maintains that only a high threshold can trigger the application of sanctions. It submits that several agreements are necessary to generate an influence that could violate this provision, unless the transferred player is exceptionally important. Likewise, the influence must be effective rather than hypothetical and the integrity of competition undermined.

73. FIFA acknowledges that not all third-party influence agreements are unlawful. Nevertheless, it argues that the acquisition of undue influence over one single transfer of one single player already constitutes a breach of Article 18bis RSTP. It also contends that the integrity of competitions is intrinsically bound to the sporting and financial means of the clubs and the amounts at stake when it comes to assessing the existence of influence.

74. The Panel understands that an infringement of Article 18bis RSTP can occur if the influence is effective and has the potential to actually impact the club's determination, regardless of its practical materialisation.

75. This interpretation is corroborated by CAS jurisprudence, which states that:

> *"*[…] *(i) the contract at stake shall enable or entitle the third party to have an influence on the club in the terms described in such article, regardless of the practical materialization of this influence or not, and (ii) that this capacity to influence shall be real and effective. This prohibition established in Article 18bis RSTP will apply insofar as the contract at stake confers to a third party a real and true capacity of producing effects, condition or affect the conduct of a club in labour or transfer-related matters, in a way that the club's independence and autonomy is really restricted* […]*"* (CAS 2020/A/7016, §56; CAS 2020/A/7414, §163).

76. In other words, a violation of Article 18bis RSTP occurs when the club enters an agreement that enables the other party to acquire the ability to exert undue influence. This is how CAS interprets the expression *"from acquiring the ability"* of Article 18bis RSTP. No influence has to actually occur and be proven for Article 18bis RSTP to be breached (CAS 2017/A/5463, §91; CAS 2020/A/7414, §164).

77. The Panel reiterates, however, that the limiting effects that this provision can have on the rights of a club demand that it is interpreted restrictively. Therefore, not every possibility of influencing another club shall be considered as an automatic violation of this prohibition. In

this context, a careful examination of Article 18bis RSTP show that both its language (*"employment and transfer-related matters";* the club's *"independence, its policies or the performance of its teams"*) and purpose (the protection of the integrity of competitions and clubs) point to a construal under which the influence exercised is examined in light of the circumstances of the case.

78. Principal among those circumstances are the sporting and financial situation of the parties and the economic value of the transferred player. In this regard, the Panel confirms the views expressed in the previous award already involving Benfica (CAS 2020/A/7008 & 7009, §76), which states that:

> *"*[…] *in players' employment and transfer matters, the degree of influence that a given contract, or certain contractual clauses, can exert on the "independence", "policies" and "teams' performance" of a contracting club can significantly differ depending on (i) the sporting and financial situation and weight of such club as opposed to the sporting and financial situation and weight of the other contracting party or parties, and (ii) the number and economic value of the players for which the club entered into a contractual relationship. In other words, in applying Article 18bis RSTP, there must be a case-by-case appraisal of the relative standing, prominence and market power of the involved clubs and companies".*

79. This is further elaborated in a recent award (CAS 2020/A/7414, §196), which highlights the importance of the amounts provided for in the disputed contract:

> *"The amount of money that the influenced club Cádiz must pay to Udinese in the event of breaching Clause 3 is an essential element to determine if the identified influence is real, effective and contrary to Article 18bis RSTP".*

80. Along the same lines, the Manual on TPI and TPO (p. 14) mentions that the prohibition *"must be applied in a reasonable manner, on case-by-case basis"*, which means that in situations where it would be unreasonable to assume the existence of an "undue influence", no violation occurs.

81. Finally, the Panel fully endorses the views expressed in CAS well-established jurisprudence, according to which one single agreement can constitute undue influence under Article 18bis RSTP (CAS 2017/A/5463, §4; CAS 2018/A/6027, §4; CAS 2020/A/7016, §4; CAS 2020/A/7414, §171; CAS 2020/A/7158). As FIFA rightly points out, the award quoted by Benfica is taken out of its original context, namely the transfer and registration of minor players, where Article 18bis was only discussed on an ancillary basis, in light of the clubs' policies (CAS 2019/A/6301, §§171 et seq.).

82. Having established the relevant criteria to be relied upon when applying Article 18bis RSTP, the Panel must turn to the provisions enshrined in the Agreement and sanctioned in the Appealed Decision, and determine whether they constitute an undue influence in the terms described above.

## B. On Benfica's ability to exert the influence envisaged in Article 18bis RSTP

### *a. Clause 2.3 of the Agreement*

83. The Panel finds it useful to recall the content of Clause 2.3 of the Agreement, which states as follows:

> *"If the transfer PLAYER is for Futebol Clube do Porto - Futebol, SAD, for Sporting Clube de Portugal - Futebol, SAD or the Sporting Clube de Braga, Futebol, SAD, is hereby expressly agreed that the BENFICA SAD will be due the amount corresponding to the ownership of the right to 50 % (fifty percent) of the total value of the transfer, plus an additional compensation of €10.000.000 (ten million), plus the VAT due to rate legal, all to be settled within 30 (thirty) days from the registration of the PLAYER's employment contract with one of the sports companies identified here".*

84. Benfica contends that Clause 2.3 is typical to third-party ownership agreements and merely assigns conditional financial obligations on Avaí in case it receives an offer to transfer the Player. It points out that the additional compensation is reasonable and acceptable in light of CAS jurisprudence, as it would only be triggered if the Player is sold to three Portuguese clubs, and was negotiated in the context of a free of charge transfer.

85. FIFA submits that this clause is problematic both in terms of its very existence and the context and amounts involved. It emphasises that Benfica could influence Avaí's decision as to whether or not to accept a transfer offer, since the financial consequences on Avaí are structured in order to be so prejudicial that the latter will never decide against Benfica's interest.

86. The Panel notes that the contractual clause at hand does not provide any direct obligation on Avaí as to whether or not to accept a transfer offer, but only forces it to bear the financial consequences of its decision.

87. Therefore, the Panel must analyse the bearing of the financial consequences in favour of Benfica on Avaí's independence in its transfer-related decisions. In other words, the Panel must establish whether such conditional obligations are structured in a way that their financial impact can efficiently and unreasonably influence Avaí when deciding whether or not to accept a transfer offer, aside from its autonomous sporting or economic convenience.

88. In this respect, the Panel observes that, unless Benfica successfully asserts its preferential right (Clause 4.2 of the Agreement), Avaí's financial obligations towards Benfica would be triggered based on the former's three alternative decisions, as follows:

    (i) Avaí decides to accept the transfer offer of one of the three of Benfica's domestic competitor clubs. In this case, it will have to pay Benfica the amount corresponding to the ownership of the right to 50 % (fifty percent) of the total value of the transfer, plus an additional compensation of EUR 10,000,000 (ten million).

    (ii) Avaí decides to reject the transfer offer of Benfica's domestic competitor clubs. In this case, Avaí would retain the services of the Player and not pay anything to Benfica.

(iii) Avaí decides to accept the transfer offer of any club in the world except one of the three of Benfica's domestic competitor clubs. In this case, it will only have to pay Benfica the amount corresponding to the ownership of the right to 50% (fifty percent) of the total value of the transfer.

89. The Panel concurs with FIFA that the first scenario may be extremely prejudicial to Avaí's financial stability, given that Avaí would *de facto* be prevented from accepting any offer that were not substantially more than EUR 10 million; the first scenario thus can have a bearing and a real ability to influence its decision as to whether or not to accept the offer made.

90. The amount of EUR 10,000,000 that Avaí would have to pay to Benfica, in addition to half of the transfer fee, substantially limits the chances for Avaí to gain some significant consideration by transferring the Player to one of the three Portuguese clubs mentioned in the Agreement. It is obvious that Avaí will try to avoid a transaction which could be very beneficial to both its own interests and those of the Player.

91. Thus, Clause 2.3 has the ability to effectively and unreasonably dissuade Avaí from transferring the Player to one of Benfica's rival clubs at national level, and seeks to benefit Benfica to the detriment of its direct competitors and of Avaí, with possible consequent distorting effects on the players' transfer market. If the Player were to be transferred to FC Porto, Sporting Clube de Portugal or Sporting Clube de Braga, Avaí would not only be financially disadvantaged but heavily sanctioned by having to pay the amount of EUR 10,000,000 to Benfica. This overwhelming amount would undoubtedly force Avaí to reconsider the acceptance of an offer from any of these rivals of Benfica. In turn, Benfica profits by ensuring that none of its direct rivals would sign the Player or otherwise it would be financially compensated with an amount greater than what it would obtain if the Player were transferred to any other clubs.

92. The Panel considers that the following circumstances and statistics, provided and documented by FIFA, are decisive to establish a violation of Article 18bis RSTP with reference to Article 2.3 of the Agreement:

*- The financial differences between Benfica and Avaí*

Benfica is a top club among those earning the highest incomes in Europe. In 2021, it ranked in the 23rd position of the European clubs by revenue (EUR 170.3 million) in the list compiled by the consulting firm Deloitte. On the contrary, Avaí does not appear in any similar list for Latin America or even nationally for Brazil. Based on the information entered into FIFA TMS, Benfica has obtained a revenue of EUR 145 million from the international transfer of players during the last two seasons, while Avaí only managed to earn USD 425,000.

*- The sporting differences between Benfica and Avaí*

Benfica is one of the most successful clubs in Europe. It has won 37 Primeira Liga titles, more than 20 Taca de Portugal trophies and two consecutive European Cups. It is the most popular Portuguese club worldwide and it has never been relegated from the top tier. Its stadium has the capacity for 65,647 spectators and it is the second club in the world in terms of affiliated

members (230,000). Avaí, on the other hand, is a modest and traditional football club of Florianópolis, Brazil, that normally plays in the second tier. It has only played a few times in the Serie A since its foundation in 1923. Its stadium has a maximum capacity of 17,800 spectators and it has 5,227 members.

*- The amounts at stake*

The Player was transferred to Avaí for free, indicating that Benfica did not seem to consider that the Player's economic rights had a significant value at that time. By way of comparison, if Avaí accepted an offer from one of Benfica's main rivals, it would have to pay EUR 10,000,000. The difference from valuing the Player's rights from EUR 0 to a compensation of EUR 10,000,000, which possibly amounts to a disguised penalty, cannot reasonably be justified The Player's economic rights appear to be currently valued at EUR 100,000. This means that the amount of EUR 10,000,000 is equal to 10,000% the value of the Player that was transferred for free by Benfica. This amount is equal to 28 times Avaí's transfer earnings in the 2019/2020 season and 156 times its transfer earnings of 2020/2021. It also represents more than 400 times the yearly salary of the Player, as provided for in his employment contract.

93. Benfica did not dispute the abovementioned statistics and acknowledged, in its written submissions, *"a difference in the standing"* between the Parties, while seeking to minimize its legal weight. It also highlighted, at the hearing, that Avaí was still in Serie A when it signed the Agreement. This specification, however, does not alter the Panel's position and the vast difference in the standing, prominence, and market power of the two clubs.

94. Moreover, the fact that Clause 2.3 is limited to three clubs in Portugal is of no avail to support the Appellant's arguments. On the contrary, the analysis of the professional pathway of the Player, of Brazilian nationality, shows that he has, since the beginning of his career, only played in Portugal, the country where he is probably well known and most likely to be hired. More generally, Portugal constitutes a very important market for Brazilian players, due notably to linguistic and administrative specificities (common language, few movement and visa restrictions, etc.).

95. The same is true for the CAS award invoked by the Appellant. This award focused on a prohibition that targeted only one club, and did not decide that the influence on a club's independence would depend on the number of competitors involved. More importantly, it concerned a contract concluded between two prestigious clubs with equal bargaining power (CAS 2020/A/7158, §§143 and 144).

96. The type of transfer (free of charge) is not particularly relevant either when it comes to assessing the compatibility of a contractual clause with FIFA regulations, nor is it a valid excuse to depart from them. It only underlines, once again, the difference in standing of both clubs.

97. Consequently, the Panel concludes that Article 2.3 of the Agreement enables Benfica to influence Avaí's independence in transfer-related matters through burdensome financial consequences granted in favour of Benfica, in violation of Article 18bis RSTP.

***b. Clause 4.4 of the Agreement***

98. In continuation, the Panel moves to analyse Clause 4.4 of the Agreement, which reads as follows:

> *"In the event that AVAÍ FC* […] *agrees to terminate by mutual agreement the sports employment contract that it celebrates on this date with the PLAYER , or allow the latter to operate the termination with just cause of the sports employment contract, or in addition, it in any way removes the PLAYER'S federative and / or economic rights without granting BENFICA SAD the aforementioned right of preference, it will be obliged to pay BENFICA SAD, as a penal clause, which the parties freely adjust and clarified, compensation of €10.000.000 (ten million), plus the VAT due at the legal rate".*

99. In other words, Clause 4.4 is a penalty clause by means of which Avaí is obligated to pay to the Appellant a penalty of EUR 10,000,000 if it fails to grant the Appellant the right of preference set out in Clause 4.1 in the event that the Player and Avaí mutually terminate the employment contract and/or the Player terminates the contract with just cause.

100. Benfica submits that Clause 4.4 is "common practice" in the world of football, perfectly legal and only exists to ensure that its preferential right is upheld. This preferential right is meant to be exercised *before* removal or disposal of the Player's right. Any notification from Avaí or the Player before they enter into a mutual termination or allow a termination with just cause could be easily implemented and would suffice to avoid the penalty.

101. Benfica argues that Clause 4.4 is clearly not drafted in a way to protect its right to 50% of a future transfer sum following the transfer of the player from Avaí FC to a third club, since the termination with just cause by the Player would not be deprive it of such right. Alternatively, even if Clause 4.4 served this purpose, Article 18bis RSTP would not be breached.

102. FIFA retorts that Clause 4.4 enables Benfica to exert undue influence on the independence of Avaí in employment and transfer-related matters, because its preferential right is meant to be exercised *after* removal or disposal of the Player's rights. The ability to influence Avaí employment-related matters stems from the fact that it would not be able to afford the termination of the Player's contract, which would automatically trigger the aforementioned penalty. Meanwhile, the ability to influence Avaí's transfer-related matters exists because Avaí would be forced to provoke the transfer of the Player in order to grant Benfica its right of preference.

103. FIFA contends that Clause 4.4 also indirectly aims to protect Benfica's right to 50% of a future transfer sum following the transfer of the Player from Avaí FC to a third club and prevent any possible related damages.

104. The Panel rejects FIFA's interpretation.

105. The Panel observes that Benfica accepted to transfer the Player to Avaí free of charge and, thus, it is more than reasonable that it demands in return to be granted the opportunity to match

another club's offer if it wishes to get this Player back at the end of the Agreement or, at least, to be compensated if it is deprived of this right.

106. Unlike FIFA, the Panel finds that, through Clause 4.4, Benfica is not provided with any real ability to influence the Appellant's independence in employment and transfer-related matters, since:

(i) Clause 4.4 is merely a way of ensuring the enforcement of the preferential right set out in Clause 4.1 of the Agreement.

(ii) According to the Manual on TPI and TPO (p. 175), preferential rights clauses – referred to as "matching rights" or "rights of first refusal" – are not, as such, regarded as a breach of Article 18bis RSTP by the FIFA administration. This fact is undisputed by the Parties and also confirmed in the Appealed Decision, which emphasises that *"Clause 4.1* […] *[is] not the clause under discussion"*.

(ii) It seems evident that the preferential right is meant to be exercised *before* removal or disposal of the Player's rights, as afterwards the Player will become a free agent and be able negotiate with any club. This right exists precisely to avoid reaching such a situation before the Appellant would have a chance to re-sign the Player.

(iii) Avaí could easily avoid the application of the penalty of Clause 4.4, by way of a single notification, before the termination of the Player's employment contract, either by mutual agreement or with just cause. Even a termination with just cause by the Player would, in principle, not prevent Avaí from fulfilling its obligations under the preferential right, since the Player would in any case have to first notify Avaí of his intention to terminate his contract if the situation does not improve and, in case of overdue payables, put the club in default, pursuant to FIFA regulations and the exigence of "*ultima ratio*" set by CAS precedents (see Articles 14 and 14bis RSTP; and, notably among others, CAS 2020/A/7380, §§79 *et seq*, and the references). Such requirement would apply regardless of the way the termination occurs, namely a formal termination letter or a determination of termination from the relevant dispute resolution body or arbitral tribunal (CAS 2021/A/7741 §§134 *et seq*).

(iv) Assuming that Avaí fails to comply with this simple formality, the only element that could be problematic in Clause 4.4 is the amount of the penalty. However, the amount of the penalty alone does not allow for a finding of "undue influence" under Article 18bis RSTP. In the worst-case scenario, the penalty could still be adjusted by the adjudicating body, if needed, based on Article 163 (3) CO, depending on the value of the Player at the time when the penalty is invoked.

(v) FIFA's broad interpretation of Clause 4.4, according to which the Appellant sought to protect its sell-on right, does not stand. It clearly goes against a literal interpretation of the clause, as its express wording indicates that the penalty is due only in case Avaí disposes of its rights over the Player without granting the preferential right.

Additionally, in accordance with the systematic interpretation, Clause 4 has 5 paragraphs, all of which expressly refer to the preferential right.

(vi) FIFA's broad interpretation would make sense if Benfica needed to be protected against the risk of missing its share of a future transfer sum if the Player's employment contract was deliberately terminated in a premature way. Yet, it is not supported by CAS precedents. On the contrary, the award quoted by Benfica shows that if the parties do not act in a loyal way, *"causing the loss of any transfer expectation, the conditions are deemed to be accomplished anyway, according to art. 156 CO. It follows that the third party is entitled to receive the amount agreed in the sell-on clause"* (CAS 2009/A/1756, summary statement 1 *in fine*).

107. Consequently, for the reasons explained above, the Panel deems that the Clause 4.4 does not contravene Article 18bis of the RSTP.

## C. The information declared in TMS breaches Article 4 (3) of Annexe 3 RSTP

108. According to Article 4 (3) of Annexe 3 RSTP, when creating a transfer instruction in TMS, clubs must provide certain compulsory data, including completing the declaration on third-party payments and influence.

109. Both Parties agree that Benfica did not mention any third-party influence when completing its transfer instruction. They have, however, different views as to the consequences of this absence of declaration.

110. Benfica holds that, without a breach of 18bis RSTP, there can be no violation of Article 4 (3) of Annexe 3 RSTP. In the alternative, Benfica invokes the *ne bis in idem* principle, which prohibits a sanction from being imposed twice for the same cause of action, to escape any infringement. FIFA refutes both arguments, and sticks to a strict and purposive interpretation of its regulations.

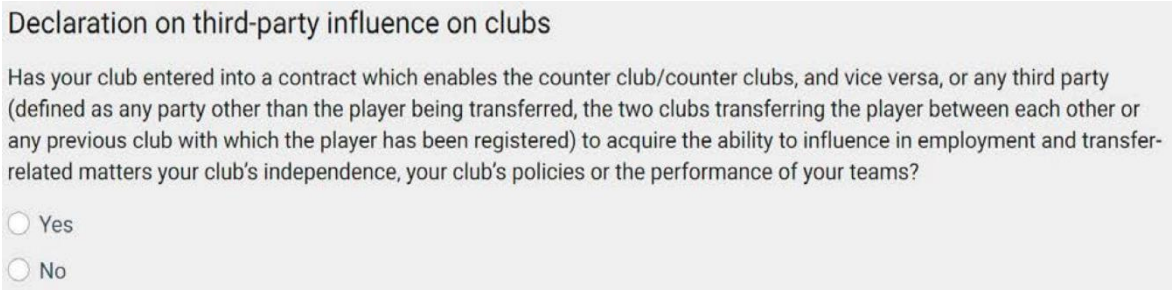
111. In accordance with its reasoning *supra*, the Panel has already established that Benfica violated Article 18bis RSTP by signing the Agreement. Therefore, it can limit itself here to considering the alternative arguments set forth.

112. The Panel is ready to accept that FIFA's regulatory framework may be seen as slightly redundant. This redundancy is implicitly acknowledged in the Manual on TPI and TPO (p. 35), which states that:

> *"An infringement of article 18bis* […] *implies a breach of article 4 paragraph 3 of Annexee 3 and therefore, the decisions of the FIFA judicial bodies sanctioning a club for a breach of article 18bis* […] *also find clubs guilty of an infringement of article 4 paragraph 3 of Annexee 3 to the FIFA RSTP".*

113. Thus, it is likely that a club which enters a contract that it believes – rightly or wrongly – to be in compliance with the regulations in force will not disclose any irregularities when completing its transfer instruction. Moreover, the club will have no way to nuance its statements, since the

declaration form on third-party influence on clubs, as provided by FIFA, does not allow any comments and only requires to tick a box, as follows:


Declaration on third-party influence on clubs

Has your club entered into a contract which enables the counter club/counter clubs, and vice versa, or any third party (defined as any party other than the player being transferred, the two clubs transferring the player between each other or any previous club with which the player has been registered) to acquire the ability to influence in employment and transfer-related matters your club's independence, your club's policies or the performance of your teams?

Yes

No

114. Similarly, a club that has knowingly entered into a contract that violates the relevant regulations will be inclined to try to hide this intent rather than expose it, seeking to elude punishment.

115. Nevertheless, the Panel cannot adhere to Benfica's position, for two main reasons convincingly elaborated by FIFA.

116. First, it is precisely through Article 4 (3) of Annexe 3 RSTP that FIFA seeks to protect clubs from entering into agreements that breach Article 18bis RSTP: by declaring this in TMS, clubs facilitate the investigatory tasks of FIFA's administration that, ultimately, seeks to ensure that the transfer market continues to be as transparent as possible. In the wake of this precautionary approach, Article 4 (3) of Annexe 3 RSTP constitutes a second safety net, intended to make clubs aware of their obligations.

117. Secondly, the *ne bis in idem* principle does not apply *in casu*, since Article 18bis RSTP and Article 4 (3) Annexe 3 RSTP sanction different conducts: the former sanctions clubs for entering into agreements which enable the influence (of other clubs or third parties) and the latter sanctions the failure to declare in TMS that a certain type of agreement has been concluded in the framework of an international transfer.

118. The Panel wishes to underline that this issue is, in any case, not of great practical importance. The FIFA Appeal Committee did not, when discussing the sanction in its decision, distinguish between principal and accessory violation, which suggests that it did not give much weight to the latter, if at all, when punishing the Appellant.

119. Notwithstanding the above, the Panel concludes that Benfica breached Article 4 (3) Annexe 3 FIFA RSTP.

## D. The proportionality of the sanction

120. The FIFA Disciplinary Committee sanctioned Benfica with a fine of CHF 40,000 and a warning for breaching Article 18bis RSTP and Article 4 (3) of Annexe 3 RSTP. The FIFA Appeal Committee confirmed the decision, but did not find it necessary to examine the proportionality of the sanctions, in the absence of prayers for relief in this regard.

121. The Appellant contends that these sanctions are not proportionate to the alleged infringement and must be reduced on the basis of various mitigating factors and recent FIFA and CAS jurisprudence. It relies on TAS 2020/A/7158, where the fine amounted to CHF 10,000, namely 25% of the fine imposed on the Appellant.

122. FIFA argues that the sanctions are proportionate and, in any case, can only be amended by CAS in arbitrary situations. It submits that the sanctions comply with FIFA regulations, FIFA and CAS jurisprudence and the specific circumstances of the case. It holds that the Appellant cannot rely on TAS 2020/A/7158, which involves a fine imposed on an influenced club. It retains that the Appellant bears a high degree of responsibility, in light of its broad experience, the substantial importance of the provisions that it breached, and the fact that it breached them for the third time in a row.

123. In order to determine the appropriate sanctions in the cases at hand, the Panel reiterates that the relevant version of the Disciplinary Code is that of June 2019, pursuant to the reasoning explained in section IX above. It observes that under Article 6 (1) FDC, legal persons (i.e. including clubs) are punishable with the following sanctions: warning, reprimand, fine, return of awards, and withdrawal of a title. Notably, Article 6 (4) FDC specifies that a fine *"shall not be less than CHF 100 or more than CHF 1,000,000"*.

124. In addition, under Article 24 FDC, the competent disciplinary body *"determines the type and extent of the disciplinary measures to be imposed in accordance with the objective and subjective elements of the offence, taking into account both aggravating and mitigating circumstances"*. This includes *"any assistance of and substantial cooperation by the offender in uncovering or establishing a breach of any FIFA rule, the circumstances and the degree of the offender's guilt and any other relevant circumstances"*.

125. With this legal framework in mind, the FIFA Disciplinary Committee made the following considerations:

    (i) Benfica was the most influential and the most beneficiary of the Agreement.

    (ii) Two clauses of the Agreement violate Article 18bis of the RSTP;

    (iii) The Club was already sanctioned several times in the past for the same violation, i.e. by entering into a contract against Article 18bis RSTP.

126. The Panel has found that the Appellant violated Article 18bis RSTP, since the Agreement allows it to unduly influence Avaí's independence and policies in transfer-related matters.

127. However, the legal reasoning and the findings of the Panel differ in some measure from those of the Appealed Decision; accordingly, the Panel must carefully determine whether the sanctions imposed on the Appellant are proportionate.

128. To that aim, the Panel recalls that, while it should not easily tamper with the sanctions imposed by the Appealed Decisions, its *de novo* power of review allows it to find that the sanctions are disproportionate and to determine more appropriate sanctions (see CAS 2018/A/5977, §178,

with references to CAS 2017/A/5003 and CAS 2015/A/4338; CAS 2020/A/7008 & 7009, §123).

129. In the case at stake, on the one hand, the Panel concurs with FIFA that Clause 2.3 of the Agreement breaches Article 18bis RSTP, and that Benfica is a recidivist in breaching this provision. It also confirms, as per the analysis *supra*, that Benfica may not rely on the argument that this provision was not enforced for several years and was unclear, since it had itself been sanctioned for similar facts by FIFA in the past.

130. On the other hand, the Panel does not agree with FIFA that Clause 4.4 of the Agreement constitutes, *per se*, any disciplinary violation. Rather, it is a clause merely aimed at ensuring the enforcement of the legitimate preferential right granted by Avaí in favour of Benfica. Therefore, only one violation, instead of two, can be held against the Appellant. Moreover, Benfica promptly and adequately cooperated with FIFA's disciplinary bodies. As a consequence, the Panel finds that the sanctions imposed on Benfica are disproportionate and must be reduced.

131. In light of all of the above, the Panel concludes that the fine inflicted on Benfica by the Appealed Decision is manifestly disproportionate. It deems appropriate to reduce it from CHF 40,000 to CHF 20,000. As usual with pecuniary sanctions imposed by FIFA, this fine will have to be paid to FIFA within 30 (thirty) days after receipt of this arbitral award.

132. Finally, the Panel confirms the warning imposed on Benfica as to its future conduct under Article 6 FDC. The Panel considers, in particular, the aim pursued by Article 18bis RSTP and the fact that, with the case at hand, the Appellant totals five violations of Article 18bis RSTP (*see* CAS 2020/A/7008 & 7009).

## E. Further or different motions

133. All further or different motions or requests of the Parties are dismissed.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that**:

1. The appeal filed on 24 June 2021 by Sport Lisboa e Benfica SAD against the decision rendered by the FIFA Appeal Committee on 8 April 2021 is partially upheld.

2. The decision of the FIFA Appeal Committee of 8 April 2021 is partially set aside and the decision of the FIFA Disciplinary Committee of 24 September 2020 is amended as follows:

   *2. The FIFA Disciplinary Committee orders the club SL Benfica to pay a fine to the amount of CHF 20,000.*

3. The remainder of the decision of the FIFA Disciplinary Committee is confirmed.

4. (…).

5. (…).

6. All further or different motions or prayers for relief are dismissed.