

Decision of the FIFA Disciplinary Committee

passed in Zurich, Switzerland, on 23 July 2020

COMPOSITION:

Mr. Yasser Al-Misehal, Saudi Arabia (member)

Mr. Maclean Letshwiti, Botswana (member)

Mr. Kossi Guy Akpovy, Togo (member)

RESPONDENT:

Club Vegalta Sendai, Japan

Regarding third-party influence and failure to enter correct information in TMS
(Ref. FDD-5760)

Art. 18bis par. 1 of the FIFA Regulations on the Status and Transfer of Players
(2020 ed.) (hereinafter, the "Regulations")

Art. 4 par. 3 of Annexe 3 of the Regulations

I. FACTS OF THE CASE

1. The following summary of the facts does not purport to include every single contention put forth by the actors at these proceedings. However, the FIFA Disciplinary 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 those arguments in the following outline of its position and in the ensuing discussion on the merits.
2. On 8 January 2020, the Portuguese club Portimonense SC and the Russian club PFC CSKA Moscow (hereinafter also referred to as *CSKA*) signed a loan agreement to release the player Takuma Nishimura (hereinafter also referred to as *the Player*) on loan to Portimonense SC.
3. On 19 March 2020, a sub-loan agreement (hereinafter also referred to as *the Agreement*) was signed between the Japanese club Vegalta Sendai (hereinafter also referred to as *Sendai* or *the Club*), Portimonense SC and CSKA in order for Sendai to engage the Player on loan. In particular, the sub-loan agreement contained the following clause 6:

“6) In case the PLAYER during the Loan Periods participates in less than 50% (fifty percent) matches for SENDAI in the J-League sporting season 2020, provided that only the matches in which the PLAYER played 45 (Forty-five) or more minutes shall be taken into account, SENDAI shall pay CSKA a conditional transfer compensation in the amount of 100,000 (One hundred thousand) Euros NET, i.e. exclusive of any solidarity contributions, training compensations, taxes, levies or bank commissions, etc., no later than 31 January 2021.”
4. On 25 March 2020, Sendai entered an “engage on loan” instruction in the Transfer Matching System (TMS) to engage the Player on loan (TMS instruction 283293) from Portimonense SC.
5. In the context of the aforementioned transfer instruction, the Club 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 teams.
6. On 15 June 2020, following the investigations conducted by FIFA’s TMS Global Transfers & Compliance Department (hereinafter, *FIFA TMS*) disciplinary proceedings were opened against Sendai with respect to a potential breach of art. 18bis par. 1 of the Regulations on the Status and Transfer of Players, 2020 edition (hereinafter, *the RSTP* or *the Regulations*) and art. 4 par. 3 of Annexe 3 of the RSTP.

II. RESPONDENT’S POSITION

1. On 17 June 2020, Sendai provided its position, which, together with the arguments provided by the Club to the FIFA TMS on 15 May 2020, can be summarised as follows:

- According to the club's understanding the "*Objective of CSKA is asking for Vegalta Sendai to pay conditional transfer fee, if the player doesn't appear in 50% of season matches. In other words, let the player appear in the game, as much as possible*";
 - Sendai refers to the definition given by TMS of a conditional payment;
 - Sendai further illustrates this definition by two examples of a loan of a player from Club A to Club B:
 - Both clubs agree that Club B shall pay a conditional payment of EUR 100,000 in case the player scores 10 goals or appears in 20 games. The player has scored 9 goals and appeared in 19 games and there is one game left in the season. "*Position of Club B has already finalized*". If the player appears or scores in the last game of the season, the conditions are fulfilled for the conditional transfer fee. It is possible for Club B to decide not to use the player in order to avoid the payment of the conditional transfer fee;
 - Both clubs agree that Club B shall pay a conditional payment of EUR 100,000, in case the player does not appear in at least 50% of the matches during the season. The player has appeared in 47% and there is one game left in the season. If Club B loses the last game of the season, it will be relegated. If the player appears in the last game the player reaches the 50% appearance. However, the player's performance is not good. "*In this situation, it is hard to believe club B decides not to use player to avoid paying conditional transfer fee*";
 - Sendai is of the opinion that whenever there is a conditional transfer fee, it is possible that the new club is influenced;
 - Sendai was informed that CSKA had imposed similar conditional transfer fees in the past and never had any problems;
 - Sendai finally states that in order to determine whether a conditional transfer fee is in breach of art. 18bis of the RSTP, it is important to determine how the condition is perceived by the new club. In this particular case, the club "*perceived as a condition if player fulfilled 50% we pay the conditional transfer fee. (...) We don't have any perceiving of acquire the ability to influence them (...) We will be choosing player for our victory. If this ending up fullfed the conditions we will be paying the conditional transfer fee*".
2. The more detailed arguments made by the Club in support of its written submissions are set out below as far as they are relevant.

III. CONSIDERATIONS OF THE DISCIPLINARY COMMITTEE

A. Jurisdiction of the FIFA Disciplinary Committee

1. First of all, the FIFA Disciplinary Committee (hereinafter also referred to as *the Committee*) notes that at no point during the present proceedings did the Club challenge its jurisdiction or the applicability of the FIFA Disciplinary Code (FDC).
2. Notwithstanding the above and for the sake of good order, the Committee found it worthwhile to emphasise that, on the basis of art. 53 of the FDC as read together with arts. 25 par. 3, 18bis par. 2 of the RSTP and art. 9 par. 2 of Annexe 3 of the RSTP, it is competent to evaluate the present case and to impose sanctions in case of corresponding violations.

B. Applicable law

3. In order to duly assess the matter, the Committee would like to begin by recalling the content and the scope of the provisions at stake.

1. Article 18bis of the RSTP

4. The Committee points out that article 18bis par. 1 of the RSTP establishes a prohibition on the so-called “third party influence”. As a matter of fact, this provision 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”*.
5. Consequently, the Committee emphasizes that this provision is addressed to clubs, which are undoubtedly responsible to ensure that they do not influence or are in any way influenced by the counter club (or a third party).
6. In other words, this prohibition aims at avoiding that a club concludes any type of contract influencing 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 club’s ability to independently determine the conditions and policies concerning purely sporting issues such as the composition and performance of its teams. This provision applies to the influencing club as well as to the influenced club (*vice versa*).

2. Article 4. par. 3 of Annexe 3 of the RSTP

7. Annexe 3 of the RSTP analyses in a very detailed manner the procedure related to international transfers of professional players through TMS.
8. In particular, art. 4 par. 3 of the Regulations 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 [...]”*.
9. In other words, should there be any influence from a counter club and/or third party on a club (as per art. 18bis of the Regulations), the club concerned must indicate it in TMS when entering the relevant transfer instruction.

C. Merits of the dispute

I. Issues of review:

10. The above having been established, the Committee subsequently analyses the evidence at its disposal, in particular, the relevant transfer agreement as well as the documents uploaded

into the TMS and the ones gathered during the investigation conducted by the FIFA TMS in light of the aforementioned provisions.

11. For the sake of good order, the Committee notes that it is undisputed that Sendai concluded a sub-loan agreement with Portimonense SC and CSKA on 19 March 2020. The Committee also observes that the Club has not questioned or disputed neither the content nor the validity of the said sub-loan agreement at any point.

II. Analysis of the sub-loan agreement in connection with art. 18bis of the RSTP

12. Having determined the above, the Committee proceeds to analyse the content of clause 6 of the Agreement, which reads as follows:

“6) In case the PLAYER during the Loan Periods participates in less than 50% (fifty percent) matches for SENDAI in the J-League sporting season 2020, provided that only the matches in which the PLAYER played 45 (Forty-five) or more minutes shall be taken into account, SENDAI shall pay CSKA a conditional transfer compensation in the amount of 100,000 (One hundred thousand) Euros NET, i.e. exclusive of any solidarity contributions, training compensations, taxes, levies or bank commissions, etc., no later than 31 January 2021.”

13. In this respect, the Committee is of the firm opinion that this clause prevents Sendai from freely making a decision as to which players to select in a match with the aim of achieving the best result possible, given that Sendai is instigated to select a certain player because of the possible negative financial impact that not doing so would involve. In this regard, the Committee observes that it is clear that Sendai would not have enjoyed complete independence with regard to its policies or the performance of its teams.
14. In this context, the Committee notes that the Club argued, *inter alia*, that the EUR 100,000 represented the conditional payment of the loan fee. In this regard, the Committee highlights that unlike clauses with conditional bonus payments, i.e. “the club shall receive EUR xx in the event that the Player plays in at least xx% of the matches”, where the new club is still free to decide if the Player plays, the clause in the matter at stake does not grant such a bonus payment in case of playing a certain amount of matches but rather imposes a penalty in case the Player does not play in at least 50% of the matches. This clearly influences Sendai in its decision whether to field the Player or not.
15. Furthermore, the Committee wishes to emphasise that a club is to be found guilty of the prohibited conduct (cf. para II.4 *supra*) whenever the contract in question enables or entitles a club to be influenced by another one (or by a third party), regardless of whether or not this influence actually materialises after the conclusion of the contract. By the mere existence of this clause, Sendai is influenced in its employment and transfer-related matters as demonstrated above.
16. In sum, the Committee considers that the relevant clause undoubtedly grants CSKA the ability to influence the independence and policies of Sendai in employment and transfer-related matters as well as the performance of its team, and therefore concludes that Sendai is liable for the breach of article 18bis par. 1 of the RSTP.

III. Analysis of the facts in light of art. 4 par. 3 of Annexe 3 of the RSTP

17. Having established the above, the Committee further notes that in the relevant transfer instruction (TMS ref. 283293) Sendai declared that it did not enter into a contract enabling a third-party influence.
18. Keeping in mind that, as demonstrated above, the Agreement signed between Sendai, Portimonense SC and CSKA, enabled CSKA to acquire the ability to influence Sendai *“in employment and transfer-related matters its independence, its policies or the performance of its teams”*, the Committee considers that, by declaring in TMS that there was no third-party influence, the Club failed to disclose full and correct information in TMS.
19. As a consequence, the Committee holds that the Club is to be found guilty of having violated art. 4 par. 3 of Annexe 3 of the RSTP.

IV. Summary

20. In view of the foregoing, the Committee concludes that the Club, by its conduct as described above, violated the following provisions of the RSTP:
 - Art. 18bis of the Regulations (2020 edition), for entering into a contract (*i.e.* the Agreement) enabling another club to influence the Clubs' independence;
 - Art. 4 par. 3 of Annexe 3 of the Regulations (2020 edition), for failing to enter correct information in TMS.
21. Therefore, the Committee considers that the Club is to be sanctioned for the aforementioned violations.

V. The determination of the sanction

22. With regard to the applicable sanctions for the present case, the Committee observes in the first place that Sendai is a legal person, and as such it can be subject to the sanctions described under art. 6 par. 1 and 3 of the FDC.
23. For the sake of good order, the Committee underlines that it is responsible to determine 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 (art. 24 par. 1 of the FDC).
24. In these circumstances, the Committee is of the opinion that the relationship between the two clubs in relation to the scope and effects of the relevant clause of the Agreement needed to be taken into account. As a matter of fact, the burden of such clause mainly lies on Sendai, while CSKA is undoubtedly benefitting from it.

25. In the same line, the Committee deems it necessary to distinguish between the influencing club's and the influenced club's responsibility in relation to art. 18bis of the RSTP. In this sense, the Committee considers that the influencer's behaviour is more reprehensible than the one of the influenced. In the matter at hand, the Committee notes that Sendai is the influenced club as it was mainly in CSKA's interest to impose such clauses.
26. Having said that, the Committee notes that Sendai does not have any precedents related to violations of art. 18bis of the RSTP.
27. In light of all the above, the Committee considers a fine to be the appropriate sanction.
28. With regard to the fine, according to the provisions of art. 6 par. 4 of the FDC, the Committee notes that it may not be lower than CHF 100 and greater than CHF 1,000,000.
29. Taking into consideration all the circumstances of the case, while keeping in mind the deterrent effect that the sanction must have on the reprehensible behaviour, the Committee deems a fine of CHF 10,000 to be adequate and proportionate to the offence.
30. In addition, a warning is also issued pursuant to art. 6 par. 1 lit. a) of the FDC in relation to Sendai's conduct. In particular, Sendai is ordered to undertake all appropriate measures in order to guarantee that the FIFA regulations (in particular the FDC as well as the Regulations and its provisions related to third party influence) are strictly complied with. Should such infringements occur again in the future, the Committee would be left with no other option than to impose harsher sanctions on the Club.

IV. DECISION OF THE DISCIPLINARY COMMITTEE

1. The FIFA Disciplinary Committee found the club Vegalta Sendai 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 Vegalta Sendai to pay a fine to the amount of CHF 10,000.
3. In application of art. 6 par. 1 lit. a) of the FIFA Disciplinary Code, the club Vegalta Sendai is warned on its future conduct.
4. The above fine is to be paid within thirty (30) days of notification of the present decision.

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



LETSHWITI Maclean

Member of the FIFA Disciplinary Committee

NOTE RELATING TO THE PAYMENT OF THE FINE

Payment can be made either in Swiss francs (CHF) to 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 account no. 0230-325519.71U, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH95 0023 0230 3255 1971 U, with reference to case number above mentioned.

NOTE RELATING TO THE LEGAL ACTION:

This decision can be contested, in accordance with art. 49 together with art. 57 par. 1 of the FIFA Disciplinary Code, 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 the contact details 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
www.tas-cas.org