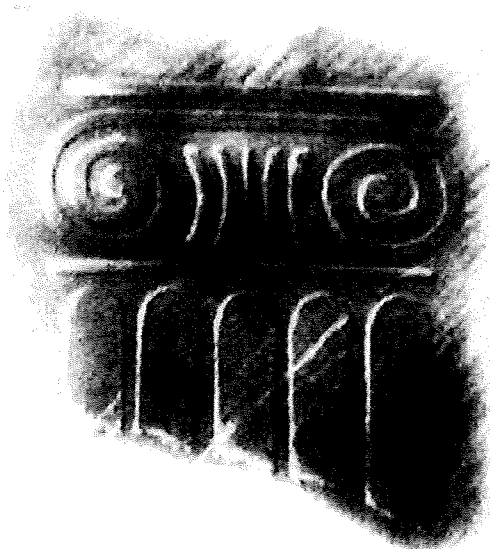


**Tribunal
Arbitral du Sport
Court of Arbitration
for Sport**



ARBITRAL AWARD

Futebol Clube Do Porto, Porto, Portugal

v.

Fédération Internationale De Football Association (FIFA), Zurich, Switzerland

CAS 2020/A/7026 - Lausanne, May 2021



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2020/A/7026 Futebol Clube do Porto v. FIFA (Mangala)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Manfred Peter Nan, Attorney-at-Law, Arnhem, the Netherlands
Arbitrators: Mr Mark Andrew Hovell, Solicitor, Manchester, United Kingdom
Mr Benoit Pasquier, Attorney-at-Law, Zurich, Switzerland

in the arbitration between

FUTEBOL CLUBE DO PORTO, Porto, Portugal

Represented by Mr David Casserly and Mr Anton Sotir, Attorneys-at-Law, Lausanne, Switzerland

as Appellant

and

FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA), Zurich, Switzerland

Represented by Mr Miguel Liétard Fernández-Palacios, Director of Litigation, and Mr Saverio Paolo Spera, Senior Legal Counsel, FIFA, Zurich, Switzerland

as Respondent

* * * * *

I. PARTIES

1. Futebol Clube do Porto (the “Appellant” or “Porto”) is a football club with its registered office in Porto, Portugal. It is a member of the *Federação Portuguesa de Futebol* (the Portuguese Football Federation – the “FPF”), which in turn is affiliated to the *Fédération Internationale de Football Association*.
2. The *Fédération Internationale de Football Association* (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the global governing body of football. It exercises regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players at international level.
3. Porto and FIFA are hereinafter jointly referred to as the “Parties”.

II. INTRODUCTION

4. The present appeal arbitration procedure concerns a dispute between Porto and FIFA related to an alleged violation of Porto of Article 18bis and Article 4(2) of Annex 3 to the FIFA Regulations on the Status and Transfer of Players (the “RSTP”) (edition 2010). The FIFA Disciplinary Committee held Porto liable for enabling the company Doyen Sports Investment Limited (“Doyen”) to acquire the ability to influence Porto’s independence and policies in transfer-related matters and for not declaring that influence in the relevant transfer instruction in FIFA’s Transfer Matching System (“TMS”) with respect to the football player Mr Eliaquim Hans Mangala (the “Player”), sanctioning Porto with a fine in the amount of CHF 55,000 and a warning for its future conduct (the “First Instance Decision”). The FIFA Appeal Committee confirmed the decision of the FIFA Disciplinary Committee on appeal (the “Appealed Decision”). Porto is challenging the Appealed Decision in the present appeal arbitration proceedings before the Court of Arbitration for Sport (“CAS”).

III. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the Parties’ written submissions, the hearing and the evidence examined in the course of the present appeals arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

6. On 16 August 2011, Porto, the Belgian football club *Standard Liège* (“Standard”) and the Player concluded a tripartite transfer agreement concerning the Player’s transfer to Porto for a transfer fee of EUR 6,500,000.
7. On 14 December 2011, Porto and Doyen concluded an agreement entitled “*Financial Economic Rights Participation Agreement*” (the “FERPA”), by means of which, shortly

put, Doyen acquired 33.33% of the Player's economic rights in return for a payment of EUR 2,647,059 to Porto.

8. On 14 August 2014, the Player was transferred from Porto to the English football club Manchester City FC ("Manchester City") on a permanent basis for an undisclosed transfer fee. In the relevant transfer instruction in TMS, Porto indicated that it had not entered into an agreement which enabled any other party to that agreement or any third party to acquire the ability to influence its independence and policies in transfer-related matters.
9. On 28 September 2015, FIFA Transfer Matching System GmbH ("FIFA TMS"), the company that operates TMS, sent a correspondence to Porto with regard to a possible breach of Article 18bis RSTP in relation to the Player, to which Porto responded on 12 October 2015.
10. On 2 December 2015, FIFA TMS informed Porto that the matter would be referred to the FIFA Disciplinary Committee.

B. Proceedings before the Disciplinary Committees of FIFA

11. On 18 January 2019, the secretariat to the FIFA Disciplinary Committee informed Porto that disciplinary proceedings had been opened against it for a possible violation of Article 18bis RSTP and Article 4(2) Annex 3 RSTP.
12. On 5 March 2019, the FIFA Disciplinary Committee rendered the First Instance Decision, communicated to Porto on 14 March 2019, with the following operative part:

1. *[Porto] is declared liable for the violation of article 18bis [RSTP] for entering into a contract which enabled a third-party to acquire the ability to influence the club's independence in employment and transfer-related matters in relation to the transfer of the [Player].*
2. *[Porto] is also declared liable for the violation of article 4 par. 2 of Annexe 3 [RSTP] as a result of failing to provide correct data in TMS in relation to the transfer of the [Player] (TMS instruction 99125).*
3. *[Porto] is ordered to pay a fine in the amount of CHF 55,000. The fine is to be paid within 30 days of notification of this decision. [...]*
4. *In application of articles 10 a) and 13 of the FIFA Disciplinary Code, [Porto] is warned on its future conduct. [Porto] is ordered to undertake all appropriate measures in order to guarantee that the FIFA regulations, in particular the RSTP and the 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 [Porto].*
5. *The costs and expenses of these proceedings amounting to CHF 3,000 shall be borne by [Porto] and be paid according to the modalities stipulated under 3. above."*

13. On 6 May 2019, the grounds of the First Instance Decision were notified to Porto.

C. Proceedings before the Appeal Committee of FIFA

14. On 9 May 2019, Porto notified FIFA of its intention to appeal against the First Instance Decision before the FIFA Appeal Committee.
15. On 6 September 2019, the FIFA Appeal Committee rendered the Appealed Decision, with the following operative part:

- “1. *The FIFA Appeal Committee found [Porto] responsible for the infringement of the relevant provisions of the [RSTP] related to third-party influence on clubs (art. 18bis) and to the obligations of clubs with respect to the TMS (art. 4 par. 2 of Annexe 3).*
2. *The Appeal lodged by [Porto] is rejected and the decision of the FIFA Disciplinary Committee passed on 5 March 2019 is confirmed in its entirety.*
3. *The costs and expenses of the proceedings amounting to CHF 3,000 are to be borne by [Porto]. This amount is set off against the appeal fee of CHF 3,000 already paid by [Porto].”*

16. On 6 April 2020, the grounds of the Appealed Decision were notified to Porto, determining, *inter alia*, the following:
 - With regard to the scope of the prohibition foreseen in Article 18bis RSTP, the FIFA Appeal Committee considers that “*a club will be in breach of art. 18bis of the RSTP every time it enters into an agreement that enables a person - natural or legal [the wording of the prohibition is intentionally broad and includes any natural or legal person (being it a party to the agreement or not)] - to have an influence on the club on its independence and policies with respect to employment, transfer-related matters or the performance of its team, regardless of whether or not this influence actually materialises. The mere fact of the presence of such clauses in the agreements represents an infraction per se.*”
 - [...] *CAS ruled that the prohibition foreseen in art. 18bis of the RSTP applies whenever any other party to that contract or any third party is granted the real ability to effect on, determine and 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.*
 - [...] *[S]aid influence by the third party, and consequently the breach of art. 18bis of the Regulations, does not materialize at the point when a club cannot effectively take a decision on employment or transfer-related matters in an independent way, but at an earlier stage, namely at the moment of the conclusion of the agreement where the possibility to influence is foreseen.*

- *Consequently, when analyzing the existence of a violation of art. 18bis of the [RSTP], it is irrelevant if any influence was actually carried out or not, but the breach is materialized whenever a real possibility to affect a club's decision-making process is agreed upon, regardless of the influence being exercised or not. As such, it is evident that a clause introduced in a contract in order for the parties to achieve or attempt to achieve a concrete goal will represent a breach of the [RSTP], as it seems difficult to foresee a scenario in which a clause that aims at securing a profit will not establish conditions that will effectively inducing the engaging club to act in a concrete manner.”*
- *With regard to the question whether the clauses of the FERPA constitute a breach of Article 18bis RSTP, the FIFA Appeal Committee considers that “the wording and nature of clause 6 of the FERPA in combination with the fact that [Porto] is obliged to provide Doyen with every detail concerning any negotiations for a transfer (i.e. club's name, transfer fee, acceptance or rejection of the offer, intermediary fees, terms and conditions of payment, acceptance by the Player, etc), grant far reaching control and involvement to Doyen, as they enable the latter to acquire the ability to influence [Porto] in employment and transfer-related matters.*
- *The Committee considers that said influence enshrined in clause 6 of the FERPA becomes even more obvious when read in conjunction with clauses 7 and 10. [...]*
- *[T]he Committee considers that clauses 7 and 10 determine the obligation for [Porto] to inform Doyen upon receipt of a transfer offer, distribute in advance the amounts to be perceived [sic] by Porto and by Doyen in case of a transfer, and even set a threshold over which [Porto] would be obliged to transfer the Player or otherwise be financially liable before Doyen, should Porto decide not to accept the relevant offer. It is evident for the Committee that the aforementioned obligations represent a clear influence and make [Porto] dependent on the agreement with Doyen and prevent its independent functioning.*
- *The Committee also concurs with the Appealed Decision in the fact that it results evident that the determination by Doyen of the conditions under which [Porto] may loan the Player (clause 11 of the FERPA) or the conditions under which the Player could become a free agent or re-sign with Porto (clause 9 of the FERPA), as well as the imposition on [Porto] of a payment to Doyen in case the Player is not transferred before a certain date (clause 15 of the FERPA), and even the distribution of the amounts to be perceived [sic] by Porto and by Doyen in such cases, represent a financial pressure on [Porto] that is not free to decide on the terms under which it may exercise any of the aforementioned options.*
- *Finally, in addition to the previous clauses influencing [Porto's] independence in transfer-related matters, the Committee also agrees with the Appealed Decision that the imposition by Doyen to Porto to insure the*

Player and to do it under certain conditions and amounts (clause 8 of the FERPA) clearly influences [Porto], as it is not free to carry out its own policy in relation to the insurance of its own players.

- *In the light of the foregoing, the Committee concurs with the Appealed Decision that the relevant clauses analysed represent a breach of art. 18bis of the RSTP.”*
- *With regard to the question whether Porto breached Article 4(2) of Annexe 3 RSTP, the Appeal Committee considers that “even though [Porto] uploaded the relevant agreement in TMS, it was a mandatory obligation to declare the third-party influence, even more so when the Disciplinary Committee considered that the said agreement breaches the provision of art. 18bis [RSTP]. Therefore, by falsely declaring in TMS that there was no third-party influence and that no third parties received money in relation to the transfer, [Porto] failed to disclose full and correct information in TMS and breached art. 4 par. 2 of Annexe 3 of the RSTP.”*
- *With regard to the question whether the sanction imposed on Porto is proportionate, the Appeal Committee considers that Porto “infringed multiple provisions of the RSTP which aim at protecting i) the clubs’ freedom and independence in relation to recruitment and transfer-related matters ii) and the credibility and transparency of the entire transfer system. In other words, these provisions intend 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”.*
- *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] are duly respected and to ensure that no third party acquires a possibility to directly influence them in such areas. Likewise, the Committee found that a failure to upload correct information in TMS is also a serious breach of the Regulations as it jeopardizes the transparency and credibility of international transfers and hinders the possibility of the football authorities to have a more effective monitoring of international transfers.*
- *As a result and bearing in mind the seriousness of the provisions infringed, the Committee unanimously found that the fine imposed is not disproportionate and is a deterrent sanction to avoid unacceptable conducts such as the one at hand. Additionally, the Committee emphasized that contrary to [Porto’s] view, there were not mitigating circumstances which could justify a lower sanction. In particular the Committee noted*

that [Porto] claimed that it always collaborated and replied to FIFA's requests. In this respect, the Committee found that [Porto] simply exercised its right to be heard by submitting its position. Nonetheless, the Committee held that this could not be regarded as a mitigating circumstance.

- *In this regard and in relation to the fine imposed, the Committee observed that under art. 15 par. 1 a) of the 2019 FIFA Disciplinary Code (FDC) in combination with art. 6 par. 4 of the 2019 FDC, it shall range between CHF 300 and CHF 1,000,000.*
- *Moreover, the Committee has taken into account the Disciplinary Committee's established practice, where the fines imposed for similar sanctions have ranged from CHF 10,000 to over CHF 100,000 depending on the seriousness of the offence.*
- *In light of all the foregoing, the Committee deems that the fine in the amount of CHF 55,000 and a warning are the appropriate sanctions to be imposed on [Porto] and decides to confirm the Appealed Decision in its entirety.”*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 27 April 2020, Porto filed a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2019) (the “Code”) with the CAS Court Office. Porto nominated Mr Mark A. Hovell, Solicitor in Manchester, United Kingdom, as arbitrator.
18. On 3 May 2020, Porto requested the CAS Court Office to order FIFA to provide documents and information related to an alleged change of interpretation of Article 18bis RSTP.
19. On 5 May 2020, FIFA nominated Mr Benoit Pasquier, Attorney-at-Law in Zurich, Switzerland, as arbitrator.
20. On 4 June 2020, FIFA denied any change of interpretation of Article 18bis RSTP, objecting to Porto's “*broad and unfounded request*”.
21. On 5 June 2020, the CAS Court Office informed the Parties that it would be for the President of the CAS Appeals Arbitration Division (the “Division President”), or her Deputy, to decide on Porto's request for production of documents. Further, the Parties were invited to inform the CAS Court Office of any objection to submit the present procedure and the case *CAS 2020/A/7025 Futebol Club do Porto v. FIFA (Brahimi)* to the same President of the Panel.
22. On 9 and 10 June 2020 respectively, FIFA and Porto informed the CAS Court Office that they had no objection to submit the present matter and the case *CAS 2020/A/7025 Futebol Club do Porto v. FIFA (Brahimi)* to the same President of the Panel.

23. On 29 June 2020, the CAS Court Office informed the Parties that the Division President, in accordance with Article R44.3(2) of the Code was not competent to rule on Porto's request for production of documents and that this request was to be assessed by the Panel, once constituted. Consequently, the CAS Court Office informed the Parties that the Division President considered that Porto's request for production of documents was premature and, at such stage of the procedure, was to be denied.
24. On 30 June 2020, pursuant to Article R54 of the Code, and on behalf of the Division President, the CAS Court Office informed the Parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

President: Mr Manfred Peter Nan, Attorney-at-Law in Arnhem, the Netherlands;
Arbitrators: Mr Mark Andrew Hovell, Solicitor in Manchester, United Kingdom; and
Mr Benoit Pasquier, Attorney-at-Law in Zurich, Switzerland.

25. On 6 July 2020, the CAS Court Office informed the Parties that the Panel had dismissed Porto's request for production of documents, advising the Parties as follows:

“Comparing FIFA’s position in the 2008 CAS proceedings and FIFA’s position in the Appealed Decision, the Panel is not convinced that FIFA changed its interpretation of article 18bis RSTP, in particular the scope of its application and the notion of influence, as argued by the Appellant. In the Appealed Decision, the Panel does not see anything that contradicts FIFA’s position back in 2008 that pure financing tools are acceptable, but any kind of influence on a club with regard to the negotiation of employment or transfer agreements in relation to the player concerned not.

Therefore, the Panel finds that the Appellant failed to establish that the practice as applied by FIFA in the Appealed Decision has ever been any different in the past. If the Appellant had established this on a prima facie basis, the Panel finds that there would have been a legitimate reason to ask FIFA to provide more decisions from back in the day, so as to allow the Appellant to substantiate its case based on discriminatory treatment. However, now that the Panel finds that the Appellant failed to establish any difference in practice, ordering FIFA to produce more decisions from back in the day amounts to a fishing expedition.

Accordingly, the Appellant’s application for production of documents is dismissed. Should the Appellant come across evidence suggesting a different practice being applied in the past, the Appellant is invited to make a renewed application for production of documents in its Appeal Brief.” (emphasis in original)

26. On 21 July 2020, Porto filed its Appeal Brief, in accordance with Article R51 of the Code.
27. On 21 August 2020, FIFA filed its Answer, in accordance with Article R55 of the Code.

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28. On 31 August and 4 September 2020 respectively, upon being invited to express their opinions in this respect, FIFA indicated its preference for a hearing to be held, whereas Porto did not object to FIFA's request for a hearing.
29. On 8 September 2020, and on behalf of the Panel, the CAS Court Office informed the Parties that, in accordance with Articles R29(3) and R44(2) of the Code, Porto was required to file a certified translation into English of the award *CAS 2017/A/5463 Sevilla v. FIFA* and that FIFA was required to file a certified translation into English of the award *CAS 2016/A/4490 RFC Seraing v. FIFA*.
30. On 5 and 6 October 2020 respectively, FIFA and Porto submitted translations in English of the requested awards that remained undisputed.
31. On 17 November 2020, both Parties returned duly signed copies of the Order of Procedure to the CAS Court Office.
32. On 3 December 2020, a hearing was held via videoconference. At the outset of the hearing, both Parties confirmed not to have any objection as to the constitution and composition of the Panel.
33. In addition to the Panel and Mr Fabien Cagneux, Counsel to the CAS, the following persons attended the hearing:
 - a) For Porto:
 - 1) Mr David Casserly, Counsel;
 - 2) Mr Anton Sotir, Counsel;
 - 3) Mr Adam Taylor, Counsel.
 - b) For FIFA:
 - 1) Mr Miguel Liétard Fernández-Palacios, FIFA Director of Litigation;
 - 2) Mr Jaime Cambreleng Contreras, FIFA Head of Litigation;
 - 3) Mr Saverio Paolo Spera, FIFA Senior Legal Counsel;
 - 4) Mr Bernhard Weber, FIFA Legal Counsel.
34. Both Parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the members of the Panel.
35. Before the hearing was concluded, both Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been fully respected.
36. On the same day, after the hearing, and upon request of the Panel, FIFA submitted information contained in TMS.
37. On 17 December 2020, upon invitation of the Panel, Porto provided its comments on the additional information provided by FIFA.
38. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by

the Parties, even if they have not been specifically summarized or referred to in the present award.

V. SUBMISSIONS OF THE PARTIES

39. The submissions of Porto, in essence, may be summarised as follows:

- Porto disagrees with the broad interpretation of Article 18bis RSTP, and submits that the FERPA does not violate Article 18bis RSTP.
- The objective of the FERPA was to obtain a loan from a third party. After the transfer of the Player to Manchester City, the loan was duly repaid to Doyen. Porto has never been instructed by Doyen, nor in any other way influenced by Doyen, with respect to the transfer of the Player.
- The only criterion in applying Article 18bis RSTP is whether a third party is able to effectively influence a transfer. It deals with the protection of clubs from the influence of any third party and has the intention of preventing a situation where a club is partially or fully excluded from the transfer of its player, or is dependent on a decision or approval of a third party.
- Article 18bis RSTP intends that no one other than the relevant club may be entitled to determine the conditions and policies concerning the transfer of its players. Such rational interpretation does not correspond to the approach taken by FIFA in the Appealed Decision.
- The teleological interpretation of Article 18bis RSTP suggests that it does not prohibit agreements with third parties according to which a club, having full discretion to decide, may be faced with negative financial consequences depending on whether it accepts or rejects a transfer offer from another club.
- Offences and sanctions of sporting organisations must be predictable. Predictable under Article 18bis RSTP is that as long as a third party has no “*say in transfer agreements*”, a club does not violate Article 18bis RSTP.
- FIFA, for a long time did not sanction clubs when they entered into agreements with third parties under the conditions similar to those contained in the FERPA. At the moment the FERPA was concluded, there was no indication that FIFA had changed its approach and that Article 18bis RSTP was to be interpreted differently. Even if FIFA has eventually changed its approach to the notion of *influence* in Article 18bis RSTP, such a change would have to be communicated to the stakeholders, which never happened.
- In accordance with the principle of *in dubio contra proferentem*, any ambiguity in the drafting of the FIFA Regulations would have to be interpreted against FIFA. In this respect, Porto submits that Article 18bis RSTP, in the absence of any express wording, must be interpreted to not cover contracts that provide for potential negative financial consequences for clubs that prefer one transfer option to another.

- The FERPA does not provide Doyen with an ability to influence Porto's transfer-related matters, its independence, policies or the performance of Porto's teams.
- It is Porto's position that for a club to infringe Article 18bis RSTP, the contract in question would have to allow a third party to control its transfer policy: a situation where the club is influenced by a third party, has to seek its approval or is not allowed to transfer its player (or to refuse a possible transfer) without the consent or permission of a third party. The Appealed Decision does not identify any article of the FERPA that provides Doyen with such ability.
- The FERPA was only a financial instrument, entered into to allow Porto to obtain additional financing with an obligation to pay the loan back later, or when the Player was transferred to a new club.
- Article 14 of the FERPA expressly prohibits Doyen from influencing – or to even seeking to influence – Porto's transfer-related matters.
- All articles of the FERPA are in compliance with Article 18bis RSTP.
- With regard to the alleged breach of Article 4(2) Annex 3 RSTP, Porto submits that as the FERPA complies with Article 18bis RSTP, Porto acted in good faith when indicating that it had not entered into an agreement which enables any third party to acquire the ability to influence Porto's independence and policies in transfer-related matters.
- Alternatively, Porto considers that the FIFA Appeal Committee erred by confirming that some clauses of the FERPA are in breach of Article 18bis RSTP and, therefore, the imposed fine of CHF 55,000 should be cancelled or substantially reduced, based on the principle of proportionality.
- Porto has never attempted to conceal any information from FIFA, disclosing the terms of the FERPA in its public annual reports, provided FIFA with the information separately, and collaborated fully with TMS.
- According to the jurisprudence of the FIFA Appeal Committee, the fact that a club was able to independently negotiate the transfer of a player, i.e. even when there was an influence of a third party, but it eventually was not exercised, is to be considered as a mitigating factor. On 14 August 2014, Porto independently negotiated the transfer of the Player to Manchester City without any instructions or influence from Doyen.
- In the alternative, Porto argued that as the majority of the clauses of the FERPA that FIFA alleged breached Article 18bis RSTP did not do so, but the Panel may determine that some did, the fine imposed should be reduced accordingly. It drew parallels with CAS jurisprudence in other disciplinary cases, such as breaches of the RSTP in relation to the registration of minors. In such cases, where it was determined that the number of registrations that were found to be in breach of the RSTP reduced, the sanction issued at first instance was reduced too. This principle should be applied here, if the number of clauses within the

FERPA found by the Panel to be in breach of the RSTP is less than in the Appealed Decision, the fine should be reduced proportionately.

40. On this basis, Porto submits the following requests for relief:

- “1. *The decisions rendered by the FIFA Disciplinary Committee on 5 March 2019 (Decision 180144 TMS POR ZH) and the FIFA Appeal Committee on 6 September 2019 (decision 180144 APC) are set aside.*
2. *Alternatively, the decision rendered by the FIFA Appeal Committee on 6 September 2019 (Decision 180144 TMS POR ZH [sic]) is amended in a manner that results in no fine being imposed on FC Porto, or the amount of the fine being substantially reduced.*
3. *FIFA is ordered to reimburse FC Porto the costs and expenses of the FIFA Appeal Committee proceedings, in the amount of CHF 3,000.*
4. *FC Porto is granted a significant contribution to its legal and other costs.”*

41. The submissions of FIFA, in essence, may be summarised as follows:

- The clear, adequate and justified wording of Article 18bis RSTP, enforceable since 1 January 2008, enables the sanctioning of a club that allows someone else to influence it in any matter possible, and aims at avoiding exactly what the FERPA produced: an agreement affording a third party (i.e. Doyen) the possibility of exerting influence over a football club in decision-making concerning employment and transfer-related matters.
- The clauses of the FERPA that contravene Article 18bis RSTP are 6.1, 7.1, 7.2, 7.3, 7.4, 8, 9.1, 9.2, 9.3, 10.1, 10.2, 10.3, 10.4, 10.5, 11, 15.1 and 15.2 as they entitle Doyen to influence Porto.
- Doyen had the possibility to influence the transfer of the Player since (i) it had to be informed by Porto about any offer received (clause 10.1), (ii) Porto was not free to decide on transfer-related matters as it had to bear in mind the financial consequences it might have faced depending on: a) its refusal of certain transfer offers for the Player (clause 10.2); or b) its acceptance of an offer below a certain threshold (clauses 7.1); c) its inability to sell the Player before certain deadlines (clause 15).
- The FERPA has an impact on the behaviour and/or conduct of Porto in employment-related matters, as it had to take into consideration the potential compensation it would have to pay to Doyen should it fail to maintain the employment contract or simply wished to terminate the contract at an earlier stage (clauses 9.1, 9.2 and 9.3).
- Certain obligations in the FERPA had an impact on Porto’s behaviour insofar as the latter had to provide confidential information to Doyen upon request (clauses 6.1 and 7.4).

- CAS jurisprudence has also confirmed that the mere fact that such clause(s) are included in an agreement constitutes an infringement *per se* and it is therefore irrelevant (in order to determine the existence of a breach) whether any influence has actually been exercised or not.
- The absence of investigations from FIFA's side until 2013 (and not 2018 as stated by Porto) was exclusively due to the secretive and concealed nature of this sort of contractual arrangements. It was only as from 1 December 2012 that clubs had the obligation to declare the existence of any possible third-party influence. Furthermore, it was not until 2015 when FIFA included the obligation for clubs to upload all TPO agreements to TMS and amended Annex 3 RSTP to support the investigative work of TMS and enabling it to properly monitor compliance with Article 18bis and 18ter RSTP.
- There was never any change of approach related to the application of Article 18bis RSTP as alleged by Porto.
- Article 18bis RSTP plays an essential role in safeguarding essential elements of organised football. In this sense, the importance of this article is confirmed by the fact that, as mentioned in the FIFA Circular no. 1130 and Article 1 RSTP, such provision has been placed on the list of articles that are binding at national level and must be included without amendments in association regulations.
- The Panel shall amend a disciplinary sanction of a FIFA judicial body only in cases in which it finds that the relevant FIFA judicial body exceeded the margin of discretion accorded to it by the principle of association autonomy and acted arbitrarily, namely only if the sanction concerned is evidently and grossly disproportionate to the offence.
- The sanction imposed by the FIFA Appeal Committee is just and proportionate, and it serves not only as a punitive measure but, most importantly, as a deterrent to avoid unacceptable conducts such as the one at hand. In this regard, FIFA refers to a list of twelve decisions which were adopted in cases where a breach of Article 18bis RSTP occurred and a similar or identical fine was imposed.
- In response to Porto's alternative argument, FIFA stated that there was no parallel with the protection of minor cases and that there was only one FERPA and if it breached Article 18bis RSTP then that would be enough for the sanctions.

42. On this basis, FIFA submits the following requests for relief:

- “(a) rejecting the reliefs sought by the Appellant;*
- (b) confirming the Appealed Decision;*
- (c) ordering the Appellant to bear the full costs of these arbitration proceedings; and*
- (d) ordering the Appellant to make a contribution to FIFA's legal costs.”*

VI. JURISDICTION

43. The jurisdiction of CAS, which is not disputed, derives from articles 58(1) FIFA Statutes (2019 edition) as it determines that “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question” and Article R47 of the Code.
44. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both Parties.
45. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

46. The appeal was filed within the deadline of 21 days set by Article 58(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fee.
47. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

48. The Parties submit that, according to Article 57(2) FIFA Statutes, CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.
49. Article R58 of the Code provides the following:

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

50. Article 57(2) FIFA Statutes stipulates as follows:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.”

51. The Panel finds that the various regulations of FIFA are indeed primarily applicable, in particular the RSTP (edition 2012), and is satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

IX. MERITS

A. The Main Issues

52. The main issues to be resolved by the Panel are:

- i. Is Porto liable for a violation of Article 18bis RSTP?
- ii. Is Porto liable for a violation of Article 4(2) of Annex 3 RSTP?
- iii. If a violation is committed, are the sanctions imposed on Porto disproportionate?

i. *Is Porto liable for a violation of Article 18bis RSTP?*

53. Article 18bis RSTP provides as follows:

“1. 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.

2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.”

a. The conduct prohibited by Article 18bis RSTP

54. The Panel notes that Article 18bis RSTP was implemented in the 2008 edition of the RSTP and that no changes were made to the provision in the applicable 2010 edition of the RSTP.

55. In the 2015 edition of the RSTP Article 18ter was implemented, specifically prohibiting the practice of clubs entering *“into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation”*.

56. Since the FERPA between Porto and Doyen was concluded on 14 December 2011, Article 18ter RSTP was not yet in force at the time the FERPA was concluded and therefore does not fall under the explicit prohibition of third-party ownership in Article 18ter RSTP. Rather, it is to be assessed whether the FERPA constitutes a violation of the more broadly formulated prohibition of third-party influence under Article 18bis RSTP, which was already in force at the relevant point in time.

57. The Panel notes that another CAS panel has interpreted Article 18bis RSTP as follows, in a translation into English provided by Porto:

“According to our reading of the precept, the offence described and prohibited in article 18bis of the RSTP involves contractually granting a third party (whether or not the latter is a party to the contract in question, through which this power is granted) the capacity to “have effects” or “predominate over” (i.e. the “ability to influence”) the independence, policies or performance of a club through employment and transfer-related matters.

Therefore, in the Panel's opinion, a contract falls foul of this prohibition if it grants a third party the real ability to have an effect on, determine or impact the behaviour or conduct of a club in relation to such matters (employment and/or transfer), in such a way as to restrict the club's independence or autonomy, thereby conditioning its sporting policies or its ability to manage such matters and/or the performance of its teams.

Therefore, with all due caution, the Panel agrees with [FIFA] that a club is guilty of the prohibited conduct not only if a third party has materially influenced its independence or policies in these areas (i.e. when the third party has had an effect), but also when the contract in question effectively enables or entitles said third party to influence the club in such matters and/or capacities, regardless or whether or not this influence actually materialises.

Notwithstanding the above, given the limiting or restrictive effects that article 18bis of the RSTP has on certain fundamental faculties and rights of clubs (inter alia, their freedom to conduct a business and freedom of contract), this prohibition must be interpreted restrictively. The prohibition must only be considered to have been flouted in such situations in which a third party has been granted a real ability to exert effective influence (to take up the term used in the decision of the FIFA Disciplinary Committee, an "effective ability") to influence the club), rather than a hypothetical or theoretical one, as would be the case for conventional contractual provisions lacking in specific and effective binding content. Consequently, the Panel considers that this precept must be applied in a reasonable manner, on a case-by-case basis and never deductively, with the benefit of any doubt being given to clubs (in dubio pro reo)." (TAS 2017/A/5463, para. 90-92)

58. The Panel considers this to be a reasonable and fair interpretation of the rule and does not deem necessary to deviate from such interpretation. The Panel reiterates that there does not have to be an actual interference in the club's transfer-related or employment-related independence for a violation to be committed, the possibility to exercise influence is sufficient. The possibility to influence may arise during the course of the relevant contract, but it may also arise already when the contract is concluded. In the Panel's view, for a violation of Article 18bis RSTP to occur, the relevant club's choice should be constrained because of the contractual arrangement it had entered into. The question thus for the Panel to decide is whether the choice for transferring a player has been influenced by the prior contractual arrangement into which the club had entered. If the contractual arrangement affects and/or restricts the independence of the transferring club, then the condition for violating Article 18bis RSTP has been met.
59. For the present matter, this means that two types of violations with respect to influence can generally be distinguished, i.e. i) violations with respect to Porto's independence in transfer-related matters; and ii) its independence in employment-related matters, which will be addressed separately below.
60. While the FIFA Appeal Committee does not address the individual provisions of the FERPA in the Appealed Decision, the FIFA Disciplinary Committee did address all

provisions separately in the First Instance Decision, which findings were subsequently endorsed in the Appealed Decision.

61. The FIFA Disciplinary Committee considered in the First Instance Decision that the following provisions of the FERPA constituted violations of Article 18bis RSTP:
- Clauses 6.1 and 6.2;
 - Clauses 7.1, 7.2, 7.3 and 7.4;
 - Clauses 8.1, 8.2 and 8.3;
 - Clauses 9.1, 9.2 and 9.3;
 - Clauses 10.1, 10.2, 10.3, 10.4 and 10.5;
 - Clauses 11.1, 11.2 and 11.3;
 - Clauses 15.1 and 15.2.
62. According to the reasoning in the First Instance Decision, these clauses sometimes affect Porto's independence in transfer-related matters, sometimes in employment-related matters and sometimes in both. In its Answer, FIFA subcategorises these same clauses in four different categories: i) clauses related to the Player's employment contract; ii) clauses relating to Porto's obligation to provide Doyen with information and documents; iii) clauses relating to a potential transfer of the Player; and iv) clauses relating to Doyen's right to sell (and Porto's obligation to buy) the asset.
63. The Panel does not consider it pertinent to determine exactly how many clauses or sub-clauses may be considered to constitute a breach of Article 18bis RSTP and to strictly categorise any such violations in sub-categories. Rather, the Panel considers it important to establish whether Porto put Doyen in a position to potentially influence i) transfer-related matters; and/or ii) employment-related matters, which will be addressed separately below.

b. Alleged violation of Article 18bis RSTP with respect to Porto's independence in transfer-related matters

64. The Panel finds that the FERPA had an impact on Porto's independence in transfer-related matters and that the most obvious violation of Article 18bis RSTP in this respect is Clause 10.2 read in conjunction with Clause 10.4 FERPA. Both clauses cannot be entirely detached from Clause 10.1 and 10.3 FERPA and are therefore paraphrased in full hereinafter:

“10.1 Where a club expresses an interest in securing the Transfer of the Player and makes an offer (the “Transfer Offer”), such Transfer Offer shall be communicated to [Doyen] pursuant to clause 6.1. Both the Club and [Doyen] declare that they consider a reasonable Transfer Offer and market value for the Player, the amount of fifteen million euros (€15,000,000).

10.2 If the Club decides to accept the Transfer Offer, then the Club shall automatically be obliged to make payment to [Doyen] of the greater of the following amounts: a) the Grant Fee plus compound interests at the rate of 10% per annum from the date of this Agreement to the date of the Transfer Offer, such amount to be paid in two (2) instalments, 50%

within thirty (30) calendar days from the date of the Transfer Offer and the pending 50% within ninety (90) calendar days of such event; or b) the 33,33% of the proposed transfer fee in the Transfer Offer, to be paid by the Club to [Doyen] in three (3) instalments, 50% within ninety (90) calendar days from the date of the Transfer Offer, 25% within a maximum payment period of one (1) year from the date of the Transfer Offer and the pending 25% within a maximum payment period of two (2) years of such event.

Subject to full and complete payment to [Doyen] of the first instalment accrued pursuant to clause 10.2, and the full and complete recognition by the Club to [Doyen] of the definitive amount and instalments to be paid to [Doyen] pursuant to clause 10.2, in a separate notarized document, [Doyen] shall then free [Doyen's] Interest in the Player's Economic Rights, becoming the Club entitled to retain 100% (one hundred percent) of the Player's Economic Rights

No fees payable (a) to any intermediaries and/or (b) by way of Solidarity Contribution and/or Training Compensation (as defined in the [RSTP], shall be deducted from the payment to be made by the Club to [Doyen] in accordance with the present clause 10.2

10.3 If the Transfer Offer implies a partial or complete exchange of players from the transferee club to the Club involving the Player, the parties accept that [Doyen] shall have the option to either: a) in the event the Player is exchanged for new player/s, to transfer [Doyen's] Interest in the Player to the Club in exchange of a certain interest in the Economic Rights of the new player/s object of such exchange, to be agreed with the Club, and in a percentage that is proportional to the 33,33% that was hold in the Player by [Doyen]; or b) demand that the Club shall pay to [Doyen] an amount equal to the 33,33% of the market value of such player's exchange, with a minimum payment to be made by the Club to [Doyen] of an amount equal to the Grant Fee plus compound interests at the rate of 10% per annum from the date of this Agreement to the date of exchange of players, such payment to be made in two (2) instalments, 50% within thirty (30) calendar days from the date of the player's exchange and the pending 50% within sixty (60) calendar days of such event.

10.4 For the sake of good order it is hereby clearly agreed that if the Club decides to accept a Transfer Offer, then Clause 7 of this Agreement shall be applied. If both the Club and [Doyen] do not accept the Transfer Offer, the present Agreement will continue fully valid and enforceable, keeping [Doyen] its [Doyen] Interest in the Player subject to the terms and conditions of the present Agreement.”

65. The Panel finds that Porto's position that a transfer offer of EUR 15,000,000 correctly reflects the market value of the Player is premature and restricts Porto in making an independent assessment of the reasonableness of an offer at the time such offer is

presented. Indeed, there may be circumstances justifying that an offer of EUR 15,000,000 may be considered below or above the value of the Player at the time the offer is presented.

66. Further, if Doyen considers that an offer is reasonable, but Porto does not consider it to be reasonable, Porto faces a significant financial hurdle to overcome if it wants to persist in refusing the offer made. Indeed, this financial hurdle would involve payment of the greater of i) the “*Grant Fee*”, i.e. EUR 2,647,059, plus 10% interest *per annum* (to be executed within 30 and 90 days respectively), or 33.33% of the offer that is being refused (50% to be executed within 90 days, 25% within one year, and 25% within two years).
67. Although it is clear from the construction of Clause 10.2 read in conjunction with Clause 10.4 FERPA that Porto has discretion in deciding whether to accept or refuse an offer and that it is not *per se* required to accept an offer of EUR 15,000,000, the Panel considers that there is an important caveat whereby Porto’s liquidity position may prevent Porto from refusing an offer made without Doyen’s consent, because it would be unable to comply with Clause 10.2 FERPA, thus practically forcing it – and thereby influencing its decision-making process – to accept an offer against its will.
68. Further, more importantly, when an offer is presented, based on Clause 10.4 FERPA, Doyen is free to decide whether or not it considers the offer to be acceptable. Whether or not Doyen accepts the offer has an important impact on the decision to be taken by Porto, because if Doyen does not consider the offer acceptable, Porto may refuse the offer without consequences. However, if Doyen considers the offer to be acceptable, but Porto does not, this would suddenly force Porto to pay Doyen a significant amount. Put differently, although Porto retains the freedom to ultimately decide, the terms under which it can decide depend on Doyen’s stance. The Panel finds that such dependence on Doyen’s view has the real ability to influence Porto’s decision-making process in transfer-related matters.
69. In light of this, the Panel finds that it cannot be said that Doyen has no “*say in transfer agreements*”, as contended by Porto. The mere fact that Clause 14.1 FERPA provides that “[Doyen] *recognizes that the Club is an independent entity in so far as the Club’s employment and transfer-related matters are concerned and [Doyen] shall not, either through this Agreement or otherwise, seek to exert influence over these matters or the Club’s policies or the performance of its teams*”, i.e. clearly using the language set forth in Article 18bis RSTP, does not make this any different, as the content of this clause is in contradiction with other clauses in the FERPA.
70. Insofar Porto contends that in order for Article 18bis RSTP to be violated it would have to allow a third party to control its transfer policy, such argument must be dismissed. Article 18bis RSTP does not refer to “control”, but to “influence”, which the Panel considers to be a considerably lower standard, comprising both direct and indirect influence. Indeed, as submitted by FIFA, the word “influence” is, *inter alia*, defined as follows in the Merriam Webster dictionary:
 - “*the power or capacity of causing an effect in indirect or intangible ways*”
 - “*the act of power of producing an effect without apparent exertion of force or direct exercise of command*”

71. The Panel agrees with Porto that not all forms of financing transfers are prohibited, but only those affording a third party the ability to influence a club's transfer-related or employment-related independence.

72. In this respect, Porto refers to the following example:

“Any commercial contract between the club and a third party (e.g. a bank) could have the same indirect impact on a club's transfer activity, whereby the club would need to pay a debt arising from such a commercial contract by a specific date. If the club at that moment does not have sufficient funds to pay the debt, but in the meantime receives a transfer offer from another club, the decision to be taken would have an impact on the club's independence in transfer-related matters, viz. either to accept the offer and pay the debt or to reject the offer and struggle with the debt.”

73. The Panel finds that an ordinary loan agreement is not to be considered as a violation of Article 18bis RSTP because in such situation a bank would not be in a position to determine whether an offer presented is acceptable or not, making the difference between the club being required to pay back the loan within set timelimits or only at a later stage. Should a bank nonetheless be able to somehow influence a club's policy, such agreement would normally also constitute a violation of Article 18bis RSTP.

74. The Panel considers Porto's reference to the examples of buy-back clauses or option rights to permanently transfer a player included in loan agreements between clubs immaterial because such kind of agreements usually do not involve third-parties. Although Article 18bis RSTP prohibits clubs entering into a contract enabling “*any other party to that contract [...] the ability to influence*”, it is not for this Panel to determine whether such options between clubs constitute violations of Article 18bis RSTP. The Panel is required to examine whether the clauses of the FERPA constitute a violation. Also, the rationale behind Article 18bis RSTP is clearly to prevent third-party influence, not necessarily to prevent influence being exercised between football clubs.

75. FIFA Circular no. 1130 makes clear that Article 18bis RSTP is implemented with a view to address “*third-party influence on clubs*”, which is reiterated in the FIFA Activity Report 2018 prepared for the 58th FIFA Congress, as referred to by Porto:

“PRINCIPLE. In the past, certain third parties have been able to influence transfers because they “owned” the rights to a player, either in whole or in part. Under the new regulations, clubs are no longer allowed to grant third parties a say in transfer agreements or professional contracts, thus denying them the opportunity to influence the autonomy and internal operations of the clubs or the performance of the teams concerned.”

76. Again, the possibility to influence does not actually need to materialise *per se* in order to constitute a violation of Article 18bis RSTP. Rather, the Panel considers that the mere possibility to exercise influence is sufficient for a violation of Article 18bis RSTP.

77. Similar clauses were also held to be in violation of Article 18bis RSTP in CAS constant jurisprudence, as set forth in the following paragraphs.

78. In TAS 2016/A/4490, a CAS panel held as follows, in a translation into English provided by FIFA:

“Next, the panel notes that the matters in question do in fact constitute an infringement of the provisions of article 18bis of the RSTP and of article 18ter of the RSTP as claimed by FIFA. The cooperation agreement concluded on 29 January 2015 in fact gives DOYEN the possibility of having an influence on the independence and policies of the club through the application in particular of the provisions of article 5b of said agreement, which obliges SERAING FC to inform DOYEN SPORTS “of any incident of any nature whatsoever affecting said players, as well as of any negotiation relating to a possible transfer or loan of one of these players, as well as any contractual renewal or contractual breach concerning them” and in particular the provisions of article 5 d), final paragraph, according to which “in the event that an offer for a transfer of one of said players is equal to or greater than five hundred thousand euros (500,000), IF THIS TRANSFER OFFER IS ACCEPTED BY DOYEN SPORTS and by the player concerned but is not accepted by SERAING UNITED, SERAING UNITED is obliged to pay DOYEN SPORTS 30% of the transfer amount proposed by the third club in its transfer offer, said amount being due in accordance with the payment schedule contained in the transfer offer”. This provision incontestably deprives the club, in such a situation, of all autonomy of management regarding the transfer of the player, and the policy defined in relation to said player. Even if the appellant claims that the conclusion of such a contract and the clauses contained therein prove the contrary regarding its autonomy of management, such an argument relating to its contractual freedom cannot seriously be understood as meaning that the consequences and effects of this contract do not fall within the field of application of article 18bis of the RSTP. [...]” (TAS 2016/A/4490, para. 174)

79. The Panel finds that the content of the Cause 5 d) of the contract concerning FC Seraing contains clear similarities with Clause 10 of the FERPA in the matter at hand.
80. In TAS 2017/A/5463, a CAS panel determined as follows:

“Similarly, the Panel is moved to clarify that DOYEN’s ability to influence the Club was not negated by the fact that Sevilla had the right (under clause 4.4) to “unilaterally and exclusively choose to cancel” its “obligation to sell” the Player if it received an offer [for the amount of or] exceeding EUR 6,000,000, provided that it: (i) reimbursed DOYEN the Minimum Return applicable at the time of the cancellation and (ii) purchased DOYEN’s 50% of the Player’s economic rights at the same price¹ offered by the third club.

In the Panel’s opinion, this in no way alters the nature of the contractual arrangement between the parties, which they designated as an “obligation to sell” on the Appellant’s part and which clearly affected the latter’s independence in relation to its transfer policy. Moreover, even though there

¹ “Albeit with the sums agreed upon in said clause (such as 50% of the income paid by the Club to the Player and 50% of the agent’s commission) being deducted.”

existed a possibility of “cancelling” or circumventing this obligation, this was contingent upon paying a substantial amount of money to DOYEN, which undoubtedly rendered the decision as to whether or not to transfer the Player dependent, or to a large extent conditional, upon the Club’s economic solvency at the time of receipt of such an offer. Consequently, irrespective of the profitability of the transaction in question (selling the Player or purchasing the remaining 50% of his rights), the Club’s ability to decide on the matter was limited or influenced by DOYEN.

Taking up the example referred to in the Contract, if Sevilla received an offer of EUR 15,000,000 for the Player, it could (i) either fulfil its obligation to sell the Player, or (ii) keep the Player in its squad, subject to paying DOYEN a total of EUR 1,800,000 by way of the agreed-upon Minimum Return, plus EUR 7,087,500 to acquire the remaining 50% of the Player’s economic rights. In the Panel’s opinion, this meant that if, upon receipt of the offer for the Player, Sevilla did not have EUR 8,887,500 at its disposal to “cancel” its “obligation to sell”, it would necessarily have to transfer the Player under the terms of the Contract. Accordingly, the Club’s power to decide on the matter was always limited, whether because it had to fulfil the obligation to sell, as stipulated in the Contract, or because it was unable to circumvent said obligation due to lacking the funds required to cancel it. In light of all the above, the Panel deems that there was a clear impingement on the Appellant’s independence.” (TAS 2017/A/5463, para. 101)

81. The Panel finds that the reasoning in TAS 2017/A/5463 is very relevant to the matter at hand. In particular, the section related to the economic solvency at the time an offer is presented can be applied *ipso facto* to Porto and is fully endorsed by the Panel.
82. Consequently, the Panel finds that Clause 10 of the FERPA provides a third party (i.e. Doyen) with the ability to influence Porto’s independence in transfer-related matters, thereby constituting a violation of Article 18bis(1) RSTP.

c. Alleged violation of Article 18bis RSTP with respect to Porto’s independence in employment-related matters

83. The Panel finds that the most obvious violation of Article 18bis RSTP with respect to Porto’s independence in employment-related matters is Clause 9.1 FERPA:

“The Club shall use its best endeavors to prevent the Player becoming a free agent and acknowledges that such endeavors are considered normal business practice for professional football clubs.”

84. The Panel finds that it is only a “normal business practice” for professional football clubs to prevent football players from becoming free agents under certain circumstances. This applies with respect to successful players that represent a (significant) market value on the transfer market. However, a football club having a football player under contract that does not perform to the level anticipated by the club, resulting in a relatively low market value, at least if compared to the salary such player is entitled to, will normally seek to mitigate its losses, either by means of transferring the player concerned to another club for the highest possible transfer fee, which may

well be lower than originally anticipated, or, as a last resort, by refusing to extend the player's employment contract.

85. Due to Clause 9.1 FERPA, Porto is practically deprived of this last option, i.e. Porto would be contractually required to offer the Player an extended employment in a situation where this would not be economically (and sportingly) rational. The Panel considers this to be a clear interference in Porto's independence in employment-related matters.
86. As to Porto's argument that using one's best endeavours is not an obligation, the Panel finds that this argument is to be dismissed. The Panel finds that the best endeavours referred to in Clause 9.1 FERPA obliged Porto to offer the Player an extended employment contract to prevent him from becoming a free agent and that this is where Porto's independence is interfered with. Reference is made to best endeavours only because Porto can obviously not be obliged to conclude an extended employment contract with the Player as it does not control the will of the Player. In case the Player would not like to extend his employment relationship with Porto, despite a good offer being made, Porto would in principle have complied with its duty to use its best endeavours pursuant to Clause 9.1 ERPA, but no extended employment contract would come about.
87. Consequently, the Panel finds that Clause 9.1 FERPA provides a third party (i.e. Doyen) with the ability to influence Porto's independence in employment-related matters, thereby constituting a violation of Article 18bis(1) RSTP.

d. Conclusion

88. In view of the above reasoning, the Panel finds that Porto clearly infringed Article 18bis RSTP with respect to both its independence in transfer-related matters as well as in employment-related matters.
89. Against the background of these two clear violation of Article 18bis RSTP, the Panel does not consider it necessary to dissect the additional clauses of the FERPA in order to potentially come to the conclusion that additional violations took place. Indeed, as indicated *supra*, the various terms of the FERPA are intertwined and the Panel finds that it does not have any added value to try and sub-categorise each clause and sub-clause in a situation where the overall breach has already been established. The Panel will address this in more detail when assessing the proportionality of the sanctions imposed on Porto in the relevant section below.

ii. Is Porto liable for a violation of Article 4(2) of Annex 3 RSTP?

90. Article 4(2) of Annex 3 RSTP provides as follows:

“Clubs are obliged to enter transfer instructions by uploading at least the mandatory documents (cf. Annexe 3, article 8.2 paragraph 1) and providing the following compulsory data depending on the selected instruction type:

- Third-party payment declaration.”

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91. Porto indicates that since it was of the view that the FERPA complied with Article 18bis RSTP, it acted in good faith when indicating that it had not entered into an agreement which enables a third party to acquire the ability to influence its independence and policies in transfer-related matters.
92. The Panel notes that Porto's reasoning is entirely dependent on the premise of whether or not the FERPA is to be considered to be in violation of Article 18bis RSTP, i.e. should the Panel consider that the FERPA is in violation of Article 18bis RSTP, Porto does not put forward any subsidiary argumentation based on which it should be acquitted of violating Article 4(2) Annex 3 RSTP.
93. Since the Panel formed the view that the FERPA is in violation of Article 18bis RSTP, Porto's argumentation is to be dismissed. Because Porto failed to inform FIFA about the FERPA when entering its instructions in TMS, the Panel finds that Porto violated Article 4(2) of Annex 3 RSTP.
94. However, the Panel finds that the severity of this violation should not be overestimated, as Porto disclosed the terms of the FERPA in its public annual reports and provided FIFA with the information separately, which demonstrates that it did not try to conceal the FERPA from FIFA.
95. Nonetheless, the Panel finds that Porto violated Article 4(2) of Annex 3 RSTP.

iii. If a violation is committed, are the sanctions imposed on Porto disproportionate?

96. The Panel considers Porto's violation of Article 18bis RSTP to be a serious violation that warrants a serious sanction and that this violation overshadows Porto's violation of Article 4(2) of Annex 3 RSTP, which the Panel considers as a mere ancillary violation.
97. Based on the reasoning of the First Instance Decision, which was subsequently confirmed by means of the Appealed Decision, a fine of CHF 50,000 was imposed for the violation of Article 18bis RSTP, whereas a fine of CHF 5,000 was imposed for the violation of Article 4(2) of Annex 3 RSTP.
98. Considering that Article 15(1)(a) read in conjunction with Article 6(4) of the FIFA Disciplinary Code provides for a scale of fines between CHF 300 and CHF 1,000,000, and that the FIFA Disciplinary Committee in practice has imposed fines ranging from CHF 10,000 to CHF 100,000 for similar violations, a total fine of CHF 55,000 falls within the statutory discretion.
99. On the one hand, a sanction should be sufficiently severe to have a deterrent effect. The Panel notes that the FERPA has a value of EUR 2,647,059, which means that the fine only amounts to approximately 2% of the value of the FERPA. The Panel does not consider this to be disproportionate and, in fact, even has some doubts as to whether a fine of EUR 50,000 will deter clubs from engaging with financing tools such as the FERPA in the matter at hand, or even to conceal doing so.
100. On the other hand, the Panel finds that FIFA appears to have been somewhat lax in prosecuting and/or investigating potential violations of Article 18bis RSTP in the first

years following its implementation, i.e. from 2008 to 2013, not until 2018 as argued by Porto. At the same time, FIFA can obviously only investigate potential violations if there are suspicions that violations may have been committed and Porto did not provide evidence in support to their argumentation that potential violations may have occurred before, but that FIFA failed to investigate such potential violations. Indeed, as argued by FIFA, it may well be that the concealed nature of these types of agreements caused – at least partially – FIFA’s lack of action. Only as from 1 December 2012 clubs were obliged to declare the existence of any third-party influence to FIFA, pursuant to Article 4(2) of Annex 3 RSTP, and only as from 2015 clubs were required to upload all third-party ownership contracts in TMS in order for FIFA to properly monitor compliance with its regulations.

101. The Panel finds that Porto failed to establish that FIFA changed its interpretation of Article 18bis RSTP since its introduction. In this respect, the Panel’s view as expressed in the CAS Court Office letter to the Parties dated 6 July 2020 did not change after the filing of the Parties’ written submissions and the hearing:

“Comparing FIFA’s position in the 2008 CAS proceedings and FIFA’s position in the Appealed Decision, the Panel is not convinced that FIFA changed its interpretation of article 18bis RSTP, in particular the scope of its application and the notion of influence, as argued by the Appellant. In the Appealed Decision, the Panel does not see anything that contradicts FIFA’s position back in 2008 that pure financing tools are acceptable, but any kind of influence on a club with regard to the negotiation of employment or transfer agreements in relation to the player concerned not.

Therefore, the Panel finds that the Appellant failed to establish that the practice as applied by FIFA in the Appealed Decision has ever been any different in the past. [...]”

102. Considering the above circumstances as a whole, the Panel does not consider a fine of CHF 50,000 and a warning for its future conduct to be disproportionate, even if only based on Clauses 10 and 9.1 FERPA. For this reason, the Panel does not consider it necessary to investigate the other provisions in the FERPA that FIFA considers to be in violation of Article 18bis RSTP.
103. In this respect, the Panel wishes to remark that it is of the view that the mere obligation for a club to provide an investment company with information is not *per se* a violation of Article 18bis RSTP, as such duty in and of itself does not allow a third-party to influence a club’s independence, although it may be that such obligation to inform in combination with other provisions of the contract may potentially lead to an overall conclusion that a club’s independence may nonetheless be influenced.
104. Porto maintains on a subsidiary basis that, should the Panel conclude that a violation of Article 18bis RSTP is committed, it should be taken into account as a mitigating factor that Doyen did not exercise its ability to influence.
105. The Panel agrees with Porto that a situation where influence was effectively exercised in principle deserves a more severe sanction and that the jurisprudence of the FIFA Appeal Committee has taken this into account as a mitigating factor in the past (FIFA

AC no. 160532 APC BRA ZH, para. 42). However, the Panel finds that Porto provided insufficient evidence of the communication with Doyen concerning the Player's transfer to Manchester City to conclude that no influence was exercised by Doyen. Accordingly, the Panel finds that this is not to be taken into account as a mitigating factor.

106. The Panel also noted Porto's position that it should draw a parallel with the way other CAS panels have dealt with protection of minor cases, and where the number of registrations found to breach the RSTP reduced at CAS compared with at first instance with FIFA, the sanction should reduce too. Porto's argument was that all the clauses in the FERPA that FIFA relied upon when issuing the sanction in the Appelled Decision did not breach Article 18bis RSTP.
107. The Panel does not consider Porto's comparison with the protection of minor cases relevant for the matter at hand. Whereas the protection of minor cases concerned numerous players and therefore numerous breaches of the RSTP, the proceedings in the matter at hand concern a single contract by means of which Article 18bis RSTP is violated. As indicated above, the Panel finds that establishing the exact number of provisions of the FERPA considered to be in breach of Article 18bis RSTP is of no added value for present purposes (see paras. 63, 89 and 102 *supra*), because the Panel finds that Porto's infringement of Article 18bis RSTP with respect to both its independence in transfer-related matters as well as in employment-related matters based on Clauses 10 and 9.1 FERPA are sufficiently severe to confirm the sanctions imposed by the FIFA Disciplinary Committee and the FIFA Appeal Committee. Finally, the Panel finds that the ancillary nature of the violation of Article 4(2) of Annex 3 RSTP is properly reflected by the imposition of a fine of CHF 5,000, i.e. only 9% of the overall fine imposed.
108. Consequently, the Panel finds that a fine of CHF 55,000 is to be imposed on Porto, plus a warning for its future conduct.

B. Conclusion

109. Based on the foregoing, the Panel finds that:
- i. Porto is liable for a violation of Article 18bis RSTP;
 - ii. Porto is liable for a violation of Article 4(2) of Annex 3 RSTP;
 - iii. The sanctions imposed on Porto by the FIFA Disciplinary Committee, and as confirmed by the FIFA Appeal Committee, are not disproportionate.
110. All other and further motions or prayers for relief are dismissed.

X. COSTS

111. The Panel observes that Article R65 of the Code provides the following:

“R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. [...]

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be

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free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.– without which CAS shall not proceed and the appeal shall be deemed withdrawn. [...]

R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4 If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel.”

112. Since the present appeal is lodged against a decision of an exclusively disciplinary nature rendered by an international federation, no costs are payable to CAS by the Parties beyond the CAS Court Office fee of CHF 1,000 paid by Porto prior to the filing of its Statement of Appeal, which is in any event retained by CAS.
113. Furthermore, pursuant to Article R65.3 of the Code, and in consideration of the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties, in particular that FIFA’s financial resources are presumably superior to those of Porto and that FIFA was not represented by external counsel, the Panel rules that both Parties shall bear their own legal fees and other expenses incurred in connection with the present arbitration proceedings.

* * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 April 2020 by Futebol Clube do Porto against the decision issued on 6 September 2019 by the Appeal Committee of the *Fédération Internationale de Football Association* is dismissed.
2. The decision issued on 6 September 2019 by the Appeal Committee of the *Fédération Internationale de Football Association* is confirmed.
3. This arbitral award is pronounced without costs, except for the CAS Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Futebol Clube do Porto, which is retained by the CAS Court Office.
4. Both Parties shall bear their own legal fees and other expenses incurred in connection with the present arbitration proceedings.
5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 21 May 2021

COURT OF ARBITRATION FOR SPORT

~~Manfred~~ Peter Nan
President of the Panel

Mark Andrew Hovell
Arbitrator

Benoit Pasquier
Arbitrator