

## **Decision**

of the

## **FIFA Appeal Committee**

(composed of: Mr Thomas BODSTROM [SWE], Chairman;  
Mr Salman AL ANSARI [QAT], Member;  
Ms Larissa ZAKHAROVA [RUS], Member)

on 12 April 2019,

to discuss the case of:

Club SL Benfica, Portugal

(Decision 180009 APC POR ZH)

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*regarding:*

Appeal lodged by the club SL Benfica, Portugal, against the decision passed by the FIFA Disciplinary Committee on 1 March 2018 (Decision 180009 TMS POR ZH)

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## **I. inferred from the file**

1. On 31 January 2014, the club SL Benfica (hereinafter also referred to as "*the Club*" or "*the Appellant*") and the company Meriton Capital Limited (hereinafter, "*Meriton*") signed an Economic Rights Participation Agreement (hereinafter, "*the ERPA*") in relation to the player André Filipe Tavares Gomes (hereinafter, "*the Player*") which contained, *inter alia*, the following clauses:
  - 2.1 *The Club warrants that the Employment Contract shall be enforceable, legal and binding on the parties to it until 30 June 2019.*
  - 2.2 *Upon the Loan of the Player to a third club (the "Third Club"), in case there is a breach by the Third Club towards the Player vis-à-vis the relevant employment contract which is not remedied by the Club and the Player terminates its employment contract with the Third Club and also the Employment Contract with Benfica, Benfica shall be bound to pay to Meriton the amount of the Grant Fee already paid (plus interest at a rate per annum of 5%, such interest accruing from day to day) and Meriton shall be under no obligation to make any further payments to Benfica.*
  - 2.3 *The Club hereby indemnifies Meriton against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by Meriton arising out of or in connection with the warranty contained in clause 2.1.*
  - 3.1 *In full consideration for the acquisition of Meriton's Interest pursuant to clause 5 below and in reliance on the warranties contained in this Agreement (and subject only to the Conditions Precedent), Meriton shall pay the Club the following amounts:*
    - a) *5 million Euros within 15 days from today's date;*
    - b) *5 million Euros on or before 30<sup>th</sup> June 2014;*
    - c) *5 million Euros on or before 31<sup>st</sup> December 2014.*
  - 4.1 *The Club shall notify Meriton of all transfer offers communicating promptly (at least within 3 (three) calendar days) every detail about each Offer (the "Transfer Offer"), including but not limited to the club's name, the Transfer Fee proposed and offered, whether the Club accepts or rejects the offer, intermediary fees (if any), terms and conditions of payment of the Transfer Fee and information about whether the Player has accepted the offer.*

- 4.3 *Meriton shall inform the Club within 3 (three) calendar days of receipt of the Transfer Offer Information whether it accepts or rejects the Transfer Offer.*
- 4.4 *If Meriton rejects the Transfer Offer and the Club proceeds with the Transfer, the provisions of clause 5 shall apply.*
- 4.5 *If Meriton accepts the Transfer Offer, the Club shall make payment to Meriton of 100% of the proposed transfer fee contained in the Transfer Offer (after deduction of Benfica's Interest, if applicable) within 7 (seven) calendar days of having received such a demand for payment from Meriton whether or not the Transfer proceeds (without prejudice, if applicable, of clause 5.2 below). The offer and the value described in this paragraph relate, solely and exclusively, to non-Portuguese clubs. Therefore, the Club shall not be obliged, in any event and under any circumstances, to accept an offer for the Player if said offer comes from a Portuguese Club, regardless of its value and the specific terms and conditions.*
- 5.1 *Without prejudice to Clause 5.2 below, where the Transfer of the Player has commenced without Meriton's acceptance and the Club has received the Transfer Fee, the Club shall pay Meriton, within 7 calendar days of the Club receiving the Transfer Fee, one of the following amounts (whichever the higher):*
- a) *Meriton's Interest; or*
  - b) *Meriton's Grant Fee, plus interest from the dates of payment of each of its instalments at a rate per annum of 5% (five per cent). Such interest shall accrue from day to day.*
- 5.3 *The Club shall, upon reasonable request, provide Meriton with copies of any and all documents, invoices and agreements relating to any Transfer of the Player as evidence of the Transfer Fee paid to the Club for the transfer of the Player. Meriton shall not share the Transfer Information with third parties other than its own advisers while such information remains out of the public domain.*
- 6.1 *Upon the Loan of the Player, the Club shall pay to Meriton 100% of any Loan Fee received by the Club within 7 calendar days of receipt by the Club of such Loan Fee.*
- 6.2 *The Club shall, upon reasonable request, provide Meriton with copies of any and all documents, invoices and agreements relating to any Loan of the Player as evidence of the conditions of the Loan and the Loan Fee paid to the Club for the Loan of the*

*Player. Meriton shall not share the Transfer Information with third parties other than its own advisers while such information remains out of the public domain.*

*7.1 Where the Player Re-Signs with the Club, Meriton shall have the option to either:*

*a) demand that the Club pays Meriton an amount equal to its Grant Fee within 7 calendar days of the day the Player Re-Signs with the Club, and the Club shall become entitled to retain 100% (one hundred percent) of the Player's Economic Rights; or*

*b) maintain Meriton's Interest.*

*11. In compliance with the mandatory provisions of the Portuguese Football League and the FIFA Regulations on the Status and Transfer of Players Meriton recognises that the Club is an independent entity in so far as the Club's employment and transfer-related matters are concerned and that Meriton shall not seek to exert influence over these matters on the Club's policies or the performance of its teams.*

*12.3. In the event that the Player terminates the Employment Contract without just cause, the Club shall pursue a claim for unlawful termination of the Employment Contract without just cause against the Player before Portuguese courts, Portuguese Football Federation or FIFA, as applicable. In the event that the Portuguese courts, Portuguese FA or FIFA, as applicable, make an award in respect of the claim in favour of the Club, the Club shall pay to Meriton the correspondent amount. Any and all amounts to be paid by the Club to Meriton arising from any award rendered by the aforementioned sports bodies and organizations in line with the present clause shall become due and payable after three (3) business days have expired from the date on which the Club effectively receives the amounts from the losing party to the proceedings.*

2. Following a preliminary investigation conducted by FIFA's TMS Compliance department, disciplinary proceedings were opened against the Appellant on 23 January 2018 for a possible violation of art. 18bis of the Regulations on the Status and Transfer of Players [Ed. 2012] (hereinafter, "*the RSTP*" or "*the Regulations*").
3. On 1 March 2018, the FIFA Disciplinary Committee passed a decision (hereinafter, "*the Appealed Decision*") against the Appellant. In particular, the Disciplinary Committee decided as follows:

1. *The club SL Benfica is declared liable for the violation of art. 18bis of the Regulations on the Status and Transfer of Players (RSTP) for entering into a contract which enabled a third-party to influence to acquire the ability to influence the club's independence in employment and transfer-related matters in relation to the player André Filipe Tavares Gomes.*
2. *The club SL Benfica is ordered to pay a fine to the amount of CHF 75,000. This fine is to be paid within 30 days of receipt of the ruling. Payment can be made either in Swiss francs (CHF) to the account no. 0230-325519.70J, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH85 0023 0230 3255 1970 J or in US dollars (USD) to the account no. 0230-325519.71U, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH95 0023 0230 3255 1971 U, with reference to case no. 180009 jud.*
3. *In application of art. 10 a) and art. 13 of the FIFA Disciplinary Code, the club SL Benfica is warned on its future conduct. The club SL Benfica is ordered to undertake all appropriate measures in order to guarantee that the FIFA regulations, in particular the RSTP and its provisions related to third-party influence, are strictly complied with. Should such infringements occur again in the future, the FIFA Disciplinary Committee may impose harsher sanctions on the club SL Benfica.*
4. *The costs and expenses of these proceedings amounting to CHF 3,000 shall be borne by the club SL Benfica and be paid according to the modalities stipulated under 2. above.*
4. The terms of the Appealed Decision were notified to the Appellant via the Portuguese Football Association on 2 March 2018. Upon request of the Appellant, the grounds of the Appealed Decision were communicated to the Appellant through its association on 13 February 2019.
5. On 17 February 2019, the Appellant informed the secretariat to the FIFA Appeal Committee (hereinafter, "the Secretariat") about its intention to appeal the aforementioned decision.

6. On 27 February 2019, the Appellant provided a copy of the proof of payment of the appeal fee and submitted its reasons for the appeal which can be summarized as follows<sup>1</sup>:

Facts of the case

- i. The Appellant claimed that the decision to enter into the ERPA was based on the following facts:
  - a. At the time the ERPA was signed, the Player was very young and still developing as a football player;
  - b. Meriton undertook to pay the full amount (EUR 15,000,000) without any other consideration, meaning that the Appellant was guaranteed to receive the said amount without any restriction or deduction;
  - c. The Player remained with the Appellant, which was able to benefit from his services during the ERPA and until it would decide to sell the Player;
  - d. Through the conclusion of the ERPA, Meriton also acquired an interest on the Player's development and on his valorization, which aligned with the Appellant's interests;
  - e. In June 2015, the Appellant decided to accept the transfer offer from the club Valencia FC considering that there were no reason to believe that the Appellant would obtain a better offer in the future.
- ii. The Appellant further argued that third-party ownership (TPO) agreements were a very common practice and became an excellent financing tool for small and medium-sized clubs to obtain funds to remain competitive. In addition, the Appellant pointed out that TPO agreements were, until April 2015, totally acceptable and legally valid under FIFA Regulations, as a result of which they were significantly widespread in football.

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<sup>1</sup> For the sake of clarity, this summary does not purport to include every single contention put forth by the Appellant. Nevertheless, the FIFA Appeal Committee has thoroughly considered in its discussion and deliberations any and all evidence and arguments submitted, even if no specific or detailed reference has been made to these arguments in the following outline of their positions and in their ensuing discussion on the merits.

### Failure to consider the Appellant's submission

- iii. The Appellant submitted that the Disciplinary Committee failed to take into account the various arguments and exhibits presented in the disciplinary proceedings.
- iv. In this regard, the Appellant found that it has not obtained a properly reasoned decision as it was entitled to under art. 92 par. 2 of the FIFA Disciplinary Code (FDC). Furthermore, it pointed out that the Disciplinary Committee's lack of analysis put him in the same situation as if it had not been invited to provide a position.
- v. In the light of the foregoing, the Appellant considered that its right to be heard was not respected.

### The content of the ERPA

- vi. The Appellant first emphasised that in the context of TPO agreements, it was common practice to assign rights and obligations to secure the third-party's investment against, for example, injuries and accidents of the player or in the event that the latter simply did not fulfil the potential seen by the third-party. For this reason, various types of clauses foreseeing these kind of situations became standard in TPO agreements.
- vii. In this respect, the Appellant referred to the report "*Project TPO*" published by the company KPMG on 8 August 2013, which portrayed in a very detailed way the reality of TPO agreements at that time. In particular, the Appellant stated that the report – supported and divulged by the European Club Association (ECA) – became a source of information for European clubs wishing to conclude TPO agreements, as the report identified "key clauses" that were commonly included therein.
- viii. In view of these explanations, the Appellant argued that it would be contrary to the Regulations and principles of law to be sanctioned for including some of these clauses in the ERPA at a time when TPO agreements were perfectly legal and widespread in football. Subsequently, the Appellant also addressed the following clauses of the ERPA:

ix. *Clauses 2.1 and 2.3*

- a. The Appellant considered clause 2.1 as a contractual recognition of the principle of contractual stability enshrined in the FIFA Regulations. According to the Appellant, this clause was nothing more than a recognition that the employment contract concluded with the Player was covered by this principle.
- b. In connection with this clause, the Appellant stated that clause 2.3 aimed at granting Meriton the right to compensation in the event that the Appellant failed to respect its part of the employment contract concluded with the Player. The Appellant considered this clause to be reasonable and proportionate considering that a breach of its obligations towards the Player would result in a termination of the Player's employment contract, leading to the total loss of Meriton's investment. In this sense, the Appellant stressed that clause 2.3 was a standard TPO clause.
- c. Additionally, the Appellant pointed out that it was free to terminate the employment contract at an earlier stage but that it would then have to bear the consequences of its action as Meriton would inevitably lose its investment of EUR 15,000,000.

x. *Clauses 4.1, 5.3 and 6.2*

- a. The Appellant claimed that these clauses simply entitled Meriton to receive information since it had a right to know if there were approaches that could affect its investment. However, the Appellant emphasized that the obligation to disclose information in itself did not provide Meriton with the ability to influence anything.
- b. With regard to the Disciplinary Committee's conclusion according to which a fully independent club would not be under the obligation to disclose to another entity confidential and sensitive information, the Appellant argued that this conclusion was based on assumptions and lacked any legal or factual basis. Moreover, the Appellant pointed out that there were several other obligations pursuant to which a club may be required to disclose information regarding employment and transfer-related matters, without however restraining the club's ability to act independently.

- c. In addition, the Appellant noted that the Disciplinary Committee expressed concern that providing information to Meriton could create a conflict of interest, should Meriton have concluded a similar agreement with another club wishing to hire the Player. In this regard, the Appellant recalled that art. 18bis of the RSTP refers only to third-party's influence and not to the potential conflicts of interest that may arise when providing information to another party.
- xi. *Clauses 4.3, 4.4, 4.5 and 5.1*
- a. With respect to these clauses, the Appellant claimed that they contained two conditional obligations for the latter in case a club made an offer to transfer the Player.
  - b. The first one was to pay Meriton the amount of the transfer offer received, which became due to Meriton if the latter accepted the transfer offer. Should Meriton decline the transfer offer, the Appellant would then have to pay Meriton the higher amount between the offered transfer fee and the amount initially paid by Meriton plus 5% interest.
  - c. The Appellant summarized the aforementioned clauses as follows:

	<b>The COMPANY accepted the offer</b>	<b>The COMPANY rejected the offer</b>
<b>SL BENFICA transfers the Player</b>	SL BENFICA must pay the COMPANY the amount of the transfer offer (minus 25% of the amount over 15'000.000€)	SL BENFICA must pay the COMPANY the higher amount between, (i) the full transfer fee received, or, (ii) the amount initially paid by the COMPANY under the ERPA plus 5% interest
<b>SL BENFICA doesn't transfer the Player</b>	SL BENFICA must pay the COMPANY the amount of the transfer offer	No consequence

- d. In this regard, the Appellant emphasized that the acceptance or rejection of Meriton served only to trigger one of the two conditional obligations. Nevertheless, the Appellant recalled that it remained absolutely free to decide on the transfer offer and that the content of the aforementioned clauses were "key clauses" of TPO agreement.
- e. Additionally, the Appellant submitted that the Disciplinary Committee misinterpreted the facts since the ERPA did not contain any clause entitling Meriton to directly take decisions or instruct the Appellant regarding employment and transfer-related matters. These clauses only created

conditional obligations that the Appellant should take into account when independently deciding on these matters.

- f. Furthermore, the Appellant pointed out that it would never stand to lose money as it already received Meriton's investment in accordance with the ERPA. In particular, the Appellant stressed that should Meriton reject a transfer offer from another club, the Appellant would in any event remain free to accept the offer and retain the transfer fee, but would simply have to reimburse Meriton for its initial investment with interest.
- g. In light of the above clarifications, the Appellant stated that it did not accept to be sanctioned for entering into a standard TPO agreement when this kind of agreements were authorized and legally valid. Consequently, the Appellant concluded that due to the extreme legal uncertainty regarding the application of art. 18bis of the RSTP, any sanction against clubs that have included such standard clauses in their agreement would appear to be contrary to general principles of law.

xii. *Clauses 2.2 and 6.1*

The Appellant claimed that clause 6.1 corresponded exactly to a standard TPO clause. With respect to the clause 2.2, the Appellant submitted that there was no influence from Meriton since this provision did not affect the Appellant's right to claim compensation from the club to which the Player had been loaned.

xiii. *Clauses 7.1 and 12.3*

The Appellant stressed that both clauses were standard TPO clauses. Regarding the first clause, the Appellant claimed that it governed the consequences of the renewal of the employment contract between the Player and the Appellant, while the second one concerned the opportunity for the Appellant to file an action for damages in the event of a breach of the employment contract by the Player. Finally, the Appellant argued that these clauses had no effect on its employment and transfer policies.

xiv. *Conclusion on the aforementioned clauses*

The Appellant concluded that the aforementioned clauses were standard provisions of TPO agreements and aimed to offer a certain degree of security for

investors as well as a balanced agreement. Consequently, the Appellant argued that determining that these standard clauses of TPO agreements were subject to sanctions was equal to sanctioning TPO agreements *per se* during a time when they were allowed and widespread in football, or would constitute a retroactive and illegal application of the TPO-ban. Finally, the Appellant pointed out that art. 18bis of the RSTP could clearly not apply to clauses that were standard and essential in TPO agreements.

#### Lack of legal certainty concerning Third-party Influence

- xv. According to the Appellant, there was no legal certainty as to the notion of influence, nor as to how art. 18bis of the RSTP should apply.
- xvi. The Appellant argued that there were a number of clauses that were common and widespread in football and should also be sanctioned by FIFA, such as:
  - sell-on clauses;
  - buy-out clauses;
  - reacquisition right;
  - loan with (obligatory) option to buy.
- xvii. In this regard, the Appellant submitted that since FIFA had always authorized such clauses, the FIFA Disciplinary and Appeal Committees were prevented from applying art. 18bis of the RSTP in a completely different manner.
- xviii. Finally, the Appellant pointed out that this situation made the sanctions that could be imposed in case of violation of art. 18bis of the RSTP completely unpredictable. In particular, the fact that certain clauses were not sanctioned implied that this provision would apply in a restrictive fashion to clauses that openly granted a third-party the contractual rights to decide directly on employment and transfer-related matters. Additionally, the fact that TPO agreements were widespread and common in football created a legitimate expectation among clubs that they were allowed to enter into TPO agreements, whereas only clauses enabling investors/third-parties to interfere directly in the decisions of the club could be subject to sanctions.

#### Interpretation of art. 18bis of the RSTP

- xix. The Appellant claimed that art. 18bis of the RSTP should be applied restrictively in order to avoid sanctioning clubs that had no way of clearly verifying where the threshold between legal and illegal clauses was.
- xx. In this regard, the Appellant submitted that a broad interpretation would infringe the principles of legal certainty and predictability of law.
- xxi. Furthermore, the Appellant argued that, in light of the wording of the Appealed Decision, art. 18bis of the RSTP only prohibits “direct influence”, which was not defined in the FIFA Regulations nor in the Appealed Decision. In this respect, the Appellant claimed that this notion of “direct influence” referred to situations where investors have been granted the possibility to decide directly on employment and transfer-related matters.
- xxii. In light of the above, the Appellant considered that the ERPA did not contain any clause allowing Meriton to directly influence the Appellant. On the contrary, the Appellant emphasised that the clauses contained in the ERPA merely generated economic obligations that should be considered as an additional factor by the Appellant when independently deciding on employment or transfer-related matters. Therefore, a narrow interpretation of art. 18bis of the RSTP would suggest that the Appellant never breached this provision.

#### Lack of ability of Meriton to influence the Appellant under the ERPA

- xxiii. The Appellant referred to clause 11 of the ERPA, which clearly reflected the absence of intention by the parties to grant Meriton any opportunity to influence the Appellant.
- xxiv. Additionally, the Appellant disagreed with the Disciplinary Committee’s reasoning that the ERPA would place excessive economic strain on the Appellant, which could therefore be influenced by Meriton. On the contrary, the Appellant claimed that its very solid and stable economic situation would have allowed it to comply with its conditional obligations, without being forced to accept or reject any potential transfer offer received from another club.
- xxv. Consequently, the Appellant submitted that the ERPA did not enable Meriton to directly influence its independence with respect to employment and transfer-

related matters given that it had the economic and financial power to answer to Meriton in case the latter would have exercised its rights. As a result, the Appellant believed that since it could not be influenced by Meriton, it did not breach art. 18bis of the RSTP.

#### Proportionality of the sanction

- xxvi. The Appellant found that the sanction imposed was disproportionate and had to be reduced.
  - xxvii. In particular, the Appellant considered that the previous sanctions imposed by the Disciplinary Committee for a violation of art. 18bis of the RSTP should not be taken into account since the grounds of these decisions were notified once the ERPA at hand had already been signed.
  - xxviii. Additionally, the Appellant referred to a decision of the Disciplinary Committee rendered against another Portuguese club, FC Porto, which was sanctioned with a fine of CHF 50,000 for two different breaches of the FIFA Regulations. Furthermore, the Appellant cited a similar disciplinary case in which it was involved and for which it was sanctioned with a fine of CHF 75,000 although the amount received from Meriton was almost twice the sum received in the case at hand.
  - xxix. In light of the above, the Appellant requested:
    - a) that the present appeal be upheld;
    - b) that the Appealed Decision be set aside and that no sanction be imposed.
  - xxx. Alternatively and in the event that the aforementioned request would be rejected, the Appellant requested that the fine be reduced in order to be proportionate to the infringement under consideration.
7. On 6 March 2019, the Secretariat acknowledged receipt of the two abovementioned correspondences and confirmed that the payment of the appeal fee had been duly received by FIFA.

## II. and considered

1. In view of the circumstances of the present matter, the FIFA Appeal Committee (hereinafter, "*the Committee*") first decided to address some key procedural aspects (A) before entering into the substance of the case at stake (B).

### A. PROCEDURAL ASPECTS

#### *a) Competence of the FIFA Appeal Committee and admissibility of the Appeal*

2. Primarily, the Committee recalled that the procedural aspects of the matter at stake are governed by the 2017 edition of the FIFA Disciplinary Code (hereinafter, "*the 2017 FDC*"), in particular considering that the present appeal was lodged by the Appellant on 19 April 2019, *i.e.* while the 2017 FDC was applicable and before the entry into force of the 2019 edition of the FDC.
3. In this context, the Committee underlined that the sanctions imposed by the Disciplinary Committee through the Appealed Decision were a fine amounting to CHF 75,000 and a warning. As such, the Committee pointed out that, in accordance with art. 79 in conjunction with art. 118 of the 2017 FDC, it was competent to hear the appeal presented by the Appellant against the decision rendered by the Disciplinary Committee on 1 March 2018.
4. This having been established, the Committee acknowledged that:
  - i. The grounds of the Appealed Decision were notified to the Appellant via the Portuguese Football Association on 13 February 2019;
  - ii. The Appellant communicated its intention to appeal on 17 February 2019 and;
  - iii. The Appellant submitted its reasons for the appeal and provided proof of payment of the appeal fee on 27 February 2019.
5. In view of this, the Committee held that the requirements of art. 120 pars. 1 and 2 and art. 123 par. 1 of the 2017 FDC have been met and therefore declared the present appeal admissible.

**b) Applicable law**

6. In continuation, the Committee deemed that it had to determine which edition of the Regulations on the Status and Transfer of Players (RSTP) applied to the substance of the matter at stake and on which edition of the FIFA Disciplinary Code (FDC) the potential sanctions should be based.
7. In these circumstances, the Committee noted from the Appealed Decision that the Appellant was sanctioned for entering into an Economic Rights Participation Agreement (ERPA) on 31 January 2014, which enabled a third-party to influence its independence and policies in employment and transfer-related matters.
8. Against this background, the Committee first observed that the version of the RSTP in force at the time of the conclusion of the ERPA was the 2012 edition<sup>2</sup>. Consequently, the Committee decided that the present matter should be analysed in light of the 2012 edition of the RSTP (hereinafter, "*the 2012 RSTP*") in accordance with art. 26 thereof.
9. Then, the Committee recalled that in accordance with art. 25 of the 2012 RSTP, any violation of the provisions contained therein shall be sanctioned in accordance with the FIFA Disciplinary Code. In this regard, the Committee held that the aforementioned facts occurred in January 2014, while the 2011 edition of the FDC was applicable<sup>3</sup>. Nevertheless, the Committee remarked that the case was decided by the Disciplinary Committee on 1 March 2018, once the 2017 edition of the FDC had already entered into force<sup>4</sup>.
10. With these elements in mind, the Committee pointed out that the 2017 edition of the FDC was applicable to facts that occurred before it entered into force provided that:
  - i. the 2017 edition of the FDC is equally favourable or more favourable for the perpetrator of the facts than the previous edition and;
  - ii. the judicial bodies of FIFA are deciding on these facts after the 2017 edition of the FDC has come into force<sup>5</sup>.

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<sup>2</sup> The 2012 RSTP edition was in force from 1 December 2012 until 31 July 2014.

<sup>3</sup> The 2011 FDC edition was in force from 1 August 2011 until 31 December 2017 (cf. art. 147 par. 2 of the 2011 FDC in conjunction with art. 147 of the 2017 FDC).

<sup>4</sup> The 2017 FDC was in force from 1 January 2018 until 14 July 2019 (cf. art. 147 of the 2017 FDC in conjunction with art. 72 par. 1 of the 2019 FDC).

<sup>5</sup> Cf. art. 4 of the 2017 FDC.

11. As far as the matter at stake was concerned, it appeared to be clear that:
  - i. The relevant facts occurred prior to the entry into force of the 2017 edition of the FDC;
  - ii. The 2011 and 2017 editions of the FDC are equally favourable insofar as the sanctions applicable to legal persons are identical. In particular, the amount of the fine ranges from CHF 300 to CHF 1,000,000 in both editions;
  - iii. The FIFA Disciplinary Committee decided on these facts after the 2017 FDC had come into force.
12. For the reasons set out above, the Committee considered that any sanction imposed on the Appellant in the present matter had to be based on the 2017 edition of the FDC.
13. This being established, the Committee subsequently went on to analyse the merits of the present case.

## **B. MERITS**

14. As preliminary remarks, the Committee recalled that the present proceedings resulted from a decision rendered by the FIFA Disciplinary Committee by means of which the Appellant was sanctioned for entering into an agreement, which enabled a third-party to influence its independence and policies in employment and transfer-related matters.
15. The aforementioned decision was then challenged by the Appellant who requested the Committee to set aside the Appealed Decision, or alternatively to reduce the fine imposed by the Disciplinary Committee.
16. In these circumstances, the Committee noted that a number of issues have been raised by the Appellant. In essence, the latter considered that its right to be heard had not been respected by the Disciplinary Committee and that there was no legal certainty regarding the interpretation and scope of application art. 18bis of the RSTP. Furthermore, the Appellant submitted that the ERPA did not enable Meriton to influence its independence and policies in employment and transfer-related matters. Finally, it contested the fine imposed in the Appealed Decision, in particular its proportionality.
17. As a result of the foregoing, the Committee considered that four questions needed to be answered in order to decide on this appeal:

- a) Was the Appellant's right to be heard respected before the FIFA Disciplinary Committee?
- b) What is the prohibition foreseen in art. 18bis of the RSTP?
- c) Does the ERPA contain clauses contrary to art. 18bis of the RSTP?
- d) If so, are the sanctions imposed by the Disciplinary Committee proportionate?

***a) Was the Appellant's right to be heard respected before the FIFA Disciplinary Committee?***

- 18. First and foremost, the Committee noted that the Appellant claimed that its right to be heard was not respected by the Disciplinary Committee.
- 19. In regard, the Committee found it necessary to establish that, as reflected through the summary of the Appealed Decision's factual backgrounds, a due process has been followed at all time in the present case.
- 20. In particular, the Committee pointed out that the Disciplinary Committee had no obligation to directly and explicitly rebut each argument submitted by the Appellant. In this respect, the Committee recalled that according to CAS jurisprudence, a decision of a sport organization such as FIFA requires a (short) reasoning that enables the addressee to understand the findings and the reasoning of the association tribunal<sup>6</sup>.
- 21. In addition, the Committee referred to the Swiss Federal Tribunal's jurisprudence which stated that the right to be heard does not mean that the judge must draw the attention of the parties on the facts which are decisive for the judgment<sup>7</sup>. Moreover, the Swiss Federal Tribunal considered that the right to be heard does not encompass a right to obtain a decision that accurately assesses the facts or applies the law, but it simply protects the parties from situations in which they would be prevented from presenting their arguments, stating their case and submitting evidence<sup>8</sup>.
- 22. With the above in mind, the Committee wished to emphasise that the Appellant had the opportunity to present its case before the Disciplinary Committee, and it did so on 16 February 2018. Moreover, the Committee found evident from the content of the Appealed Decision that the aforementioned submission and in particular the Appellant's arguments were indeed considered by the Disciplinary Committee, which in its reasoning indirectly rebutted them.

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<sup>6</sup> CAS 2015/A/3879.

<sup>7</sup> ATF 108 IA 293 at 4c p. 295, ATF 117 Ib 64 consid. 4 p. 86, ATF 114 Ia 233 consid. 2 p. 242, ATF Ia 107) (4A 450/2017).

<sup>8</sup> 4A\_672/2012 section 3.1.2.

23. In these circumstances, the Committee considered that the fact that the Disciplinary Committee followed a different reasoning than the one of the Appellant did not mean that its position was disregarded or that all fundamental rights of the Appellant were not respected.
24. In addition to the above, the Committee referred to art. 124 par. 1 of the 2017 FDC and recalled that, in any event, it was competent to examine *de novo* the facts and the law of a case. In other words, the Committee was not limited nor bound to the facts and legal arguments of the previous instance.
25. As a result, and with regard to the particular issue raised by the Appellant regarding its right to be heard having not been respected during the procedure before the Disciplinary Committee, the Committee held that any such possible procedural flaw was, in any case, cured in these *de novo* appeal proceedings.

***b) What is the prohibition foreseen in art. 18bis of the RSTP?***

26. First of all, the Committee would like to recall the content of art. 18bis of the 2012 RSTP which reads as follows:

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

27. In this respect, the Committee pointed out that this provision primarily aimed at protecting the clubs' independence from third parties or other clubs that may have a different interest other than the clubs' sporting activity. In particular, this provision was intended to ensure that clubs' freedom and independence in relation to recruitment and transfer-related matters were not put at stake as well as to avoid situations of conflict of interest which could lead to match manipulation and match fixing practices. In light of the above, the Committee emphasised that the overall objective of this provision was to ensure that the integrity of the game of football and its most essential values were safeguarded.
28. Bearing in mind the foregoing, the Committee noted that the Appellant considered that art. 18bis of the RSTP should be interpreted narrowly in order to cover only cases in which a third-party is entitled to directly influence a club. In particular, the Appellant argued that "direct influence" appears to refer to such instances in which third-party ownership

agreements provide investors the right to have a direct decision on employment and transfer-related matters.

29. In this respect, the Committee wished to stress that a correct interpretation of the FIFA Regulations in general, and of art. 18bis of the RSTP in particular, must show their true meaning. This is possible only through the analysis of the purpose sought, of the interest protected as well as of the legislator's intent<sup>9</sup>.
30. In this context, the Committee first pointed out that according to the wording of art. 18bis of the RSTP – *"No club shall enter into a contract which enables any other party to that contract or any third-party to acquire the ability [...]"* –, there was a passive stance: a club must not empower another entity to influence it by means of a contractual obligation, meaning that a club is in violation of article 18bis if it allows a third-party or another club to acquire the ability to exercise influence over its own decision-making process on employment or transfer-related matters.
31. Secondly, the Committee referred to the jurisprudence of the Court of Arbitration for Sport (CAS) which has shed some light on the notion of "influence"<sup>10</sup>. In this regard, CAS ruled that the prohibition contained in art. 18bis of the RSTP applied whenever any other party to that contract or any third-party was granted the real ability to effect on, determine or impact the behaviour or conduct of the concerned club in relation to employment and transfer-related matters in such a way as to restrict the club's independence or autonomy in such matters.
32. Consequently, the Committee considered that the criteria "direct or indirect influence" mentioned by the Appellant was irrelevant when assessing whether a club is in breach of art. 18bis of the RSTP. On the contrary, the Committee deemed that a club is in breach of art. 18bis of the RSTP every time it entered into an agreement that enabled a third-party – natural or legal person – to have a real ability to effect on, determine or impact the behaviour or conduct of the club in employment and transfer-related matters or the performance of its team, and therefore influenced the club's independence and policies in these matters. Furthermore, the Committee emphasised that the mere fact that such clause(s) was/were included in an agreement was an infringement *per se* and it was therefore irrelevant whether any influence has actually been exercised or not.
33. Subsequently, the Committee noted that the Appellant mainly claimed that many clauses of the ERPA at stake were standard clauses of TPO agreements. In particular, the

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<sup>9</sup> CAS 2008/A/1673; CAS 2009/A/1810; CAS 2009/A/1811; CAS 2017/A/5173

<sup>10</sup> CAS 2017/A/5463.

Appellant considered that determining that these standard clauses of TPO agreements were subject to sanctions was equal to sanctioning TPO agreements *per se* during a time when they were allowed and widespread in football. Finally, the Committee observed that the Appellant was of the opinion that art. 18bis of the RSTP could clearly not apply to clauses that were standard and essential in TPO agreements.

34. In view of the Appellant's allegations, the Committee acknowledged that art. 18ter of the RSTP, prohibiting the conclusion of TPO, entered into force in April 2015. Nevertheless, the Committee rejected the arguments put forward by the Appellant since art. 18bis of the RSTP entered in force on 1 January 2008 – *i.e.* more than 6 years before the conclusion of the ERPA at stake – and was announced to all direct and indirect FIFA members by means of the circular no. 1130 dated 20 December 2007.
35. In addition, the Committee found that art. 18bis of the RSTP was already applicable when the Appellant entered into the ERPA with Meriton and that the Appellant – relying on its own misinterpretation of this provision – could in no way depart from the mandatory application and enforceability of art. 18bis of the RSTP.
36. As a result, the Committee considered that the Appellant's allegations, namely the lack of legal certainty regarding the interpretation and scope of application of art. 18bis of the RSTP, had to be rejected and went on to analyse the clauses of the ERPA at stake in light of the above outlined clarifications.

**c) Does the ERPA contain clauses contrary to art. 18bis of the RSTP?**

37. As starting point, the Committee recalled that following an appeal against a decision initially decided by the Disciplinary Committee, the Committee has the power to review the Appealed Decision but is prevented from amending it to the detriment of the Appellant<sup>11</sup>. Consequently, the Committee held that only clauses for which the Appellant was found by the Disciplinary Committee in violation of art. 18bis of the RSTP could be analysed.
38. In this regard, the Committee took note from the Appealed Decision that clauses 2.1, 2.2, 2.3, 4.1, 4.3, 4.4, 4.5, 5.1, 5.3, 6.1, 6.2, 7.1 and 12.3 were considered by the Disciplinary Committee to be contrary to art. 18bis of the RSTP as they entitled Meriton to influence the Appellant. In particular, the Committee noticed that these clauses could be divided into three categories:

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<sup>11</sup> Cf. art. 124 par 1 of the 2017 FDC in conjunction with art. 125 par. 2 of the 2017 FDC.

- a. Clauses relating to the Player's employment contract (clauses 2.1, 2.2, 2.3, 7.1 and 12.3);
  - b. Clauses relating to the Appellant's obligation to provide Meriton with specific information and documents (clauses 4.1, 5.3 and 6.2);
  - c. Clauses relating to a potential transfer or loan of the Player (clauses 4.3, 4.4, 4.5, 5.1 and 6.1).
39. This being established, the Committee decided to analyse these clauses in the aforementioned order.
- a. Clauses relating to the Player's employment contract (clauses 2.1, 2.2, 2.3, 7.1 and 12.3)
40. In this context, the Committee noted that the Disciplinary Committee considered that these clauses undoubtedly interfered in the contractual relationship between the Appellant and the Player given that:
- The Appellant had to ensure that the employment contract remained into force until a certain date (clause 2.1) and had to compensate Meriton for any potential costs, expenses, damages or losses that the latter might incur in case the Appellant decided to terminate the employment contract at an earlier stage (clause 2.3);
  - In case of a loan of the Player where the third club did not fulfil its obligations towards the Player, the Appellant was required to remedy the situation in order to avoid having to pay a sum of money to Meriton (clause 2.2);
  - The Appellant had to take into consideration the fact that Meriton had two options in case the Appellant and the Player agreed to extend the employment contract. In particular, Meriton could decide to either have its "grant fee" repaid or maintain its interest in the Player (clause 7.1);
  - The Appellant had the obligation to file a complaint against the Player in case the latter terminated his employment contract without just cause (clause 12.3).
41. In addition, the Committee acknowledged that the Appellant considered clause 2.1 to be a contractual recognition of the principle of contractual stability and stated that clause 2.3 was intended to grant Meriton the right to receive compensation in the event that the Player terminated the employment contract with just cause. Moreover, the Appellant claimed that it could have terminated the employment contract but then had to bear the

consequences that such an action would have on Meriton considering that the latter would inevitably lose its investment of EUR 15,000,000.

42. The Committee further noted that the Appellant pointed out that clause 7.1 governed the consequences of the renewal of the employment contract between the Player and the Appellant, while clause 12.3 concerned the Appellant's right to sue the Player, should the latter terminate the employment contract without just cause.
43. Against this background, the Committee focused on the relevant clauses in light of the aforementioned explanations<sup>12</sup>.
44. In particular, the Committee made the following observations:
  - Clause 2.1 clearly obliged the Appellant to maintain the Player's employment contract in force, and in case it failed to do so, clause 2.3 provided that the Appellant was required to compensate Meriton for any damage or loss the latter would suffer in such a situation;
  - Clause 2.2 governed the action to be taken by the Appellant in the event that, during a loan of the Player, a third club failed to fulfil its obligations towards the Player. In particular, the Committee noted that the Appellant was clearly compelled to avoid any situation where the Player could terminate his employment contract with just cause, otherwise it would have to reimburse Meriton the total grant fee plus 5% interest *p.a.*;
  - Clause 7.1 stated that in case the Player and the Appellant agreed to extend the employment contract, Meriton had the opportunity to either ask to have its grant fee repaid or to maintain its interest in the Player. In particular, the Committee acknowledged that the Appellant could not influence Meriton's decision but had to suffer the consequences that such a decision may have on it;
  - Clause 12.3 obviously forced the Appellant to lodge a complaint against the Player, should the latter terminate his employment contract without just cause. Moreover, this clause provided for that any amount awarded by a tribunal to the Appellant was to be paid to Meriton.
45. In addition to the foregoing, the Committee observed that the Appellant acknowledged that should it terminate the employment contract or fail to comply with its contractual

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<sup>12</sup> Cf. point II para. 26 *ff.*

obligations towards the Player, it would have to bear the consequences of its action/decision by compensating Meriton from its losses.

46. The above being established, the Committee recalled that a club is in breach of art. 18bis of the RSPT whenever it entered into an agreement that allowed a third-party to have a real ability to effect on, determine or impact its behaviour or conduct in employment and transfer-related matters or the performance of its team.
47. As a result, the Committee found that the aforementioned clauses limited the Appellant's independence to freely decide on the contractual relationship with the Player. In particular, the Committee considered that clauses 2.1, 2.2 and 2.3 clearly have an impact on the behaviour and/or conduct of the Appellant in employment-related matters. In this regard, the Committee concluded that the Appellant had to take into consideration the potential compensation it would have to pay to a third-party, namely Meriton, should it fail to maintain the employment contract or simply wished to terminate the employment contract at an earlier stage.
48. Moreover, the Committee recalled that clause 7.1 offered predefined options to Meriton, should the Appellant and the Player have agreed to extend the employment contract. With this in mind, the Committee noted that the Appellant, before considering to extend the employment contract with the Player, had to take into account the potential consequences that such an extension would imply since Meriton could decide to have its grant fee repaid, *i.e.* EUR 15,000,000, or to maintain its interest in the Player. As a result, the Committee found that this clause impacted the behaviour of the Appellant and was therefore contrary to art. 18bis of the RSTP since the Appellant could not freely decide on employment-related matter.
49. Finally, the Committee considered that clause 12.3 determined the behaviour to be adopted by the Appellant when facing a termination of the employment contract by the Player given that the Appellant had to sue the Player and to forward any amounts awarded by a tribunal to Meriton, thus being in violation to art. 18bis of the RSTP.

*b. Clauses relating to the Appellant's obligation to provide Meriton with specific information and documents (clauses 4.1, 5.3 and 6.2)*

50. In this respect, the Committee took note that the Disciplinary Committee made the following analysis concerning the aforementioned clauses:

- A fully independent club would not be required to inform any other entity, such as Meriton, of the transfer offers it has received in respect of a player (clause 4.1);
  - Similarly, a fully independent club would not need to provide any third-party with privileged and confidential information enabling it to ascertain that the transfer or loan has been duly executed (clauses 5.3 and 6.2);
51. In addition, the Disciplinary Committee expressed concern that disclosing sensitive and confidential information to Meriton could result in a conflict of interest, should Meriton have entered into a similar agreement with another club wishing to hire the Player.
52. In reply thereto, the Appellant emphasized that the obligation to disclose information in itself did not provide Meriton with the ability to influence anything. In addition, the Appellant submitted that a club may be required to disclose information on transfer-related matter under various other obligations, without however limiting its ability to act independently. Finally, the Appellant recalled that art. 18bis of the RSTP referred only to third-party's influence and not to the potential conflict of interest that may arise when providing information to another party. In particular, the Appellant argued that a potential conflict of interest would anyway not grant Meriton the ability to influence the Appellant.
53. In this regard, the Committee first noticed that these clauses referred to the Appellant's obligation to provide Meriton with several information, such as:
- All transfer offers the Appellant received concerning the Player, including amongst other the name of the club, the transfer fee offered as well as whether the Appellant and/or the Player accepted this offer (clause 4.1);
  - Any and all documents, invoices and agreements relating to the transfer or loan of the Player once executed (clauses 5.3 and 6.2).
54. Then, the Committee admitted that art. 18bis of the RSTP does not directly refer to conflict of interest that may arise when a club provides information to a third-party. Nevertheless, the Committee recalled that the purpose of this provision is to ensure that clubs' freedom and independence regarding employment and transfer-related matters are not put at risk as well as to avoid situations of conflict of interest which could ultimately lead to match manipulation and match fixing practices.

55. Having considered the foregoing, the Committee found that clause 4.1 had to be analysed in conjunction with other clauses, in particular clauses 4.3, 4.4, 4.5, 5.1 and 6.1 discussed below, as the obligation to inform Meriton of any offer received was the first step to be undertaken by the Appellant. In continuation, the Committee noted that the Appellant was required to inform first Meriton whether it accepted or rejected the offer and then await Meriton's decision. In this regard, the Committee observed that before sharing the transfer offer and its decision to accept or reject it with Meriton, the Appellant had first to consider the financial impact that would result from Meriton's decision. As such, the Committee deemed that this clause was impacting on the Appellant's conduct and was therefore contrary to art. 18bis of the RSTP.
56. Regarding clauses 5.3 and 6.2, the Committee considered that they both governed the final phase once the transfer or the loan had been executed. In particular, the Committee noted that the Appellant had, upon request of Meriton, to provide the latter with a number of documents, invoices and agreements concerning the transfer or loan of the Player. In this regard, the Committee believed that the sole purpose of these clauses was to enable Meriton to ensure that the transfer or loan had been properly executed as well as to verify that the amounts received from the Appellant reflected those contained in the sensitive and confidential documents provided by the Appellant.
57. As a result, the Committee confirmed that clause 5.3 and 6.2 infringed art. 18bis of the RSTP, as they impacted the Appellant's behaviour insofar that the latter had to provide confidential information to Meriton upon request. In addition, the Committee endorsed the conclusion of the Disciplinary Committee whereby a fully independent club would not be under the obligation to inform any other entity of such information, thereby enabling that entity to verify that the transfer or loan was duly executed and to establish that the amounts received in connection therewith were correct.
- c. Clauses relating to a potential transfer or loan of the Player (clauses 4.3, 4.4, 4.5, 5.1 and 6.1).
58. With respect to these clauses, the Committee noted that the Disciplinary Committee found that Meriton had the possibility to influence the negotiations by instructing the Appellant to accept or reject the potential transfer offer, and therefore acquired the ability to influence the Appellant in transfer-related matters.
59. In particular, the Disciplinary Committee considered that these clauses granted Meriton a major advantage over the Appellant and drastically reduced its freedom when deciding on a transfer offer it had received. In addition, the Disciplinary Committee pointed out

that should the Appellant decide to loan the Player, it would not be entitled to receive the relevant loan fee as this fee had to be transferred to Meriton.

60. As a result, the Disciplinary Committee concluded that it was clear from the content of clauses 4, 5 and 6 that the Appellant was not in a position to freely negotiate a potential transfer or loan of the Player and recalled that a fully independent club should be the only one entitled to discuss about, to negotiate and to decide on the possible transfer of its players. Therefore, the Disciplinary Committee found that these clauses contravened art. 18bis of the RSTP since they undoubtedly and abusively influenced the Appellant in employment and transfer-related matters.
61. With respect to these clauses, the Committee observed that the Appellant claimed that they imposed two conditional obligations in the event a club made an offer to engage the Player:
- The first one was to pay to Meriton the amount of the transfer offer received that became due in case the latter accepted this offer;
  - The second one provided for that should Meriton decline the transfer offer, then the Appellant would have to pay Meriton the higher amount between (i) the transfer fee and (ii) the amount initially paid by Meriton to the Appellant plus 5% interest<sup>13</sup>.
62. In this regard, the Appellant emphasized that the acceptance or rejection of Meriton served only to trigger one of the two aforementioned conditional obligations. However the Appellant argued that it remained absolutely free to decide on the transfer offer.
63. Finally, the Committee observed that the Appellant submitted that the ERPA did not contain any clause giving Meriton the right to make decision or instruct the Appellant with respect to employment and transfer-related matters. According to the Appellant, these clauses only generated conditional obligations that it should take into account when deciding on these matters. In addition, the Appellant stressed that in a situation where Meriton would have declined the transfer offer, the Appellant would have in any case remained free to accept the offer and retain the transfer fee, but then would have had to reimburse Meriton for its initial investment with interest.

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<sup>13</sup> Cf. table provided by the Appellant summarising the different scenarios, p.9 above.

64. In light of the above and having analysed both positions, the Committee stressed that the aforementioned clauses should be interpreted jointly and noticed that clauses 4.3, 4.4 and 4.5 contained the modalities of a potential transfer of the Player. In particular, clause 4.3 empowered Meriton to decide whether to accept or reject the transfer offer. The Committee also noted that depending on Meriton's decision, clause 4.4 or 4.5 would apply.
65. In this respect, the Committee drew first its attention to clause 4.4 which governed the situation where Meriton rejected the offer but the Appellant accepted it and transferred the Player. In such a situation, clause 4.4. referred to clause 5 according to which the Appellant would have to either:
- Pay Meriton's Interest, *i.e.* 100% of the financial value stemming from the Player's Federative Rights, after deduction of the Appellant's interest (corresponding to 25% of the Transfer Fee in excess of EUR 15,000,000 in case the Transfer Fee was higher than this amount, if applicable);
  - Pay Meriton's Grant Fee, *i.e.* EUR 15,000,000 plus 5% interest.
66. Then, the Committee focused on Clause 4.5 which referred to the scenario where Meriton accepted the transfer offer. In this event, the Committee noted that the Appellant was obliged to pay to Meriton the full amount that was offered by the club wishing to hire the Player, and this regardless of whether or not the transfer of the Player actually took place.
67. Finally, the Committee observed that should the Appellant decide to loan the Player, it would not be entitled to receive the relevant loan fee given that this fee should be transferred to Meriton as per clause 6.1.
68. Against this background, the Committee recalled that a club is in breach of art. 18bis of the RSTP whenever it entered into an agreement that allowed a third-party to have a real ability to effect on, determine or impact the behaviour or conduct of the club in employment and transfer-related matters or the performance of its team. The Committee further reiterated that the inclusion of such a clause in an agreement constituted an offence in itself meaning that it was irrelevant whether or not influence was exercised.
69. In light of the foregoing, the Committee first admitted that it might be true that Meriton could not directly take decisions or instruct the Appellant regarding transfer-related matters. Nevertheless, the Committee noted that the Appellant itself acknowledged that

it had to take into account the aforementioned clauses when it had to decide on a transfer offer.

70. Secondly, the Committee addressed the potential situation where the Appellant refused the transfer offer, for any reason whatsoever, but Meriton accepted it. In such a situation, the Player would remain with the Appellant but the latter would have to pay Meriton the full amount that was offered by the club to hire the Player. In other words, the Committee pointed out that the Appellant would end up paying Meriton the transfer fee that the former did not even receive because it refused to transfer the Player.
71. Similarly, the Committee held that the Appellant, in the event of a loan of the Player, would have to transfer the loan fee to Meriton. Accordingly, the Committee found that in such a situation the Appellant would no longer benefit from the player nor would it be entitled to any monetary compensation since the loan fee would be paid to Meriton.
72. On this basis, the Committee strongly believed that it cannot be denied that the aforementioned clauses 4.3, 4.4, 4.5, 5.1 and 6.1 did not impact or affect the Appellant's behaviour and conduct when considering a transfer or loan offer from a club wishing to hire the Player, and especially the response that the Appellant should give to it. In particular, the Committee considered that the Appellant was not free to decide on transfer-related matters as it had to bear in mind the financial consequences it might face depending on Meriton's choice to accept or reject the transfer offer.
73. In light of all of the foregoing, the Committee considered that the aforementioned clauses enabled Meriton to have the ability to influence the Appellant's independence in transfer-related matters, and are therefore infringing art. 18bis of the RSTP.

***d) If so, are the sanctions imposed by the FIFA Disciplinary Committee proportionate?***

74. Having established that the Appellant breached art. 18bis of the RSTP, the Committee subsequently noted that the Appellant considered that the sanctions imposed by the Disciplinary Committee were disproportionate and argued that the previous sanctions imposed on it should not be taken into account.
75. In particular, the Appellant pointed out that the motivated decisions – by means of which the latter was sanctioned for infringing art. 18bis of the RSTP – were only notified once the ERPA at hand had already been entered into. Finally, the Appellant referred to another decision of the Disciplinary Committee against the club FC Porto, where the

latter was sanctioned with a fine of CHF 50,000 for breaching two different provisions of the FIFA Regulations.

76. In these circumstances, the Committee went on to analyse whether the sanctions imposed, namely a fine of CHF 75,000 and a warning, were proportionate to the offences committed.
77. In this respect, the Committee recalled the jurisprudence of CAS according to which a decision-making body fixing the level of pecuniary sanctions should, amongst others, take into consideration the following elements: (a) the nature of the offence; (b) the seriousness of the loss or damage caused; (c) the level of culpability; (d) the offender's previous and subsequent conduct in terms of rectifying and/or preventing similar situation; (f) the applicable case law and (g) other relevant circumstances<sup>14</sup>.
78. In light of the foregoing, the Committee observed that the Appellant infringed art. 18bis of the RSTP, a provision aiming at protecting clubs' freedom and independence in relation to recruitment and transfer-related matters as well as to ensure that the integrity of the game of football and its most essential values were safeguarded. In other words, this provision intends to protect one of the FIFA objectives which is to *"to promote integrity, ethics and fair play with a view to preventing all methods and practices, such as corruption, doping or match manipulation, which might jeopardise the integrity of matches, competitions, Players, Officials and members or give rise to abuse of Association Football"*<sup>15</sup>.
79. In this regard, the Committee wished to endorse the developments of the Appealed Decision in the sense that any possible situation where a third-party acquired a possibility to directly influence a club in its employment and transfer-related matters should not be tolerated and is absolutely forbidden. In particular, the Committee reiterated that clubs are responsible to assure that the RSTP is duly respected and to ensure that no third-party acquires a possibility to directly influence them in such areas.
80. Bearing the above in mind and with respect to the Appellant's submission according to which the Disciplinary Committee should not have taken into consideration the Appellant's disciplinary records to increase the amount of the fine in the present case, the Committee noted that Meriton and the Appellant entered into the ERPA at stake on 31 January 2014. Furthermore, the Committee observed from the documents at its

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<sup>14</sup> CAS award 2014/A/3813.

<sup>15</sup> Cf. art. 2 lit g) of the FIFA Statutes.

disposal that the two decisions the Appellant was referring to were taken on 24 January 2014 and were directly notified with the grounds on 30 March 2015<sup>16</sup>.

81. In this context, the Committee admitted that the conclusion of the ERPA predates the notification of the two aforementioned decisions. However, the Committee pointed out that the disciplinary proceedings relating to these decisions were initiated before the conclusion of the ERPA at hand, *i.e.* on 27 November 2013.
82. As a result and bearing in mind the seriousness of the provision infringed, the Committee unanimously found that the fine imposed was not disproportionate and was a deterrent sanction to avoid unacceptable conducts such as the one at hand. Additionally, the Committee emphasized that the disciplinary background of the Appellant had been duly taken into consideration by the Disciplinary Committee and therefore no lower sanction would be justified.
83. In particular, the Committee found it doubtful that the Appellant was allegedly not aware of the scope of application of art. 18bis of the RSTP. On the contrary, the Committee firmly believed that the Appellant, being notified on 27 November 2013 of the opening of disciplinary proceedings for a possible violation of art. 18bis of the RSTP<sup>17</sup>, should have been more diligent and cautious before entering into the ERPA at stake involving a third-party a few weeks later, *i.e.* on 31 January 2014.
84. Consequently, the Committee deemed that the Disciplinary Committee properly analysed the facts and circumstances of the case and correctly applied the principle of proportionality when deciding on the sanctions to be imposed.

### **C. CONCLUSION**

85. In light of all the foregoing, the Committee concluded that the decision taken by the FIFA Disciplinary Committee on 1 March 2018 was to be confirmed in its entirety, namely the fine amounting to CHF 75,000, the warning and the costs of the proceedings to the amount of CHF 3,000.

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<sup>16</sup> Cases 131017 and 131051.

<sup>17</sup> Cases 131017 and 131051.

#### **D. COSTS**

86. The Committee decided based on art. 105 par. 1 of the 2017 FDC that the costs and expenses of these proceedings amounting to CHF 3,000 shall be borne by the Appellant.
87. In this sense, the Committee noted that the Appellant had already paid the appeal fee of CHF 3,000 and decided that the aforementioned costs and expenses of the proceedings were set off against this amount.

#### **III. has therefore decided**

1. The appeal lodged by the club SL Benfica is rejected and the decision of the FIFA Disciplinary Committee rendered on 1 March 2018 is confirmed in its entirety.
2. The costs and expenses of the proceedings amounting to CHF 3,000 are to be borne by the club SL Benfica. This amount is set off against the appeal fee of CHF 3,000 already paid by the club SL Benfica.

FÉDÉRATION INTERNATIONALE  
DE FOOTBALL ASSOCIATION



Thomas Bodstrom  
Chairman of the FIFA Appeal Committee

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## LEGAL ACTION

According to art. 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS.

The full address and contact numbers of the CAS are the following:

Avenue de Beaumont 2  
1012 Lausanne  
Switzerland  
Tel: +41 21 613 50 00  
Fax: +41 21 613 50 01  
e-mail: [info@tas-cas.org](mailto:info@tas-cas.org)  
[www.tas-cas.org](http://www.tas-cas.org)