

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 Arsenal FC, England

Regarding third-party influence and failure to enter correct and complete information in the Transfer Matching System (TMS)

Art. 18bis par. 1 of the FIFA Regulations on the Status and Transfer of Players (hereinafter: *the RSTP* or *the Regulations*)

Art. 4.3 of Annex 3 of the FIFA RSTP

I. FACTS OF THE CASE

1. The following summary of the facts does not purport to include every single contention put forth by the club Arsenal FC 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 6 February 2020, the club Arsenal FC (hereinafter referred to as, “Arsenal” or “the Club”) and the club Cork City (hereinafter, “Cork”) concluded a loan agreement (hereinafter, “the Agreement”) in relation to the transfer of the player Joseph Oluwbenga Olowu (hereinafter, “the Player”), who was transferred from Arsenal to Cork. The parties agreed on a loan fee in the amount of GBP 8,000 as well as on a so-called “Performance Fee” in the amount of GBP 15,000. In this respect, the Agreement contained the following clause (hereinafter, the Clause):

Clause 5.3:

It is agreed that, if conditions set out at any of clauses 5.3 (A) to (D) below are satisfied, the Performance Fee shall be reduced based on the number of Starting Appearances made and the total number of minutes played by the Player during the Loan Period, as follows:

(A) to £10,000 (ten thousand pounds) (plus any applicable VAT) in the event the Player makes a minimum of eight Starting appearances and plays for a minimum total period of 800 minutes in First Team Competitive matches during the Loan Period; or

(B) to £8,000 (eight thousand pounds) (plus any applicable VAT) in the event the Player makes a minimum of 10 Starting appearances and plays for a minimum total period of 1000 minutes in First Team Competitive matches during the Loan Period; or

(C) to £ 4,000 (four thousand pounds) (plus any applicable VAT) in the event the Player makes a minimum of 13 Starting appearances and plays for a minimum total period of 1300 minutes in First Team Competitive matches during the Loan Period; or

(D) to £0 (such that the Performance Fee payable to Arsenal is zero) in the event the Player makes a minimum of 16 Starting appearances and plays for a minimum total period of 1500 minutes in First Team Competitive matches during the Loan Period”

3. On 11 February 2020, Arsenal entered a “release on loan against payment” transfer instruction in the Transfer Matching System (TMS) (TMS instruction: 277429).
4. 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.

5. On 25 June 2020, following an investigation conducted by the FIFA TMS department (hereinafter, “the FIFA TMS”), disciplinary proceedings were opened against Arsenal with respect to a potential breach of art. 18bis par. 1 of the RSTP (hereinafter: the RSTP or the Regulations) and art. 4 par. 3 of Annexe 3 of the RSTP.

II. RESPONDENT’S POSITION

1. On 9 July 2020, Arsenal provided its position in relation to the present disciplinary proceedings, which, together with the arguments provided by the Club to the FIFA TMS, can be summarized as follows¹:

- Loans

- Loan agreements should be subject to a more lenient application of article 18bis of the Regulations.
- When it comes to loans, the releasing club has an ongoing and legitimate interest in safeguarding the player and its value. In fact, FIFA, by means of the FIFA Commentary, acknowledges that the club of origin has an interest in ensuring that the investment on a player that has been loaned, is duly protected, as the loan system is designed to encourage the development of those players.
- Therefore, it is reasonable and legitimate for the club of origin to include some form of protection in the relevant loan agreement and ensure that the player will be afforded access to competition. This is commonly done by introducing financial incentives for the player to be fielded.
- The incentive fees are designed to provide comfort to the club of origin that the objective of the loan may be fulfilled, while avoiding any direct interference in the transferee club.
- By considering such incentive fees to be in breach of article 18bis of the RSTP, the objectives of the loan system are jeopardized and, hence, this has a negative impact on the development of young players.

- Article 18bis and the Clause

- The relevant clause is a simply commercial provision to encourage the development of the Player during the Loan Period. This does not constitute a restriction that could amount to Arsenal influencing the decisions of Cork, which retains complete independence and control over its team selection.

¹ The summary does not purport to include every single contention put forth by the Club. 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.

- Legitimate expectation
 - Arsenal had a legitimate expectation to believe that the loan agreement did not contravene article 18bis of the Regulations since i) there is no guidance from FIFA that could suggest that variable appearance-related loan fees would breach Article 18bis; ii) Arsenal has agreed similar clauses in the past without any issue being raised by FIFA; and iii) The FA and the Premier League approved the contents of the relevant loan agreement.

- Comments on the TMS Case Transfer Report
 - FIFA TMS has not considered properly the arguments provided by Arsenal.
 - In this sense, the fact that financial implications may flow from Cork's decisions and that the performance fee may or may not reduce depending on whether the Player plays, does not undermine the independence of Cork in its decisions.
 - The Clause is in essence, no different from a contingent payment clause which provides for a payment to be due to the club of origin if the player loaned plays in a certain number of matches for the transferee club. As far as Arsenal understands, there is no suggestion that the described clauses infringe article 18bis of the RSTP. Otherwise, this would imply that contingent payments which are in any way linked to a player's appearance/ performance, would be deemed to affect the potential payer's decision-making and thus be in breach of article 18bis. This interpretation of article 18bis goes beyond the scope of application and purpose for which the said article was implemented.

- Article 4 par. 2 of Annex 3 of the Regulations
 - Arsenal did not infringe article 4.3 of Annex 3 of the RSTP because it declared that there was no third party influence in good faith, as it firmly believes that the Agreement does not contravene article 18bis of the Regulations and in any event, Arsenal is not a third party in the present case.

III. CONSIDERATIONS OF THE DISCIPLINARY COMMITTEE

1. In view of the circumstances of the present matter, the FIFA Disciplinary Committee (hereinafter also referred to as "*the Committee*") decided first to address the procedural aspects, namely, its jurisdiction and the applicable law, before entering into the substance of the matter and assessing the possible breach of art. 18bis and art. 4 par. 3 of Annexe 3 of the RSTP by Arsenal, as well as the potential sanctions, if applicable, resulting therefrom.

A. Jurisdiction of the FIFA Disciplinary Committee

2. First of all, the Committee observes that at no point during the present proceedings did the Club challenge its jurisdiction or the applicability of the FIFA Disciplinary Code (FDC).

3. Notwithstanding the above, and for the sake of good order, the Committee finds 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 was competent to evaluate the present case and to impose sanctions in case of corresponding violations.

B. Applicable law

4. In order to duly assess the present matter, the Committee wishes to recall the content and the scope of the provisions at stake.

i. Article 18bis of the RSTP

5. The Committee points out that art. 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.”*
6. 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).
7. In other words, this prohibition aims at avoiding that a club concludes any type of contract, which 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. Finally, it is reminded that this provision applies to the influencing club as well as to the influenced club (*vice versa*).

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

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

C. Merits of the case

I. Issues of review:

11. After having outlined the content and the scope of the aforementioned provisions, the Committee subsequently examines the evidence at its disposal (in particular, the Agreement, the documents uploaded into TMS as well as those collected during the investigation carried out by FIFA TMS and during the present disciplinary proceedings) in light of the said provisions.
12. For the sake of good order, the Committee highlights that the conclusion of the Agreement between Arsenal and Cork on 6 February 2020 is an undisputed fact and notes that Arsenal has not questioned or disputed neither the content nor the validity of the Agreement at any point.

II. Analysis of the Agreement in connection with art. 18bis of the RSTP

13. Bearing in mind the foregoing, the Committee proceeds to examine the content of the Clause (cf. point I.2 *ut supra*) and notes that such clause establishes certain conditions, related to the number of starting appearances of the Player in each match during his loan period with Cork, that, if met, would reduce the Performance Fee of £15,000 agreed between Arsenal and Cork (i.e. clause 5.2 of the Agreement).
14. Subsequently, the Committee moves on to analyze the position provided by Arsenal. Namely, the arguments related to the legitimate interest the Club had in safeguarding the Player's value and ensuring his access to competition.
15. First of all, the Committee wishes to express that it agrees with Arsenal's view that the loan system, in principle, helps and encourages the development of players, in particular, the younger ones. However, it is important to bear in mind that this does not imply that the club of origin shall be entitled to impose measures or conditions on the assignee club to ensure the development of those players.
16. The Committee is of the opinion that the protection of the interests of both clubs involved in the loan transfer of a player is grounded in the very nature of this type of contracts, in which one of the parties (i.e. the club of origin) wishes to loan a player to other club so that he has the chance to play more minutes and gain experience. Likewise, the assignee club can use the player in order to achieve its sporting goals.
17. Notwithstanding the above, the Committee observes that in this particular case, the parties agreed on a loan and performance fee. Indeed, Cork accepted that the loan of the Player would have costed a maximum of GBP 23,000 (i.e. GBP 8,000 as loan fee and GBP 15,000 as performance fee). The Committee believes that the possibility for Cork of having the performance fee reduced appears to be an incentive rather than a possible external influence of Arsenal on Cork's decisions.

18. In addition, the Committee finds that the total fee, as well as the potential deductions, are relatively modest. Moreover, the Committee notes that Arsenal bore the salary of the Player. Additionally, the Committee deems important to underline that, at the time of the loan, the Player was only 20 years old, and considers that Arsenal had legitimate interests in trying to encourage Cork to field the Player as much as possible in order to ensure his sporting evolution.
19. Following the above deliberations, the Committee proceeds to ascertain whether the contents of the Clause contravenes the provision laid out in article 18bis of the Regulations. In this particular case, the Committee considers that, although the conditions set out in the Clause could affect somehow the decisions taken by Cork in relation to the Player, they do not enable Arsenal to exercise a real influence on Cork.
20. In light of the above, the Committee considers that the Club has not violated article 18bis of the Regulations and therefore, concludes that the charges against the latter have to be dismissed.

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

21. The Committee further observes that in the relevant transfer instruction (TMS ref. 277429) the Club declared that it did not enter into a contract enabling a “third-party influence”.
22. On the other hand, the Committee remarks that, as determined above, the Clause does not suggest clearly enough that the Club is acquiring the ability to influence in employment and transfer-related matters the independence, the policies or the performance of the teams of Cork.
23. Consequently, since Arsenal was not found to have violated art. 18bis of the Regulations, the Committee understands that by checking the cell “no” in the field related to the declaration of “third-party influence”, the Club did not infringe article 4 par. 3 of Annexe 3 of the RSTP in the present case.

IV. Summary

24. In view of the foregoing, the Committee concluded that, in the present case, the Club has not violated the Regulations, in particular, article 18bis and art. 4 par. 3 of Annex 3.
25. As a result, the Committee considers that no sanctions shall be imposed on the Club.

IV. **DECISION OF THE DISCIPLINARY COMMITTEE**

All charges against the club Arsenal FC are dismissed.

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



LETSHWITI Maclean

Member of the FIFA Disciplinary Committee

NOTE RELATING TO THE LEGAL ACTION

This decision can be contested before the FIFA Appeal Committee (art. 57 of the FDC, 2019 edition). Any party intending to appeal must announce its intention to do so in writing within three (3) days of notification of the grounds of the decision. Reasons for the appeal must then be given in writing within a further time limit of five (5) days, commencing upon expiry of the first time limit of three (3) days (art. 56 par. 4 of the FDC, 2019 edition). The appeal fee of CHF 1,000 shall be transferred to the following bank account on the date of the expiry of the time limit of five days for submitting the reasons for appeal at the latest (art. 56 par. 6 of the FDC, 2019 edition).

The payment of the appeal fee 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.