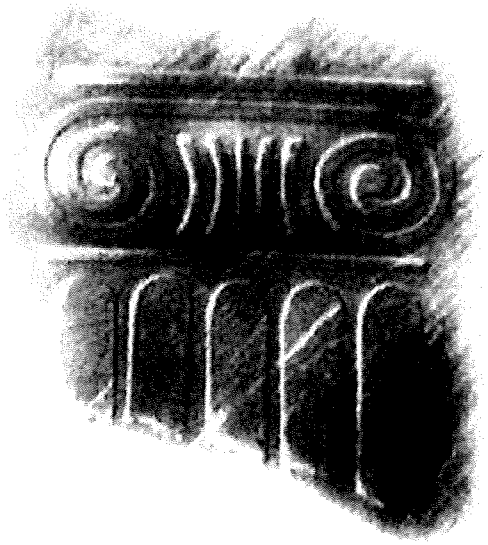
TAS / CAS

Tribunal Arbitral du Sport
Court of Arbitration for Sport
Tribunal Arbitral del Deporte



ARBITRAL AWARD

Issa Hayatou, Cameroon

v.

FIFA, Switzerland

CAS 2021/A/8256 - Lausanne, February 2022

CAS 2021/A/8256 Issa Hayatou v. FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Manfred P. Nan, Attorney-at-law in Arnhem, The Netherlands
Arbitrators: Mr Hamid G. Gharavi, Attorney-at-law in Paris, France
Mr José J. Pintó, Attorney-at-law in Barcelona, Spain

Clerk: Ms Alexandra Veuthey, CAS clerk in Lausanne, Switzerland

in the arbitration between

Mr Issa Hayatou, Cameroon

Represented by Mr Fabrice Robert-Tissot and Ms Sumin Jo, Attorneys-at-law, Bonnard Lawson, Geneva, Switzerland

Appellant

and

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

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

Respondent

I. PARTIES

1. Mr Issa Hayatou (the "Appellant") is a Cameroonian national. He was the President of Confédération Africaine de Football ("CAF"), based in Giza, Cairo, Egypt, between 10 March 1988 and 15 March 2017. He was also a member of the FIFA Council between 1990 and 2017, including a mandate as President of the FIFA Council between 9 October 2015 and 25 February 2016. He was appointed Honorary Vice-President of FIFA on 11 May 2017 and Honorary President of CAF in January 2021.

2. The Fédération Internationale de Football Association ("FIFA" or the "Respondent") is an association under Swiss law. Its registered office is in Zurich, Switzerland. FIFA is the global governing body for the sport of football. It exercises regulatory, supervisory and disciplinary functions over continental federations, national associations, clubs, officials and football players worldwide. The Appellant and FIFA are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

3. This matter is related to an appeal filed by the Appellant against the decision rendered by the Adjudicatory Chamber of the FIFA Ethics Committee ("Adjudicatory Chamber") on 17 June 2021 (the "Appealed Decision") to impose a one-year ban from taking part in any football-related activity on him and a CHF 30,000-fine for a breach of the duty of loyalty as defined in Article 15 of the FIFA Code of Ethics ("FCE"). The grounds of the Appealed Decision were notified to the Appellant on 3 August 2021.

4. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings and the evidence adduced in these proceedings. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Panel refers in the Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background Facts

a) The first agreement between CAF and Sportfive for the period 2008 - 2016

5. On 3 October 2007, CAF entered into an agreement in French with Sportfive (which later became Lagardère Sports, "LS"), appointing the company as CAF's exclusive agent for the commercialization of marketing and media rights related to various CAF competitions to be held until the end of 2016 (the "First Agreement"). This First Agreement provided for a minimum guarantee of USD 150 million payable by LS to CAF for the relevant contractual period (2008 – 2016).

6. The First Agreement was valid from 1 July 2007 until the end of the last competition to be held in 2016, for all competitions scheduled between 2008 and 2016. The First Agreement contained so-called rights of first and last refusal for LS, providing as follows (in a translation into English from the original French provided by FIFA that was not disputed by the Appellant):

> *"[…] In order for* [LS] *to able to exercise its right of preference, it is agreed that CAF will notify it of the proposed conditions for the award of the commercialisation of the said rights, concerning all subsequent editions of all or part of the competitions subject of the present contract taking place over a period of at least eight consecutive years and a similar scope of rights (hereinafter the 'CAF Proposal'), and this by notification made in accordance with the modalities provided for in article 11.4 and presented to* [LS] *no later than 31st December 2014.*
>
> *In the absence of an agreement between CAF and* [LS] *by 31 December 2015 at the latest, and in the absence of a response from* [LS] *by that date at the latest, CAF shall have the option of transmitting the said proposition to any third party and according to any procedure of its choice on a basis at least identical to those previously submitted to* [LS].
>
> *In the event that CAF modifies the CAF Proposal at the bottom, it shall again give* [LS] *the benefit of the right of preference described above, which shall apply until the end of a period of four months from the date of notification by CAF to* [LS] *of the new CAF Proposal."*

b) The negotiations between CAF and LS resulting in the conclusion of the 2015 Memorandum of Understanding

7. On 26 August 2014, the Appellant set up "*a working group in charge of re-negotiation of the CAF-S5 contract of 8 years*" (the "Working Group"). The selected members were as follows, notably the Appellant himself was not a member of the Working Group:

1. Mr Suketu Patel – CAF 1st vice-president and chairman of the finance committee
2. Mr Leodegar Tenga – CAF Chairman of the Marketing Committee
3. Mr Hani Abo Rida – FIFA Executive Committee member and CAF marketing consultant
4. Mr Danny Jordaan – SAFA President and CAF President Advisor
5. Mr Raymond Hack – Chairman of the CAF Disciplinary Board
6. Mr Hicham El Amrani – CAF Secretary General
7. Mr Amr Shaheen – CAF Marketing & TV Division Director

8. The Appellant informed the members of the working group that their objectives were as follows:

- *"Analyze the current contract and identify the positive and negative aspects of it*
- *Analyze the current / perceived value of CAF competitions*

- *Establish a clear strategy for the renewal*
- *Ensure the respect of the current contractual obligations for the renewal*
- *Submit to the CAF Executive Committee the best course of action"*

9. The Appellant maintains that the renewal of the First Agreement was discussed at the CAF Executive Committee ("ExCo") meeting in Addis-Ababa, Ethiopia, held on 19 and 20 September 2014.

10. On an unknown date, CAF also established a CAF/LS Strategic Committee (the "Strategic Committee"), dealing specifically with matters between CAF and LS. The Strategic Committee was comprised of the following five persons, notably the Appellant was not a member of the Strategic Committee:

1. Mr Suketu Patel – CAS 1st vice-president and chairman of Finance Committee
2. Mr Tarek Bouchamaoui – CAF EXCO member and chairman of the Marketing Committee
3. Mr Hani Abo Rida – FIFA EXCO member and consultant to CAF Marketing Committee
4. Mr Hicham El Amrani – CAF Secretary General
5. Mr Amr Shaheen – CAF Marketing Director

Supported by two legal experts:

1. Mr Raymond Hack – Chairman of CAF Disciplinary Committee and expert lawyer
2. M. Julius Oouisthuzen – From ENS Law, Legal expert from South Africa

11. In October 2014, the Strategic Committee produced a report for the CAF ExCo meeting in October 2014, *inter alia*, referring to different scenarios as to the desired duration of an extended agreement with LS, i.e. 4, 6 or 8 years, where the following advantages and disadvantages were mentioned with respect to an 8-year contract:

> *"It will secure a long term investment which proved not to be a bad experience after all from the current contracts where CAF was able to sign long term agreement that strengthen its financial position despite the economical crises that hit the world in 2009.*
>
> *CAF will not be able to respond to any changes in the market throughout such an agreement. Yet a long term relation with partners have always proved to be much better that a short affair!"*

12. On 11 November 2014, the Working Group reported its conclusions at the CAF ExCo meeting in Cairo, Egypt, during which meeting the strategy of the Working Group was approved. The minutes of this meeting provide as follows:

> *"XII. REPORT OF THE WORKING GROUP ON THE RENEWAL OF THE CAF COMMERCIAL AGREEMENT FOR THE PERIOD 2017-2024*

The Secretary General presented a summary of the working group's recommendations on the renewal of the CAF commercial contract for the period 2017-2024.

The Working Group recommended to update the sponsorship strategy, including securing CAF partners, competitions sponsors and official supporters and to avoid awarding sponsors the option to link their brand names to major CAF competitions. (e.g. Orange as title sponsor). In addition, the Group recommended that a contract for a period of 8 years to be signed while offering more than 45 competitions.

It was noted that the commercial value of AFCON is 3 times higher than the minimum guaranteed and that globally the commercial performance of the CAF contract has generated a figure three times higher than the guaranteed minimum of 150 million USD.

Finally, concerning the CHAN, and knowing that this tournament involves local players, a new strategy could be adopted that would provide the CHAN LOCAL SPONSORS which generally do not have comparable budgets like multinationals and companies oriented towards Africa, such MTN, Eko Bank, Orascom Telecom, Castle Lager, Ethiopian Airlines, Kenya Airlines ... etc.

This new strategy adequately addresses the need of host associations to partner with local businesses to ensure better positioning of CHAN locally and to reduce logistics.

CAF will give its final offer at the latest on 31st December 2014, to allow for negotiations in the year 2015. If no agreement is reached with S5, CAF will have an opportunity to make a public tender from January 1ST, 2016 onwards.

Mr. Raouraoua expressed the importance of negotiating the principle of "delcredere", to ensure that when a partner is deficient for payment, CAF can guarantee repayment by [LS]*, beyond the minimum guaranteed."*

13. On 24 December 2014, in accordance with its contractual obligation under the First Agreement, and leaving aside more specific elements as to the nature of the contract, Mr Hicham El Amrani, CAF Secretary General ("Mr El Amrani"), made an offer to LS on behalf of CAF to extend the First Agreement, proposing, *inter alia*, a minimum guarantee of net revenues for CAF of USD 750 million over an eight-year period spanning from 2016 to 2024.

14. On 30 December 2014, leaving aside more specific elements as to the nature of the contract, LS counter-proposed to CAF two alternative financial deals: either a minimum guarantee of net revenues for CAF of USD 500 million for a period of eight years or USD 800 million for a period of twelve years.

15. On 22 February 2015, Mr El Amrani on behalf of CAF counter-proposed to CAF two alternative financials deals: either a minimum guarantee of net revenues for CAF of USD 750 million for a period of eight years or USD 1,2 billion for a period of twelve years.

16. On 21 March 2015, LS, *inter alia*, counter-proposed to CAF a minimum guarantee of net revenues for CAF of USD 1 billion for a period of twelve years, which financial counter-proposal was ultimately accepted by CAF.

17. On 5 April 2015, a CAF ExCo meeting was held in Cairo, Egypt, during which the members were informed of the ongoing discussions with LS. More specifically, the following is recorded in the minutes of this meeting:

> *"The General Secretary informed the members that negotiations with* [LS] *were still on going and that an update will be sent to the Committee as soon as CAF and* [LS] *find an agreement on the essential points."*

18. On 26 May 2015, a CAF ExCo meeting was held in Zurich, Switzerland, during which the members were informed of the ongoing discussions with LS. More specifically, the following is recorded in the minutes of this meeting again:

> *"The General Secretary informed the members that negotiations with* [LS] *were still on going and that an update will be sent to the Committee as soon as CAF and* [LS] *find an agreement on the essential points."*

19. On 11 June 2015, the Appellant and Mr El Amrani signed a Memorandum of Understanding with LS on behalf of CAF (the "2015 MoU"). The 2015 MoU provides, *inter alia*, that CAF and LS agreed *"on the main terms and conditions"* under which CAF appointed LS as exclusive agent for the purpose of *"commercialising globally the commercial rights* [...] *related to the competitions 2017-2028"* in exchange for a guarantee of minimum net revenues for CAF of USD 1 billion. The 2015 MoU further provides as follows in clause 8:

> *"Without prejudice to the binding effect of this MOU, a full form agreement (herein referred to as the "FULL FORM AGREEMENT") shall be submitted by CAF to* [LS] *or by* [LS] *to CAF. The FULL FORM AGREEMENT will detail the rights and obligations of the PARTIES and will be drafted in accordance with similar terms than those provided under the* [First Agreement] *subject to the provisions otherwise agreed between CAF and* [LS] *pursuant to this MOU and the necessary adaptations.* [...]"

c) The negotiations between CAF and LS resulting in the conclusion of the Second Agreement

20. On 6 August 2015, a CAF ExCo meeting was held in Cairo, Egypt, the minutes of which meeting provide as follows:

> *"V. REPORT ON THE SIGNING OF A MOU BETWEEN CAF AND* [LS] *ON THE COMMERCIAL RIGHTS OF THE CAF COMPETITIONS FOR CYCLE 2017-2018*
>
> *The CAF President congratulated the Committee that worked hard with* [LS] *to secure a contract on the favour of CAF. This allowed the signature of a contract last June with* [LS] *with up to a billion dollars as a guaranteed minimum for 12 years,*

> *which is an exceptional amount guaranteeing the future of African football. The old contract was 150 million dollars as a guaranteed minimum for 8 years. The Executive Committee congratulated CAF and the President for this historic agreement."*

21. On 27 and 28 October 2015, a CAF ExCo meeting was held in Cairo, Egypt, during which the members approved the distribution of the USD 1 billion revenues between the different competitions. In addition, a report on the progress of the 2015 MoU and negotiations on the full form agreement was shared.

22. On 27 November 2015, LS provided CAF with a first draft of the full form agreement.

23. On 24 January 2016, CAF provided LS with an amended draft of the full form agreement.

24. On 5 February 2016, a CAF ExCo meeting was held in Kigali, Rwanda, during which meeting the main issues related to the full form agreement were finalised.

25. On 11 May 2016, a report on the conclusion of the 2015 MoU was presented at the CAF General Assembly. The minutes of this meeting, *inter alia*, provide as follows:

> *"On 12 June 2015, the contract with* [LS] *has been renewed for the period from 2017 to 2028, with a guaranteed minimum of one billion US dollars."*

26. On 29 June 2016, while such letter was not put into evidence by either of the Parties, the Egyptian Competition Authority (the "ECA") apparently contacted CAF with respect to the process of concluding the 2015 MoU and/or the Second Agreement.

27. On 5 July 2016, the Egyptian sports and entertaining agency Presentation Sports ("PS") contacted CAF regarding the commercial rights for African Championships for the period from 2017 to 2028. PS sought to acquire rights for the Middle East region through a bidding process, *inter alia*, alluding to an "*official tender or bidding as imposed by laws and regulations to acquire the forecited rights*".

28. On 14 July 2016, CAF informed PS to contact LS directly on the topic, which triggered an exchange of correspondence between these two companies.

29. On 6 August 2016, PS informed CAF with a one-page letter that it insisted on competing to "*acquire those rights*", submitting a proposal "*specifically for Middle East and North Africa region with preliminary amount of 600 million American Dollars for bidding on forecited exclusive broadcast rights*", without further detail.

30. On 24 August 2016, PS reiterated its offer of 6 August 2016.

31. On 22 and 26 September 2016, PS approached LS with two further one-page letters with respect to its interest in acquiring broadcasting rights related to CAF for an

amount of respectively USD 650 million and USD 750 million for the Middle East and North Africa region.

32. On 26 September 2016, a one-page proposal from PS was slipped under the door of the hotel room of Mr Suketu Patel, then CAF vice-president and Chair of the Finance Commission ("Mr Patel"). The proposal was addressed to the Appellant personally in his capacity of CAF President and indicated that PS was *"interest to acquire the full commercial rights of CAF competitions* [...] *for the coming twelve years in return of a Minimum guarantee of 1,200,000,000 (1 Billion two hundred Million American Dollars)"*. This letter was accompanied by the 22 September 2016 letter from PS to LS.

33. On 27 September 2016, a CAF ExCo meeting was held in Cairo, Egypt, during which meeting the members were informed that the full form agreement would be signed the next day. As reflected in the minutes of the subsequent CAF ExCo meeting held in Libreville, Gabon, during the 27 September 2016 CAF ExCo meeting, the members were informed about the financial offer presented by PS to the Appellant the day before. The minutes of the 27 September 2016 CAF ExCo meeting provide, *inter alia*, as follows:

> *"*[LS] *has the right of 1st refusal in the contract only. CAF and* [LS] *are now ready to sign.*
>
> *The CAF president added that there should be no sensitivities between the members of the Executive Committee, and that he is disappointed to hear members complaining that CAF negotiated the contract behind their backs, as if he had personal interests. He condemned this kind of regrettable attitude, especially since all the elements are shared in advance with the Committee for agreement.*
>
> *Since CAF has existed, the President himself has consistently refused to receive a salary since 1988, noting that he does not need to steal CAF's money. He therefore wishes to maintain mutual respect."*

34. Furthermore, while not incorporated in the minutes of the 27/28 September 2016 CAF ExCo meeting, in the approval process of such minutes during the 12 January 2017 CAF ExCo meeting held in Libreville, Gabon, the CAF ExCo agreed to amend the 27/28 September 2016 minutes as follows:

> *"II. APPROVAL THE MINUTES OF THE CAF EXECUTIVE COMMITTEE HELD IN CAIRON, EGYPT, ON SEPTEMBER 27TH 2016*
>
> *Mr Patel took the floor to request adding missing elements concerning the minutes in connection with the signing of the long-form contract between CAF and* [LS]. *Mr. Patel had mentioned indeed that two days before the signing of the contract a company named Presentation had slipped under his door at Marriott Hotel a letter stating an "offer" of 1.2 billion US Dollars to acquire the same commercial rights as those for which* [LS] *had signed to be an exclusive agent of CAF.*

This offer was neither really discussed nor considered given that the entity Presentation offers no guarantees nor has a serious desire to work with CAF. The document sent was rather as a diversion and an attempt to destabilize the relationship between CAF and its agent.

The minutes were approved taking into account the mentioned modification."

35. On 28 September 2016, CAF and LS signed the full form agreement (the "Second Agreement"). The Second Agreement was signed by the Appellant and Mr El Amrani on behalf of CAF. The Second Agreement was deemed to have taken effect retroactively since 11 June 2015, i.e. the date the 2015 MoU was concluded. The Second Agreement comprised a right of first and last refusal for LS for the period between 2029 and 2036 similar to the one that had been included in the First Agreement, in case CAF were to appoint an external agent for the commercialization of CAF competitions.

e) The facts leading up to the termination of the Second Agreement

36. On 6 November 2016, Mr El Amrani responded to the ECA's alleged enquiry of 29 June 2016.

37. On 3 January 2017, the ECA sent a letter to CAF, stating that the Second Agreement violated Egyptian competition law. It ordered CAF to immediately terminate the Second Agreement in relation to the Egyptian market within seven days and to proceed with a call for tender for the award of the TV rights on the Egyptian market. CAF did not follow such order of the ECA.

38. On 4 January 2017, the ECA pressed criminal charges against the Appellant and Mr El Amrani in their capacities of CAF's legal representatives in relation to the signing of the Second Agreement.

39. On 12 January 2017, a CAF ExCo meeting was held in Libreville, Gabon, during which meeting, besides amending the minutes of the 27/28 September 2016 CAF ExCo meeting as set forth *supra*, the members of the CAF ExCo were also informed about the actions of the ECA, as reflected in the minutes as follows:

"The Secretary General made a brief report on the situation arising from well coordinated attacks by Egyptian entities, the ECA (Egyptian Competition Authority) and the PFA (Egyptian Public Funds Authority) against CAF and its President, concerning the agreement concluded between CAF and [LS] *for the period 2017-2028 and the agreement concluded by* [LS] *with BeIn Sports for TV rights. The company Presentation initiated these attacks.*

The PFA even summoned the Secretary General for a hearing that lasted more than 8 hours in order to get information about CAF's commercial agreements so as to prove that CAF acted in contravention of Egyptian laws, and that the Egyptian Football Federation being a CAF member, it represent a case of potential corruption.

As for the ECA, it sent a letter to CAF indicating that it had examined CAF's actions with regard to the methods and procedures adopted for the sale of broadcasting rights for the football competitions organized.

To this end, it received a complaint concerning the granting of rights, that potentially violates the rules of competition within the Egyptian market.

The ECA considers that CAF has violated certain provisions of Article 8 of the Competition Law, in particular through its practices related to the method and mode of conclusion of contracts for granting direct broadcasting rights to championships for which CAF holds commercial exploitation rights.

The ECA has therefore sent a list of administrative measures to CAF, including the cancellation of the contract concluded between CAF [LS] *and the Egyptian market within a deadline of 7 days, to oblige CAF to grant the rights of television broadcasting of the 2017 AFCON to another company that had submitted tenders to broadcast the tournament in Egypt, as well as via the internet, to re-propose the granting of broadcasting rights for the Egyptian market for the period extending from 2017 to 2028, then present different packages instead of a global package.*

CAF strongly regretted some of the misleading information in the Egyptian press related to the award of marketing and media rights for major competitions in Africa until 2028.

CAF also confirmed that, in accordance with the contractual renewal mechanism, CAF had asked [LS], *as the exclusive rights holder, to apply for the renewal of the marketing and media rights award for the main competitions in Africa until 2028, while considering other serious market options likely to ensure financial and performance commitments.*

CAF clarified that the contract with [LS] *does not contravene the Egyptian competition law, as established by categorical legal opinions in this regard. CAF will strongly contest any actions that may be taken against it.*

Finally, the Secretary General informed the members that lawyers had been appointed and that a reply had been sent to the ECA requesting an extended response period to prepare the required documentation.

After a debate on this issue, members demanded that CAF be able to defend its standing as an international non-governmental institution, and that Egypt as a host country should respect CAF after 60 years of exemplary cooperation. The President asked Mr Raouraoua to prepare a draft letter to be sent to the Head of State in order to summarize the situation and possibly organize a meeting at the highest level."

40. On 17 January 2017, CAF issued a letter to PS as well as the ECA, contesting their respective claims and determinations.

41. On the same date, 17 January 2017, the Egyptian Attorney General called Mr El Amrani and Mr Arm Shaheen for questioning.

42. On 7 March 2017, the ECA addressed the President of the Investigatory Chamber of the FIFA Ethics Committee (the "Investigatory Chamber") to inform him on the opening of criminal proceedings.

43. On the same date, 7 March 2017, the PS's Swiss lawyers filed a complaint with the FIFA Ethics Committee and the FIFA Review Committee against the Appellant and Mr El Amrani.

44. On 26 November 2018, the Cairo Economic Court of First Instance sentenced the Appellant and Mr El Amrani, personally, to pay a fine of 500 million Egyptian pounds (i.e. approximately CHF 29 million) for breaching Egyptian competition law and imposing monopolistic practices. This decision was appealed by the Appellant, Mr El Amrani as well as the public prosecutor.

45. On 14 July 2019, following appeals filed, *inter alia*, by the public prosecutor (who appealed the decision of the Cairo Economic Court of First Instance primarily because of the alleged mistaken personal liability of the Appellant and Mr El Amrani, without CAF being held jointly liable, the Egyptian Court of Appeal reduced the fine imposed upon the Appellant and Mr El Amrani to 200 million Egyptian pounds (CHF 11.7 million) and declared CAF jointly and severally liable. The Appellant and Mr El Amrani contest that such fine was ever enforced against them or against CAF and FIFA provided no evidence that it had been enforced.

46. On 22 July 2019, the Common Market for Eastern Europe and Southern Africa ("COMESA") Competition Commission issued its "Finding Report" in relation to the agreements signed by CAF. In its report, the COMESA Competition Commission recommended to the COMESA Board of Commissioners that a fine be imposed on CAF and to the "Committee Responsible for Initial Determination" to terminate the Second Agreement.

47. In November 2019, CAF terminated the Second Agreement. An arbitration in this respect is pending before the International Court of Arbitration of the International Chamber of Commerce (the "ICC").

B. The Proceedings before FIFA

a) Proceedings before the Investigatory Chamber

48. On 1 October 2019, following the aforementioned complaints filed with FIFA on 7 March 2017, the Appellant was informed of the opening of investigation proceedings in relation to possible violations of Articles 13 (general rules of conduct), 15 (duty of loyalty) and 25 (abuse of position) FCE.

49. On 2 December 2019, the accounting firm Pricewaterhouse Coopers ("PwC"), commissioned by FIFA, issued a review of CAF on a variety of areas investigated, including the conclusion of the Second Agreement. It concluded that the Second Agreement was detrimental for CAF and should have been renegotiated.

50. On 24 March 2021, the Investigatory Chamber informed the Appellant that the investigation proceedings had concluded and that a final report (the "Final Report") would be submitted to the attention of the Chairperson of the Adjudicatory Chamber in accordance with Article 65 FCE.

51. The conclusions of the Investigatory Chamber, as stated in its Final Report, can be summarised as follows:

- By signing the Second Agreement, CAF provided LS an exclusive mandate to exploit the rights in all possible viewing platforms (TV, Internet, mobile phones) for all CAF competitions for the period 2017 to 2028. By doing so, it reduced competition in the market, which may be considered detrimental to both CAF and the audiences of CAF's competitions.

- No proper tender process was ever carried out and the described behaviour was considered by the Egyptian judicial authorities to be anti-competitive.

- Such conclusion is supported by the fact that CAF contacted LS on 24 December 2014 with an offer to continue the contractual relationship, which clearly shows that there was never any intention on CAF's side to organise a tendering process.

- Furthermore, the duration of the Second Agreement, which could potentially be extended for the period 2029-2036, could lead to a situation in which LS would hold exclusive commercial rights to CAF competitions from 2008 to 2036.

- CAF ignored PS' offer worth USD 1.2 billion and concluded an agreement with LS worth USD 200 million less a few days later.

- Based on the minutes of the CAF ExCo meeting of 27 September 2016, several members expressed their disagreement for not being (properly) involved in the procedure to negotiate the Second Agreement with LS. In addition, the Appellant was discontent with the complaint made by the members of the CAF ExCo and condemned their posture.

- Despite the expressed disapproval of some CAF ExCo members, one day after, on 28 September 2016, CAF concluded the Second Agreement with LS. One of the signees representing CAF was the Appellant.

52. In view of the foregoing and all the evidence gathered, the Investigatory Chamber established, to its comfortable satisfaction, that the Appellant had breached his duty of loyalty towards CAF. It found that the Appellant abused his official powers by entering into an anti-competitive agreement with LS and eventually caused damage to CAF in the amount of USD 200 million. Therefore, the Appellant violated the prohibition of engaging in conducts mentioned in Article 13 paras 1, 2, 3 and 4 and Article 15 of the FCE (2012 edition).

53. The Investigatory Chamber highlighted that *"the referred conducts have been sanctioned and maintained throughout the FCE editions 2012, 2018, 2019 and 2020, respectively."*

b) Proceedings before the Adjudicatory Chamber

54. On 26 March 2021, the Appellant was informed that the Adjudicatory Chamber had opened proceedings against him based on the Final Report as per Article 68 para 3 FCE.

55. On 30 April 2021, the Appellant filed an Answer. He contested the charges contained in the Final Report and alleged that the investigation was incomplete.

56. On 17 June 2021, a hearing before the Adjudicatory Chamber was held by videoconference. Two witnesses, Mr El Amrani and Mr Patel, called by the Appellant, testified at the hearing.

57. On the same day, the Adjudicatory Chamber passed the Appealed Decision, whereby it was decided that:

> *"1. Mr Hayatou is found responsible for having breached art.15 (Duty of Loyalty) of the FIFA Code of Ethics.*
>
> *2. Mr Hayatou is hereby banned from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) for one year, as of notification of the present decision, in accordance with article 7 lit. j) of the FIFA Code of Ethics in conjunction with art. 6 par. 2 lit. c) of the FIFA Disciplinary Code.*
>
> *3. Mr Hayatou shall pay a fine in the amount of CHF 30,000 within 30 days of notification of the present decision.*
>
> *4. Mr Hayatou shall pay costs of these proceedings in the amount of CHF 3'000 within 30 days of notification of the present decision.*
>
> *5. Mr Hayatou shall bear his own legal and other costs incurred in connection with the present proceedings.*
>
> *6. This decision is sent to Mr Hayatou. A copy of the decision is sent to CAF and to the chief of investigation, Ms Margarita Echeverria."*

58. On 3 August 2021, the Appealed Decision, together with its grounds, was notified to the Appellant.

59. The Appealed Decision is based on the following reasoning:

> *(i) Temporal application of the FCE*

- The Adjudicatory Chamber explained that *"relevant facts* [of this case] *occurred mostly between 2014 and 2017, and in particular in 2015 and 2016 (with a focus on 28 September 2016, when the second agreement between CAF and LS was signed)."* The Adjudicatory Chamber recalled the content of Article 3 FCE, which stipulates that the (current) FCE shall apply to conduct whenever it occurred, unless a more favourable provision was in force at the time of the facts (principle of *lex mitior*). It noted that, in the case at stake, *"the legal provisions of the respective articles are deemed equivalent in the various editions of the FCE (i.e., 2012, 2018, 2019, and 2020)."* In particular, Article 13 FCE (general duties), Article 15 FCE (duty of loyalty) and Article 25 FCE (abuse of position) contain equivalent provisions.

- The Adjudicatory Chamber concluded that the material rules of the FCE (2020 version) are applicable to the present case. This is also true for the procedural rules enacted therein, pursuant to Article 88 FCE, which states that the new FCE applies to all adjudicatory proceedings opened after 13 July 2020.

(ii) Violation of Article 15 FCE (Loyalty)

- The Adjudicatory Chamber indicated that the obligation of loyalty established under Article 15 FCE includes two constitutive elements. The first element requires the person acting to be bound by the FCE. The second element establishes a "fiduciary duty" on persons bound by the FCE to various bodies (FIFA, Confederations, associations, leagues and clubs).

- The Adjudicatory Chamber considered that the Appellant was bound by the FCE at the time of the alleged conduct, by virtue of his positions as a FIFA and CAF football official. Therefore, the first requirement of Article15 FCE is fulfilled.

- The Adjudicatory Chamber then examined the concept of fiduciary duty, which presupposes a position of trust and the obligation to act in the "best interests" of the organisation towards which the official is bound. It highlighted that the Appellant occupied a high position at the time, which subjected him to high ethical and moral standards, and an obligation of complete transparency. It also noted that the Appellant had the obligation to protect CAF's interests by ensuring that CAF made the best financial profit, and by refraining from exposing it to legal action or damages.

- In the present case, the Appellant was accused of violating his fiduciary duty towards CAF in relation to the signing of the Second Agreement with LS on 26 September 2016. More precisely, the conduct under scrutiny concerned:

  - The lack of tender process and the exclusive negotiations with LS, which led to the conclusion of a contract for a minimum guarantee that was USD 200 million below what CAF could have obtained.

- The opacity of the process of negotiating, drafting and concluding the Second Agreement with LS, which was not completely disclosed to the CAF ExCo.

- The creation of an unjust advantage and *de facto* monopoly for LS due to the extremely long and exclusive relationship between CAF and the company (up to 29 years).

- The exposure of CAF to sanctions imposed by several Egyptian and international authorities, for breaching national and international regulations of competition law, as well as to the corresponding damage to its reputation.

➢ The Adjudicatory Chamber examined each of the above alleged conducts, in light of the constitutive elements of the "fiduciary duty" previously mentioned. It found that the Appellant had breached his fiduciary duty towards CAF, in his capacity as president, and therefore legal representative of CAF. In particular, the following conduct of the Appellant was detrimental to CAF's best interests:

- Signing the 2015 MoU with LS, which legally bound CAF to the company following a negotiation that was conducted in haste, without appropriately testing the market, contacting other competitors or conducting a tender procedure in order to secure the best possible offer.

- Accepting a deal for a significantly lower value (i.e. USD 200 million lower) and a longer duration than CAF's initial proposal/objective.

- Failing to keep the CAF ExCo properly informed of the status of the aforementioned process and to obtain its approval for the 2015 MoU prior to the signature.

- Failing to ensure that the CAF ExCo is provided with all the relevant information with respect to the Second Agreement with LS, in particular the "right of first refusal" clause.

- Signing the Second Agreement on behalf of CAF on 28 September 2016, with the effect of binding CAF to LS for up to 20 years, and extending the contractual relation between the two entities to a staggering total duration of 29 years, without the express approval of the CAF ExCo.

- Ignoring the warnings of the ECA, such as the official communication of 29 June 2016 stating that the exclusive contractual relation with LS was in (potential) violation of Egyptian competition law and had to be amended.

- Renouncing to address and solve the matter, or at the very least report to the CAF ExCo, and subsequently signing the Second Agreement on 28 September 2016, which led to financial sanctions being imposed on CAF.

- Consequently, the Adjudicatory Chamber was comfortably satisfied concluding that the Appellant had breached Article 15 FCE.

(iii) Other possible violations

- The Adjudicatory Chamber could not establish that the Appellant had breached Article 25 FCE, which prohibits abuse of position. It could in particular not prove that the Appellant was driven by private aims or gains or had a malicious intent when he signed the Second Agreement.

- The Adjudicatory Chamber also renounced to apply Article 13 FCE, which sets officials' general duties. It found that the potential breaches of the said article were already sufficiently consumed by the breach of Article 15 FCE.

(iv) Sanction for violation of Article 15 FCE

- The Adjudicatory Chamber then turned to consider what sanction should be imposed on the Appellant.

- The Adjudicatory Chamber began its consideration of this issue by noting that according to Article 6 para 1 FCE, FIFA may pronounce the sanctions described in the FCE, the FIFA Disciplinary Code (the "FDC", 2019 version) and the FIFA Statutes. It recalled that all relevant factors of the case must be considered when imposing a sanction. This includes the nature of the offence, the offender's assistance and cooperation, the motive, the circumstances, the degree of the offender's guilt, the extent to which the offender accepts responsibility and whether the person returned the advantage received (Article 9 para 1 FCE).

- In this regard, the Adjudicatory Chamber retained that:

  - The Appellant held the highest position in African football for 29 years and, as such, had responsibility to serve the football community and act as a role model. He also held a paramount role as Vice-President of the FIFA Council for 27 years, including a short term as acting FIFA President. In these senior positions, he was at the top of FIFA's organisation, and of world football, in terms of influence and image.

  - Therefore, the Appellant has to be considered an experienced and highly professional football official. Yet, his conduct revealed *"a pattern of disrespect for core values of the FCE."*

  - The Appellant's role was central, since he was CAF's legal representative, signing all documents and letters binding CAF, including the MoUs and the First and Second Agreements with LS. Additionally, he presided all meetings of the CAF ExCo in which the commercial dealings of CAF were discussed and approved.

- The Appellant did not express awareness of wrongdoing or remorse for his actions. On the contrary, he highlighted that he had done everything he could for CAF during his 29-year tenure, never harming CAF, and that he consequently felt that he had been wronged by the accusations before the FIFA Ethics Committee.

- The Appellant collaborated during the proceedings. He notably provided documentation, complied with the deadlines, sent statements to the FIFA Ethics Committee and participated in the hearing in a spirit of cooperation and to clarify the facts.

- The Appellant does not have any known disciplinary, administrative or judicial record.

➢ In light of these considerations, the Adjudicatory Chamber deemed appropriate and proportionate to impose a one-year worldwide ban on taking part in any football-related activity, namely half of the maximum possible duration, with a view to prevent subsequent misconduct (Article 9 paras 2 and 3 FCE and Article 15 para 2 FCE).

➢ The Adjudicatory Chamber concluded that a fine should also be imposed, given the *"gravity of the matter which had significant and long-lasting (negative) implications for CAF."* It determined that such fine should amount to CHF 30,000, given the prominent positions held by the Appellant and the detrimental effects of his actions on CAF (Articles 6 para 2 and 15 para 2 FCE; Article 6 para 4 FDC).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

60. On 24 August 2021, the Appellant filed an appeal with the Court of Arbitration for Sports ("CAS") against the Appealed Decision in accordance with Article R48 of the CAS Code of Sports-related Arbitration ("CAS Code"). In his Statement of Appeal, the Appellant requested, *inter alia*, a stay of the Appealed Decision pursuant to Article R37 of the CAS Code. The Appellant also nominated Mr Hamid G. Gharavi, Attorney-at-law in Paris, France, as arbitrator.

61. On 9 September 2021, FIFA filed its response to the Appellant's application for a stay. On the same date, FIFA nominated Mr José J. Pintó, Attorney-at-law in Barcelona, Spain, as arbitrator.

62. On 24 September 2021, within the extended time limit, the Appellant filed his Appeal Brief with the CAS Court Office.

63. In his Appeal Brief, the Appellant advanced a request for an order requiring FIFA to provide him with the copies of the minutes of various CAF ExCo's meetings held from September 2014 to January 2017. The Appellant submitted that the production of these documents would enable to determine whether the CAF ExCo members

were aware of PS's offer, and whether that decision to conclude the Second Agreement had been taken collectively. The Appellant indicated that he would, however, be willing to renounce to this request if FIFA formally acknowledged the authenticity of the redacted copies produced together with his appeal. He specified that such renunciation would not apply to the minutes of the meeting of 19 and 20 September 2014 in Addis-Ababa, Ethiopia, which are not in his possession. Finally, he provided the names of two witnesses, Mr El Amrani and Mr Patel.

64. On 28 September 2021, the President of the CAS Appeals Arbitration Division rendered an Order on the Request for a Stay, rejecting the Appellant's application for a stay.

65. On 7 October 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Arbitral Tribunal appointed to hear the appeal was constituted as follows:

President: Mr Manfred P. Nan, Attorney-at-law in Arnhem, The Netherlands
Arbitrators: Mr Hamid G. Gharavi, Attorney-at-law in Paris, France
Mr José J. Pintó, Attorney-at-law in Barcelona, Spain

66. On 12 October 2021, the CAS Court Office informed the Parties that Ms Alexandra Veuthey, CAS clerk, would assist the Panel in this matter.

67. On 9 November 2021, within the extended time-limit, FIFA filed its Answer with the CAS Court Office. In its Answer, FIFA opposed the Appellant's request for production of documents, on the basis that it considered that such request was irrelevant and constituted an attempt to revert the burden of proof. It also maintained that it was an unjustified fishing expedition which would serve no legitimate purpose and that these documents were not in its possession.

68. On 16 November 2021, the Appellant requested a hearing to be held, whereas FIFA left it to the Panel to decide whether to hold a hearing.

69. On 17 November 2021, the CAS Court Office requested FIFA to indicate whether it intended to cross-examine the Appellant's witnesses and expert at the upcoming hearing. It also apprised the Parties that the Panel had examined the Appellant's request of production of documents. The Panel considered that FIFA did not contest the authenticity of the redacted versions of the minutes. Therefore, the Panel declared this part of the Appellant's procedural request moot. The Panel also took note that the minutes of the meeting of 19 and 20 September 2014 were not in possession of FIFA. It granted the Appellant an additional opportunity to submit a copy of this document within ten days, respectively to file evidence of his unsuccessful efforts to obtain such document, pursuant to Article 44.3 para 2 of the CAS Code. It reserved the right to postpone the hearing if needed.

70. On 19 November 2017, FIFA answered that it did not foresee to cross-examine the expert called by the Appellant, as his testimony was irrelevant for the matter at stake, but did not exclude the possibility to put forth questions to the factual witnesses. It underlined that this renouncement did not constitute acceptance of the expert's observations contained in his report.

71. On 27 November 2021, the Appellant informed the CAS Court Office that his attempts to obtain the minutes had been unsuccessful, and requested an extension until 1 December 2021 to pursue his efforts. The Appellant also provided evidence of having addressed CAF to obtain the evidence sought.

72. On 29 November 2021, the CAS Court Office, on behalf of the Panel, granted the requested extension. It also advised the Parties that it was no longer possible to partly hold the hearing in person, given the last pandemic developments and the reintroduction of a mandatory quarantine for some countries.

73. On 2 December 2021, upon a further request of the Appellant, the Panel granted an additional extension of the time limit to obtain the relevant documents from the CAF.

74. On 3 December 2021, the Parties provided the CAS Court Office with a list of their hearing attendees and returned a signed copy of the Order of Procedure provided to them by the CAS Court Office on 30 November 2021.

75. On 7 December 2021, the hearing took place by videoconference.

76. The Panel was assisted at the hearing by Mr Giovanni Maria Fares, CAS Counsel, and Ms Alexandra Veuthey, CAS clerk.

77. In addition, the following persons attended the hearing:

For the Appellant:

- Mr Issa Hayatou (Appellant)
- Mr Fabrice Robert-Tissot (Counsel for the Appellant)
- Ms Sumin Jo (Counsel for the Appellant)
- Ms Lea Steudler (Paralegal)
- Mr Franck Siyapnzeu Paterne (Interpreter)
- Prof. Thomas Probst (expert-witness)
- Mr Hicham El Amrani (Witness)
- Mr Suketu Patel (Witness)

For the Respondent:

- Mr Miguel Liétard Fernández-Palacios (FIFA Director of Litigation)
- Mr Saverio Paolo Spera (FIFA Senior Legal Counsel)

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

79. The Panel heard the testimony of the Appellant. It also heard evidence from Mr El Amrani, Mr Patel and Prof. Probst. The expert and the witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss Law. All of them were cross-examined and confirmed their witness statements/expert report.

80. The Parties thereafter were given a full opportunity to present their case, submit their arguments and submissions and answer the questions posed by the Panel. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and that their right to be heard was satisfied.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant's Position

81. In his Appeal Brief, the Appellant submitted the following prayers for relief:

> *"1. The appeal brought before the Court of Arbitration for Sport against the FIFA Adjudicatory Chamber's decision taken on 17 June 2021 and notified to the Appellant on 3 August 2021 is admissible.*
>
> *On the merits:*
>
> *2. The FIFA Adjudicatory Chamber's decision taken on 17 June 2021 and notified to the Appellant on 3 August 2021 is set aside.*
>
> *3. The Appellant is granted an award for his legal costs and other expenses pertaining to these appeal proceedings before the Court of Arbitration for Sport.*
>
> *4. The Respondent shall bear the costs of these appeal proceedings before the Court of Arbitration for Sport and reimburse the CAS court office fee of CHF 1,000 paid by the Appellant."*

82. The Appellant's submissions may be summarised as follows:

As to the burden and standard of proof

- FIFA has the burden of proof of the offences alleged against the Appellant according to Article 49 FCE (2020 edition). The standard of proof is "comfortable satisfaction", according to Article 48 FCE (2020 edition). This standard is higher than the "balance of probabilities." The degree of proof is higher depending on the seriousness of the alleged offence. In the present case, the degree of proof required is much higher than a mere preponderance of probabilities.

As to FIFA's investigation

- FIFA's investigation is incomplete and based on mere speculations. It sets aside several crucial elements, as follows:
  - The agreements between CAF and LS and the renewal of the said agreements (by virtue of the 2015 MoU and the Second Agreement) were historical and highly beneficial to CAF: LS guaranteed to CAF a minimum of net revenues amounting to USD 1 billion in respect to all CAF competitions throughout the term of the Second Agreement.
  - All the members of the CAF ExCo were fully informed of the 2015 MoU and the Second Agreement with LS.
  - They were also appraised of the (allegedly) superior offer made by PS the very day when such offer was made, as evidenced by the minutes of the CAF ExCo meeting of 12 January 2017.
  - CAF decided to comply with the renewal clause agreed upon with LS and, accordingly, renounced to make a public tender in the best interest of CAF.
  - The decision to conclude the 2015 MoU and the Second Agreement was taken collectively by all the members of the CAF ExCo – and not by the Appellant individually.
- The Final Report selectively refers to the minutes of the CAF ExCo of 27 September 2016 to incriminate the Appellant. It completely ignores the minutes of the CAF ExCo's meetings that establish that all decisions related to the 2015 MoU and the Second Agreement were taken collectively, in complete and full knowledge of the situation.
- The Adjudicatory Chamber refused to liaise with CAF to request the unredacted version of the said minutes, although the investigation related to alleged misconducts within its member association.

As to due process rights

- The Final Report and FIFA's subsequent submissions refer to the 2012 edition of the FCE. Likewise, during the hearing before the Adjudicatory Chamber, the matter was also discussed under the same 2012 edition. The issue of whether the 2020 edition should apply in the case at hand was never discussed during the FIFA proceedings, but the 2020 edition was suddenly applied in the Appealed Decision, which gives rise to a completely new reasoning that came as a total surprise.

- The Appellant's due process rights have thus been violated with respect to a key issue, i.e. the (non-)applicability of the new Article 15 FCE.

- The curing effect of CAS *de novo* power of review under Article R57 CAS Code is not applicable here, due to the egregious nature of the procedural defect at stake.

As to the legal basis

- There is no legal basis to impose any sanction on the Appellant for an alleged violation of his duty of loyalty/fiduciary duties.

- Article 15 FCE (2012 edition) does not constitute a valid basis for imposing a sanction pursuant to the predictability test. Both the offence and the sanction that it encompasses are not sufficiently "determinable".

- Article 15 FCE (2012 edition) does not describe the offence in a sufficiently precise way. Swiss law does not endorse the concept of a general duty of loyalty, regardless of the obligor and the obligee. Likewise, the related concept of "fiduciary duties", which is a general and abstract concept, derived from common law, is of no avail.

- Article 15 FCE (2012 edition) does not indicate clearly which sanction may be imposed in such a case, contrary to the Swiss Federal Tribunal's and CAS' jurisprudence. This shortcoming was only addressed in the later editions of Article 15 FCE (2018/2020).

- Article 15 FCE (2012) should, in any case, be interpreted against the party which drafted it (*contra proferentem*), namely FIFA.

- Although these points were raised in the Appellant's written submission filed in the proceedings before the Adjudicatory Chamber, the Appealed Decision does not address this issue. The Adjudicatory Chamber decided, instead, to apply Article 15 (2020 edition).

As to the principles of non-retroactivity and lex mitior

- The principles of non-retroactivity and *lex mitior* constitute fundamental legal principles. The Appealed Decision violates this fundamental principle, by applying the 2020 edition of the FCE (instead of the 2012 edition).

- The 2020 edition of the FCE cannot be applied to the Appellant, since the facts at issue took place before its entry into force. The Appellant's tenure as CAF president ended more than three years before the 2020 edition came into force, and he did not consent to by bound by this document.

- Contrary to what the Adjudicatory Chamber sustains, the 2012 and 2020 editions of the FCE do not have the same content. The 2012 edition only defines the types of sanctions that can be imposed (see Articles 7 and 15), without specifying which sanction may be imposed for a breach of the duty of loyalty, whereas the 2020 edition refers to *"an appropriate fine of at least CHF 10,000 as well as a ban on taking part in any football related activity for a maximum of two years"* (Article 15 para 2).

- The Adjudicatory Chamber did not only infringe the principle of non-retroactivity and of the *lex mitior*. It went one step further by considering facts that took place prior to the enactment of the first edition of the FCE (2009), namely the First Agreement (2007) and the renewal clause contained therein.

As to Article 15 FCE

- The issue of whether member associations' officials should be held liable towards the member association does not fall within the remit of the FIFA Ethics Committee.

- Article 15 FCE imposes a duty of loyalty and fiduciary duties. This concept must be interpreted in accordance with Swiss law, which is applicable by virtue of Article 57 para 2 of the FIFA Statutes (September 2020 edition). It includes the obligation to manage and avoid conflicts of interest, the obligation of confidentiality and the obligation of loyalty.

- According to CAS jurisprudence, a fiduciary has the duty to act in the interest of the principal and not in his own interest. As acknowledged in the Appealed Decision, the Appellant did not pursue any "private aims or gains" when he signed the 2015 MoU and Second Agreement. Therefore, he cannot have infringed any duty of loyalty.

- The Appealed Decision mixes up two different concepts, namely the duty of loyalty, which requires the fiduciary to act in the beneficiary's interest rather than his own, and the duty of care, which entails an obligation to act in the best interest of the corporation concerned.

- Accordingly, CAS panels have held that a duty of loyalty is violated in case of conflicts of interest or undue pecuniary advantages/bribes. By contrast, there has never been a case of breach of the FCE in the case of a violation of the duty of care by an official, simply because there is no provision in the FCE to sanction an individual on that basis.

- The liability of officials for possible breaches of their duty of care is subject to very high standards. It is presumed that the directors of a company have taken their decision with full knowledge of the situation and in good faith. In the case at stake, FIFA has not provided any evidence to overturn the above presumption. To the contrary, the evidence in the file shows that the 2015

MoU and Second Agreement were approved by all members of the CAF ExCo, with full knowledge of the amount offered by LS and the duration of the contract.

- In the present case, the Appellant did not breach his duty of loyalty/fiduciary duties towards CAF. He has, collectively with the other members of the CAF ExCo, faithfully looked after CAF's interests, pursuant to the renewal clause included in the First Agreement.

- The FIFA Ethics Committee's whole case was (initially) based on the Appellant's alleged failure to disclose information related to PS' offer. However, the CAF ExCo's members agreed to amend and clarify the minutes of the meeting of 27 September 2016, which allegedly incriminate the Appellant. The minutes of the CAF ExCo meeting of 12 January 2017 prove that the Final Report's findings were wrong.

- There is no evidence that CAF had any obligation to tender in Egypt.

- FIFA misses the marks by contending that the Appellant failed to maximise profits through a public tender. CAF is a non-profit organisation that, pursuant to its regulations, should also be concerned by the maximisation of media coverage of all its competitions. In this respect, it is clear that an international group like LS, with an international expertise in broadcasting, was a far better alternative than the local company PS.

- More generally, FIFA wrongly retains that the Second Agreement was detrimental to CAF. To the contrary, this was a historical deal of USD 1 billion that was approved by all members of the CAF ExCo (with applause).

- In addition to this historic amount, the contractual relationship with LS was beneficial due to various factors (previous successful collaboration, in-depth knowledge of the African continent, collaboration in the implementation of a production unit within CAF to reduce TV production costs, possibility to increase capacity within the CAF's marketing Committee, links to Paris stock exchange, guarantee of long-term financial stability despite the corruption events that affected CAF and FIFA in 2015).

- Conversely, PS did not show sufficient financial guarantees, was undercapitalised, and had a bad business reputation. Additionally, it made its offer by slipping a letter under a hotel room's door, more than one year after the conclusion of the 2015 MoU, and six months after the formal acceptance of the USD 1 billion offer. As to that date, CAF was therefore bound to LS for the agreed period and would have been liable to pay substantial damages in the event of a breach of its contractual obligations.

- The legal analysis put forward by FIFA to create a personal liability of the Appellant for the business actions taken by the CAF ExCo is ill-founded and

violates Swiss association law and Articles 23 and 24 CAF Statutes (legal opinion of Prof. Thomas Probst).

- Likewise, the ECA's decision does not constitute a proper basis for the Appellant's personal liability. These proceedings were conducted in a questionable way, were not *"pursued"* (on appeal), and only targeted individuals due to the specific nature of Egyptian competition law, which is based on criminal law.

- In conclusion, the Appellant did not violate any duty of loyalty under Article 15 FCE, and cannot be sanctioned.

As to the proportionality of the sanction

- The Appealed Decision, which imposes a worldwide ban from taking part in any football-related activity for one year, as well as a CHF 30,000 fine on the Appellant, is grossly disproportionate.

- The first instance body is required to explain why a sanction should be considered proportionate to benefit from the deference that is applied in CAS jurisprudence. Moreover, the Panel should consider all mitigating circumstances, carefully weigh the level of liability of the person charged but also compare similar cases and sanctions imposed.

- In the present case, the Appellant was not in a situation of conflicts of interest and did not defer his own interests to the ones business interests when signing the 2015 MoU and Second Agreement. Furthermore, no official was ever sanctioned for business decisions taken by the ExCo of a member association.

- Therefore, the Appellant should not be sanctioned at all. Subsidiarily, his sanction should be reduced.

As to the "new" reasoning of the Ethics Committee

- The Investigatory Chamber's case (as set out in the Final Report) was based on the assumption that the Appellant did not inform the CAF ExCo's members of the terms agreed upon in the 2015 MoU and the Second Agreement and, in particular, failed to disclose PS' offer. This assumption turned out to be completely wrong based on the evidence filed by the Appellant.

- The Adjudicatory Chamber decided nonetheless to sanction the Appellant based on a completely new set of baseless arguments and so-called "vital" issues/pieces of evidence, which were never raised in the Final Report.

- The Adjudicatory Chamber applied the wrong standard under Article 15 FCE. It wrongly relies on a duty of loyalty, whereas the Appellant never pursued

his own interest when acting on behalf of CAF. It mixes up the concepts of duty of loyalty and duty of care, oversteps its authority by acting as a super-supervisory authority and unfairly incriminates the Appellant personally for decisions taken by the CAF ExCo collectively.

- The Adjudicatory Chamber erroneously retained that the Appellant had not sought any competing offers and had exclusively negotiated with LS. This statement is contradicted by the testimonies of Mr El Amrani and Mr Patel, who confirmed that the company Infront had offered approximately USD 500 million for eight years. It is also disclaimed by a report drafted by Mr Patel and an exchange of emails between Mr Patel and Infront.

- CAF is not a state authority, which must tender for public contracts. It did not do so for the First Agreement either, without it seeming to be a problem for anyone. In any case, public tenders are not always the best way to maximize profit, the issue at stake is governed by contractual freedom and the negotiation process was not detrimental to CAF.

- CAF had to negotiate the renewal of its First Agreement with LS in accordance with its contractual obligations, namely the contractual clause contained therein. Any other behaviour would have equaled to a breach of an ongoing contract.

- The Adjudicatory Chamber inappropriately concluded that the negotiation and conclusion of the Second Agreement was not sufficiently transparent. This statement is contrary to all the evidence on file. It amounts to considering that the Appellant and his witnesses made false statements, that the authenticity of the CAF ExCo's minutes is questionable, and that all the members congratulated the President without knowing the file.

- It is incorrect to state that CAF's "internal evaluation" amounted to a market price of USD 1.2 billion. This was just an offer made to LS during the negotiations to get the best price.

- The CAF ExCo's members did not raise any proper objection nor filed any complaint in due time regarding the negotiations, and were fully aware of the situation, which excludes any violation of the duty of transparency.

- The Adjudicatory Chamber incorrectly relied upon the alleged violation of competition law and sanctions imposed on CAF by national and international authorities. It qualified ECA'S letter of 29 June 2016 as a *"vital piece of evidence"*, whereas it had never been mentioned previously and is not on file. It provided an incomplete account of this document, and of the correspondence that ensued. It also failed to consider the troubling timing of its sending (after the conclusion of the 2015 MoU) and the equally surprising coordination between Egyptian authorities and PS.

- The Egyptian proceedings were closely monitored by the CAF ExCo. The case was finally closed and the relevant judgment (on appeal) was never executed nor enforced.

- The COMESA report only contains recommendations.

- The Adjudicatory Chamber wrongly stated that the Appellant should be held personally liable for the purported misconducts. This statement goes against the most basic principles of corporate/association law and CAF ExCo members' congratulations. It also stems from a misunderstanding of Egyptian competition law. Finally, it is based on the rejection of a one-page sheet offer flipped under the door of a hotel room, several months after the conclusion of the 2015 MoU and 24 hours before the signature of the Second Agreement.

B. The Respondent's Position

83. In its Answer, the Respondent submitted the following prayers 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."

84. The Respondent's submissions may be summarised as follows:

As to the burden and standard of proof

- FIFA has amply met his burden of proof that, in accordance with Article 49 FCE, rests initially on the Ethics Committee; whereas the Appellant has not substantiated any of his arguments. Pursuant to Article 8 of the Swiss Civil Code ("CC"), each party must prove the facts upon which it is relying and has a duty to participate in the administration of evidence.

As to FIFA's investigation

- FIFA's investigation was comprehensive and based on strong evidence. It demonstrated that the Second Agreement was concluded in opaque circumstances and proved to be extremely unfavourable to CAF. It should have, at the very least, been renegotiated and entails the Appellant's individual liability.

As to due process rights

- The Appellant's argument regarding an alleged violation of his right to be heard is flawed from a substantive point of view. The application of the 2020

FCE and the 2012 FCE over time was interpreted correctly by FIFA. It has, in any case, no practical impact, and the legal considerations brought in the Final Report and the Appealed Decision are aligned.

- The Appellant's argument regarding an alleged violation of his right to be heard is also flawed from a procedural point of view, in light of the curing effect of CAS *de novo* review.

As to the legal basis

- The Appellant unduly attempts to create a *vacuum* in FIFA's regulatory system, and avoid any sanction, by arguing that the 2020 edition of the FCE is not applicable *ratione temporis*, and that Article 15 of the 2012 edition is not precise enough to impose a sanction.

As to the principle of non-retroactivity and of the lex mitior

- The Appellant fails to take into consideration the principle of *lex mitior* and/or the content of Article 3 FCE (2020 edition), according to which the new Code applies "*to conduct whenever it occurred, including before the enactment of this Code. Any individual may be sanctioned for a breach of this Code only if the relevant conduct contrived the Code applicable at the time it occurred. The sanction may not exceed the maximum sanction available under the then-applicable Code*".

- As put forth by CAS panels, "*Article 3 FCE (2012 edition) departs from the traditional lex mitior principle by reversing it so that the new substantive rule applies automatically unless the old rule is more favourable to the accused. The CAS has previously held that even if the starting point of Article 3 FCE (2012 edition) is different, the approach is equivalent to the traditional principle of lex mitior*" (CAS 2017/A/5003, para 140; CAS 2019/A/6489, para 84).

- Article 3 FCE implies to determine whether the relevant conduct breaches the FCE applicable at the time of the alleged offence, and whether the maximum sanction provided in the current version is applicable.

- The Appellant seems to suggest that he would have received no sanction under Article 15 FCE (2012 version) because, at that time, this provision did not contain a minimum fine and maximum ban. However, the specific sanctions and their duration were mentioned in other articles of the Code.

- The Appellant could in fact have received a much longer ban under the 2012 edition (life ban instead of two years). Therefore, either by applying Article 3 FCE (2020 version) or by strictly applying the *lex mitior* principle, the same decision, or even a harsher decision, could have been imposed under the former Code.

As to Article 15 FCE

- The Appellant could incur a personal liability, since he is an "official" within the meaning of Article 2 FCE and Article 13 FIFA Statutes.

- The Appellant's conduct falls within the jurisdiction of the FIFA Ethics Committee, pursuant to Article 30 para 1 FCE. In addition, the FCE only applies to individuals.

- The Appellant cannot absolve himself of any liability by arguing that he did not act in his personal interests, since the FCE applies to *"acts of commission or omissions, whether they have been committed deliberately or negligently, whether or not the breach constitutes an act or attempted act"* (Article 6 para 2 FCE). In addition, the degree of diligence required is even greater when dealing with finance-related matters, exercised by high-ranked individuals like the Appellant (Article 13 para 1 FCE).

- The Second Agreement was an extremely detrimental deal for CAF, both from the perspective of the responsibility looming on CAF for violations of competition law and from a purely financial perspective. This is demonstrated by ECA's investigation, the Egyptian Court proceedings and rulings, the COMESA Competition Commission's report and the PwC's report.

- The so-called troubling coordination between the Egyptian authorities and PS remains pure speculation and is unsubstantiated.

- The ECA's investigation found that CAF had infringed Egyptian competition law, breached transparency principles and turned a blind eye to its invitations to *"amicably stop its abusive behaviour."*

- The Cairo Economic Court of First Instance imposed on the Appellant and Mr El Amrani a fine of 500 million Egyptian pounds per defendant for breaching Egyptian competition law and imposing monopolistic practices. The Egyptian Court of Appeal reduced the fine to 200 million Egyptian pounds and declared CAF jointly liable. Its judgment is now final and binding.

- The COMESA Competition Commission gave a stark judgment of what the Appellant portrays as a "*historical*" achievement for CAF and the work of those who negotiated and signed it. It also recommended its Board of Commissioners to impose a fine on CAF.

- The PwC's report suggested that the Second Agreement was detrimental and should have been renegotiated.

- In fact, what the Appellant describes as a *"historical deal"* for CAF had to be revoked. It lasted less than one year, determined a fine around USD 12

million to be jointly paid by CAF, negatively affected CAF's reputation and entailed costly legal fees in connection to the arbitration procedures that followed the drop-out.

- Article 15 FCE (2020 version), as interpreted by the FIFA Ethics Committee and CAS, was imposed on the Appellant, as President of CAF, to promote and protect CAF's best interests.

- Article 15 FCE (2020 version) does not require the existence of a conflict of interest upon the agent nor the gaining of personal advantages. This offence is governed by Article 19 FCE, which provides for a harsher sanction. While there is always a breach of fiduciary duty when there is a conflict of interest, it might not be the case the other way around.

- Swiss law would only be relevant subsidiarily and within the exclusive aim of filling any regulatory gap. In the present case, there is no need to recur to Swiss law, as there are no gaps to be filled in the FCE. Consequently, the expert opinion filed by the Appellant is irrelevant. Even assuming that Swiss law is applicable, the Appellant would be liable to CAF within the meaning of their internal relationship, since he infringed his duty of loyalty towards this entity.

- Contrary to what the Appellant seems to contend, the Appealed Decision never sanctioned him in relation to the signing of the First Agreement. Only the conduct related to the signing of the Second Agreement constituted a violation of the Appellant's fiduciary duty towards CAF and its members.

- The Appellant deliberately chose to keep liaising only with LS when he had no obligation to do so after the latter's first refusal, with all the consequences in terms of lack of adequate assessment of the market. The statements of two persons involved in the very facts at the basis of the accusations (i.e. Mr Al Amrani and Mr Patel) cannot constitute any reliable evidence in this regard.

- Moreover, the Appellant did not keep the members of the CAF ExCo informed of every step of the negotiations. There is no evidence that the content of the 2015 MoU has ever been properly discussed with the members prior to its signing. Conversely, the minutes of the CAF ExCo meetings show that the MoU was rather 'imposed' on its members by the Appellant.

- Likewise, between the signing of the 2015 MoU on 11 June 2015 and Second Agreement on 28 September 2016, there is no evidence of transparency with the members of the CAF ExCo. The minutes of the CAF ExCo meeting of 27 September 2016 do not refer either to the warning letter ECA had addressed to CAF on 29 June 2016.

- The Appellant also concealed PS' offer of USD 1,2 billion prior to the signing of the Second Agreement. On the contrary, the minutes of the meeting of 27

September 2016 show that some members raised concerns about the fact that the negotiations with LS had been carried *"behind their backs"*. Such minutes were only complemented after the meeting of 12 January 2017, upon Mr Patel's request, as to include a paragraph stating that PS' financial offer had been disclosed.

- The 2015 MoU does not define all the specificities of the financial relationship between CAF and LS that, instead, form part of the (much lengthier) Second Agreement. In other words, a number of clauses which were eventually included in the Second Agreement, such as Article 7.3 (the right of first refusal) could have been the object of more accurate negotiations in light of, *inter alia*, the ECA's warning and PS' offer.

- The Appellant could not simply refrain from considering and disclosing PS' offer, on the ground that this company was undercapitalized and had delivered its offer in an unorthodox way. Additionally, the Appellant seems to have only assessed PS' financial situation during the FIFA proceedings, according to the extract from the commercial register dated 11 January 2017. Even assuming that the Appellant had been able to "sense" that PS could be potentially be a risky commercial partner (in only one day), CAF could have signed the agreement with PS including safeguards against non-fulfilments.

- The Appellant's position, maintaining that CAF qualifies as a "non-profit organisation" whose purpose is not the maximisation of profit but the promotion of football, appears to be naïve and fundamentally flawed. CAF's capacities to promote football in Africa would have benefited from higher revenues. Instead, they were heavily impaired by the reputational and financial repercussions of the Second Agreement.

As to the proportionality of the sanction

- The Adjudicatory Chamber decided to impose a one-year ban and a fine of CHF 30,000 on the Appellant.

- The one-year ban on taking part in any football-related activity represents half the maximum duration provided for in Article 15 FCE (2020 edition).

- The principle of proportionality, as interpreted by CAS, requires the taking into account of the specific circumstances of each case. Only evidently and grossly disproportionate sanctions can be overturned.

- When imposing a sanction, the deciding body shall take into consideration the negative consequences that the misbehaviour caused to the institution, the personality of the accused, the severity of the fault, the motives of infringement as well as the responsibility and the status of the person.

- Article 13 FCE (2020 version) places particular emphasis on infringements that concern finance-related matters. It requires officials to always seek the best interest of football and the organisation(s) they represent.

- In the present case, the Appellant clearly failed to genuinely promote CAF's best interests. As a member of the FIFA's Council and former President of CAF, he held several prominent and senior positions both at national and international level. His conduct revealed a pattern of disrespect for core values of the FCE, determining significant and long-lasting negative implications for CAF.

- The Appellant cooperated, however, during the proceedings, and has no known previous disciplinary records or precedents.

- In light of the foregoing, the Adjudicatory Chamber correctly applied the FCE and, consequently, the Appealed Decision is proportionate to the infringement committed.

As to the "new" reasoning of the Ethics Committee

- The legal considerations mentioned in the Final Report and the Appealed Decision are consistent.

V. JURISDICTION

85. Article R47 of the CAS Code provides that:

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

86. Article 82 para 1 of the FCE (2020 edition), applicable by way of Article 88 FCE of the same edition, indicates that:

> *"Decisions taken by the Adjudicatory Chamber are final, subject to appeals lodged with the Court of Arbitration for Sport (CAS) in accordance with the relevant provisions of the FIFA Statutes."*

87. Article 57 para 1 of the FIFA Statutes (May 2021 edition) sets forth as follows:

> *"Appeals 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 receipt of the decision in question."*

88. Article 56 para 1 of the FIFA Statutes states that:

> *"FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agents."*

89. The FIFA Statutes define an "*official*" as follows:

> *"*[A]*ny board member (including the members of the Council), committee member, referee and assistant referee, coach, trainer and any other person responsible for technical, medical and administrative matters in FIFA, a confederation, a member association, a league or a club as well as all other persons obliged to comply with the FIFA Statutes (except players, football agents and match agents)."*

90. FIFA did not contest the jurisdiction of CAS in respect of the appeal. Moreover, both Parties confirmed the CAS's jurisdiction by signing the Order of Procedure. In these circumstances, the Panel is satisfied that CAS has jurisdiction to hear and determine this appeal.

VI. ADMISSIBILITY

91. Article R49 of the CAS Code states:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against."*

92. Article 57 para 1 of the FIFA Statutes reads as follows:

> *"Appeals 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."*

93. Furthermore, the Appealed Decision provides as follows:

> *"The statement of appeal must be sent directly to CAS within 21 days of notification of this decision."*

94. The Panel notes that the Appellant received the Appealed Decision on 3 August 2021 and filed his Statement of Appeal on 24 August 2021. Thus, the appeal was filed within the deadline of 21 days and is, therefore, admissible.

VII. APPLICABLE LAW

95. Article R58 of the CAS Code states:

> *"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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

96. Article 56 para 2 of the FIFA Statutes states:

> *"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."*

97. The Appellant submits that the laws applicable to this appeal are the FIFA Regulations (FCE, FIFA Statutes and FDC) and, additionally, Swiss law. The Respondent states that the laws applicable to this appeal are primarily the FIFA regulations (in particular the FCE) and, subsidiarily, Swiss law.

98. The Panel concludes that the laws applicable to this appeal are the FIFA regulations (principally the FCE) and Swiss law (subsidiarily). As noted above, however, there is a dispute between the Parties regarding the applicable version of the FCE and the need to resort to Swiss law in the present case.

A. The relevant regulations

a) The FIFA Code of Ethics 2012

99. Article 1 FCE (2012 edition) defines the "*Scope of applicability*" of the FCE. It states:

> *"This Code shall apply to conduct that damages the integrity and reputation of football and in particular to illegal, immoral and unethical behaviour. The Code focuses on general conduct within association football that has little or no connection with action on the field of play."*

100. Article 2 FCE (2012 edition) defines the "*Persons covered*" by the FCE 2012 in the following terms:

> *"This Code shall apply to all officials and players as well as match and players' agents who are bound by this Code on the day the infringement is committed."*

101. Article 3 FCE (2012 edition) concerns the temporal scope of the Code. It states:

> *"This Code shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code except that no individual shall be sanctioned for breach of this Code on account of an act or omission which would not have contravened the Code applicable at the time it was committed nor subjected to a sanction greater than the maximum sanction applicable at the time the conduct*

occurred. This shall, however, not prevent the Ethics Committee from considering the conduct in question and drawing any conclusions from it that are appropriate."

102. Article FCE (2012 edition) gives a general overview of the sanctions:

"1. The Ethics Committee may pronounce the sanctions described in this Code, the FIFA Disciplinary Code and the FIFA Statutes on the persons bound by this Code.

2. Unless otherwise specified, breaches of this Code shall be subject to the sanctions set forth in this Code, whether acts of commission or omission, whether they have been committed deliberately or negligently, whether or not the breach constitutes an act or attempted act, and whether the parties acted as participant, accomplice or instigator."

103. Article 6 paras 1 and 2 FCE (2012 edition) adds:

"1. Breaches of this Code or any other FIFA rules and regulations by persons bound by this Code are punishable by one or more of the following sanctions:

a) warning;
b) reprimand;
c) fine;
d) return of awards;
e) match suspension;
f) ban from dressing rooms and/or substitutes' bench;
g) ban on entering a stadium;
h) ban on taking part in any football-related activity;
i) social work.

2. The specifications in relation to each sanction in the FIFA Disciplinary Code shall also apply."

104. Article 9 FCE (2012 edition) is entitled "*General rules*". Article 9 para 1 provides:

"The sanction may be imposed by taking into account all relevant factors in the case, including the offender's assistance and cooperation, the motive, the circumstances and the degree of the offender's guilt."

105. Article 15 FCE (2012 edition) is entitled "*Loyalty*". It provides:

"Persons bound by this Code shall have a fiduciary duty to FIFA, the confederations, associations, leagues and clubs."

106. Article 19 para 2 FCE (2012 edition) governs *"Conflicts of Interest"*, as follows:

"Persons bound by this Code shall avoid any situation that could lead to conflicts of interest. Conflicts of interest arise if persons bound by this Code have, or appear to have, private or personal interests that detract from their ability to perform their duties with integrity in an independent and purposeful manner. Private or personal

interests include gaining any possible advantage for the persons bound by this Code themselves, their family, relatives, friends and acquaintances."

107. Article 51 FCE (2012 edition) establishes the standard of proof applicable to alleged violations of the Code:

"Standard of proof

The members of the Ethics Committee shall judge and decide on the basis of their personal convictions."

108. This must be read in conjunction with Article 52 FCE (2012 edition), which governs the burden of proof:

"Burden of proof

The burden of proof regarding breaches of provisions of the Code rests on the Ethics Committee."

b) The FIFA Code of Ethics (2020 version)

109. Article 1 FCE (2020 edition) relates to the "*Scope of applicability*" of the Code. It states that:

"This Code shall apply to any conduct, other than those specifically provided by other regulations and connected to the field of play that damages the integrity and reputation of football and in particular to illegal, immoral and unethical behaviour of the persons covered under art. 2 of this Code."

110. Article 2 FCE (2020 edition) describes the "*Persons covered*" by the FCE 2020 in the following terms:

"1. This Code shall apply to all officials and players as well as match agents and intermediaries, under the conditions of art. 1 of the present Code.

2. The Ethics Committee is entitled to investigate and judge the conduct of persons who were bound by this or another applicable Code at the time the relevant conduct occurred, regardless of whether the person remains bound by the Code at the time proceedings commence or any time thereafter."

111. Article 3 FCE (2020 edition) relates to the *"Applicability in time."* It states that:

"This Code applies to conduct whenever it occurred, including before the enactment of this Code. An individual may be sanctioned for a breach of this Code only if the relevant conduct contravened the Code applicable at the time it occurred. The sanction may not exceed the maximum sanction available under the then-applicable Code."

112. Articles 6 and 7 FCE (2020 edition), which generally describe sanctions, are, in their relevant parts, similar to their former versions.

113. Article 9 para 1 FCE (2020 edition), states that:

> *"When imposing a sanction, the Ethics Committee shall take into account all relevant factors in the case, including the nature of the offence; the substantial interest in deterring similar misconduct; the offender's assistance to and cooperation with the Ethics Committee; the motive; the circumstances; the degree of the offender's guilt; the extent to which the offender accepts responsibility, and whether the person mitigated his guilt by returning the advantage received, where applicable."*

114. Article 15 FCE (2020 edition) is concerned with the *"Duty of Loyalty"*:

> *"1. Persons bound by this Code shall have a fiduciary duty to FIFA, the confederations, associations, leagues and clubs.*
>
> *2. Violation of this article shall be sanctioned with an appropriate fine of at least CHF 10,000 as well as a ban on taking part in any football-related activity for a maximum of two years."*

115. Article 19 para 1 of the FCE (2020 edition) prohibits *"Conflicts of Interest"*:

> *"Persons bound by this Code shall not perform their duties (in particular, preparing or participating in the taking of a decision) in situations in which an existing or potential conflict of interest might affect such performance. A conflict of interest arises if a person bound by this Code has, or appears to have, secondary interests that could influence his ability to perform his duties with integrity in an independent and purposeful manner. Secondary interests include, but are not limited to, gaining any possible advantage for the persons bound by this Code themselves or related parties as defined in this Code."*

116. Article 48 of the FCE (2020 edition) provides defines the applicable standard of proof:

> *"The members of the Ethics Committee shall judge and decide on the basis of their comfortable satisfaction."*

117. Article 49 of the FCE (2020 edition) reiterates the former definition of the burden of proof, as expressed in the 2012 Code.

B. The applicable version of the FCE and the principles of *tempus regit actum* and *lex mitior*

118. The Panel observes that, according to well-established CAS jurisprudence, intertemporal issues in the context of disciplinary matters are usually governed by the general principle *tempus regit actum* or principle of non-retroactivity. This principle holds that (i) any determination of what constitutes a sanctionable rule

violation and what sanctions can be imposed in consequence must be determined in accordance with the law in effect at the time of the allegedly sanctionable conduct; (ii) new rules and regulations do not apply retrospectively to facts occurring before their entry into force; (iii) any procedural rule – on the contrary – applies immediately upon its entry into force and governs any subsequent procedural act, even in proceedings related to facts occurred beforehand; (iv) any new substantive rule in force at the time of the proceedings does not apply to conduct occurred prior to the entry into force of that rule unless the principle of *lex mitior*, which requires to apply the most lenient sanction, makes it necessary (CAS 2009/A/1918, paras 18 et seq; CAS 2017/A/5003, para 139).

119. While the Panel agrees with the afore-cited analysis, Article 3 FCE (2020 edition) deviates from the traditional approach, by determining that the FCE (2020 edition) applies *"to conduct whenever it occurred, including before the enactment of this Code. Any individual may be sanctioned for a breach of this Code only if the relevant conduct contrived the Code applicable at the time it occurred. The sanction may not exceed the maximum sanction available under the then-applicable Code."*

120. Given that the conduct for which the Appellant is reproached by FIFA occurred between 2014 and 2017, the Panel is required to take a closer look at the scope of the duty of loyalty provisions in the 2012 and 2020 versions of the FCE, as well as their related sanctions.

121. The Panel notes that the violation of the duty of loyalty was a punishable conduct in the FCE (2012 edition) and continued to be punishable under the FCE (2020 edition). The wording of Articles 15 of both versions of the FCE are identical. As such, with respect of the punishable conduct, the Appellant is by no means prejudiced by the application of the FCE (2020 edition) as opposed to the application of the FCE (2012 edition).

122. What is different between both versions is the addition of a second paragraph to Article 15 in the FCE (2020 edition) that was absent in the FCE (2012 edition).

123. Article 15 para 2 FCE (2020 edition) sets a maximum sanction by way of its new paragraph:

> *"Violation of this article shall be sanctioned with an appropriate fine of at least CHF 10,000 as well as a ban on taking part in any football-related activity for a maximum of two years."*

124. The FCE (2012 edition) did not contain any limitation as to the maximum period of taking part in any football-related activity, as such edition contained a more general scale of sanctions that could potentially be imposed, referring, *inter alia*, to the possibility of imposing a life ban.

125. Accordingly, with respect to the principle of *lex mitior*, the Panel notes that the FCE (2012 edition) at least in theory allowed for the imposition of a lifetime ban, the

Panel finds that the addition of Article 15 para 2 FCE (2020 edition) is more favourable to the Appellant as it caps the maximum period of taking part in any football-related activity potentially to be imposed.

126. As to the fine, Article 15 para 2 FCE (2020 edition) provides for a minimum fine of CHF 10,000, whereas the FCE 2012 does not refer to a minimum fine, but more generally to the possibility of imposing a fine in Article 6 para 1 sub c FCE (2012 edition).

127. Also in this respect, the Panel finds that the Appellant is not prejudiced by the application of the FCE (2020 edition), as the imposition of a fine of CHF 30,000, as was imposed in the Appealed Decision, could also have been imposed on the Appellant if the Adjudicatory Chamber had applied the FCE (2012 edition).

128. Accordingly, while the application of the principle of *tempus regit actum* set forth in the FCE (2020 edition) is different from the traditional approach set forth *supra*, the Panel finds that, in the matter at hand, the application of the FCE (2020 edition) is by no means prejudicial to the Appellant and therefore accepts to apply the FCE (2020 edition) to the Appellant.

VIII. MERITS

A. The Main Issues

129. As a result of the above, the issues that arise for determination by the Panel in this appeal may be summarised as follows:

(a) Were the Appellant's due process rights violated in the proceedings before Investigatory Chamber and/or the Adjudicatory Chamber? and, if so, what should be the consequence thereof?
(b) Does Article 15 para 1 FCE 2020 provide for a sufficiently clear legal basis?
(c) Did the Appellant violate Article 15 para 1 FCE 2020?
(d) If the Appellant violated Article 15 para 1 FCE, what sanction should be imposed on him?

(a) Were the Appellant's due process rights violated in the proceedings before the Investigatory Chamber and/or the Adjudicatory Chamber? and, if so, what should be the consequence thereof?

130. The Appellant argues that the issue of whether the 2020 edition of the FCE should apply in the case at hand was never discussed during the FIFA proceedings. In his opinion, the application of the 2020 edition in the Appealed Decision gives rise to a completely new reasoning, and constitutes a violation of his due process rights.

131. FIFA contends that the application of the FCE over time was interpreted correctly. It highlights that it has, in any case, no practical impact, and that the legal

considerations brought in the Final Report and the Appealed Decision are aligned. It finally invokes the curing effect of CAS' *de novo* review.

132. As already addressed *supra*, the Panel is convinced that the application of the FCE (2020 edition) did not deprive the Appellant from appropriately arguing his case, being recalled that Article 15 FCE (2020 edition) has exactly the same content as Article 15 FCE (2012 edition), except for a more favourable regime concerning sanctions.

133. The Panel recalls that, according to Article R57 para 1 CAS Code, it has full power to review the facts and the law. In principle, the *de novo* proceedings before the CAS cure any purported (procedural) violations that occurred in prior proceedings (see e.g. CAS 2011/A/2594; CAS 2018/A/5853). There may be exceptions to this rule in case of exceptional circumstances. This includes, for instance, the breach of provisions which are essential to prove the existence of an antidoping rule violation, the non-communication of the reasons of the decision in disciplinary cases, and non-elections or expulsions of members without respecting their right to be heard (D. MAVROMATI / M. REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Wolters Kluwer, 2015, p. 514-515, and the references).

134. Insofar the Appellant maintains that his due process rights were violated by the Adjudicatory Chamber because it allegedly failed to consider evidence presented by the Appellant, the Panel finds that this argument is to be dismissed as any such violation is cured by the *de novo* competence of CAS.

135. The same applies with respect to the procedural requests presented before the Adjudicatory Chamber, i.e. these requests, even if unjustly denied, could have been resubmitted to the Panel in the present appeal arbitration proceedings, and in fact were resubmitted, as a consequence of which any alleged default from the Adjudicatory Chamber could be repaired by the Panel in these proceedings.

136. In any event, the aforementioned alleged violations would not meet the threshold of an irreparable breach of the applicable procedural standards. The Appellant had the opportunity to extensively present his case before this Panel, where all of his fundamental procedural rights were fully respected (as was confirmed by him at the hearing), as a consequence of which the alleged procedural flaws of the Investigatory Chamber and/or the Adjudicatory Chamber fade to the periphery and are cured in the present appeal arbitration proceedings.

137. With respect to the Appellant's argument that the Adjudicatory Chamber based itself on new reasoning and evidence that had not be submitted to in the Final Report of the Investigatory Chamber, the Panel in principle considers such alleged conduct not permissible, as the report of the Investigatory Chamber forms the basis of the charges against which the defendant is to defend himself. If entirely new elements would be brought up during the proceedings before the Adjudicatory Chamber, there

may be exceptional circumstances warranting such elements to be taken into account, but in principle the scope of the investigation should not be expanded after the issuance of the Investigatory Chamber's report.

138. However, while the Panel is prepared to accept that the narrative of the Appealed Decision is somewhat different from the Final Report, the Panel does not find that the charge filed against the Appellant fundamentally changed.

139. Consequently, the Panel finds that no due process rights of the Appellant were violated in the proceedings before the Investigatory Chamber and/or the Adjudicatory Chamber and that any such alleged violations are in any event cured by the Panel's *de novo* competence.

(b) Does Article 15 para 1 FCE provide for a sufficiently clear legal basis?

140. The Appellant maintains that there is no legal basis for imposing any sanction against him. In his opinion, Article 15 para 1 FCE fails the "predictability test", as the concept of "duty of loyalty" in turn refers to the vague and broad concept of "fiduciary duty". The provision is therefore not precise enough to be used as a basis for imposing sanctions. Neither the offence, nor the sanctions are sufficiently determinable.

141. On a subsidiary basis, the Appellant also argues that the concept of "duty of loyalty" is to be interpreted in accordance with Swiss law and that, following such interpretation, he did not violate Article 15 para 1 FCE, as he did not pursue any "*private aims or gains*", as acknowledged in the Appealed Decision. The Appellant argues that FIFA mixes up two different concepts, i.e. the duty of loyalty and the duty of care.

142. Commencing with the Appellant's second argument as to the predictability of the sanctions, the Panel finds that the mere fact that the FCE (2012 edition) does not give specific guidance as to the minimum or maximum of sanctions to be imposed for a violation of such provision does not mean that it fails the "predictability test", recalling that the range of potential sanctions is set forth in other articles of the same FCE 2012 version and that the sanction set forth in Article 15 para 2 FCE (2020 edition) falls within such range. The Panel agrees that the guidance provided by Article 15 para 2 FCE (2020 edition) is helpful, but its absence from previous editions of the FCE does not mean that covered persons could not be sanctioned at all for breaching their "duty of loyalty".

143. As to the alleged lack of predictability of Article 15 para 1 FCE, FIFA maintains that this provision is to be interpreted without reference to Swiss law, as the provision itself is sufficiently clear. In this respect, FIFA relies on an interpretation of the FIFA Ethics Committee in a different matter:

> *"In general terms, a fiduciary duty is defined as a legal obligation by which one person (the fiduciary) must protect and promote the interests of another (the*

beneficiary). Conversely, a breach of fiduciary duty occurs when someone who is placed in a position of trust, acts in a way that is detrimental to the interests of the beneficiary or is likely to damage its reputation." (no 9/2020, para 266)

144. The Panel recalls that Article 15 para 1 FCE, entitled "duty of loyalty", provides that persons bound by the FCE shall have a fiduciary duty to FIFA, the confederations, associations, leagues and clubs.

145. The Panel initially notes that this article has given rise to various interpretations in the jurisprudence of FIFA and CAS.

146. The Panel notes that the decision of the FIFA Ethics Committee referred to by FIFA was partially overturned on appeal by CAS in a recent award (CAS 2020/A/7592). Although such CAS panel did not explicitly disagree with the elements mentioned by the FIFA Ethics Committee for violating the "duty of loyalty", it states, with reference to the fiduciary duty (translated into French by the expression "*loyauté absolue*") that:

"Selon la jurisprudence du TAS, une personne fait « preuve d'une loyauté absolue » lorsqu'elle met les intérêts de la FIFA, des confédérations, etc., au premier plan, avant même ses propres intérêts (TAS 2011/A/2433)." (CAS 2020/A/7592, para. 280)

Freely translated into English:

"According to CAS jurisprudence, a person meets her fiduciary duty when he or she puts the interests of FIFA, the confederations, etc., first, even before his or her own interests (CAS 2011/A/2433)."

147. The relevant CAS panel denied any violation of Article 15 FCE, in the absence of conflicts of interest, failure to comply with transparency requirements, and conduct contrary to the interests of CAF as alleged in first instance against the appellant.

148. Other CAS panels have also emphasized that the duty of loyalty encompassed the obligation of sports officials not to promote their own interests to the detriment of their associations, to abstain from doing anything that could be contrary to their interests, and/or to disclose any inappropriate approach they may be subject to (CAS 2011/A/2425, para 155; CAS 2011/A/2426, para 144; CAS 2017/A/5006, para 202).

149. CAS panels have also confirmed, in more recent awards, that the duty of loyalty is established by a general provision, which is not applicable in case of other more specific offences, such as conflicts of interest and the acceptance of undue advantages (CAS 2016/A/4474, paras 322 et seq.; CAS 2017/A/5003, paras 200 et seq.).

150. The Panel acknowledges, in view of this analysis, that the wording of Article 15 para 1 FCE, in its English version - which prevails in case of doubt -, is not crystal clear as to the exact conduct from which one should abstain.

151. However, the Panel finds that it does not have to make any concrete determinations as to the legal boundaries of Article 15 para 1 FCE, as it finds that, regardless of whether the position of the Appellant or FIFA is followed, and while the provision is sufficiently clear to potentially sanction a perpetrator of the "duty of loyalty", there is in any event insufficient evidence on file to establish that the Appellant violated Article 15 para 1 FCE, i.e. the Panel finds that FIFA did not prove that the Appellant personally acted "*in a way that is detrimental to the interests of* [CAF] *or is likely to damage its reputation*" as will be considered in turn.

(c) Did the Appellant violate Article 15 para 1 FCE?

152. At the outset, the Panel finds that FIFA bears the burden of establishing the Appellant's alleged violations of the FCE to the comfortable satisfaction of the Panel under Articles 48 and 49 FCE. As the CAS jurisprudence recognises, the standard of comfortable satisfaction is more onerous than the civil standard of balance of probabilities, but it is not as high as the criminal standard of proof beyond reasonable doubt (CAS 2017/A/5006, para 180).

153. The Panel also takes due note of the opinion expressed by the Panel in the following excerpt from CAS 2004/O/649, quoted by the Appellant:

> *"Built into the balance of probability standard is a generous degree of flexibility that relates to the seriousness of the allegations to be determined. In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or "comfort", required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not. Nor is there necessarily a great gulf between proof in civil and criminal matters. In matters of proof the law looks for probability, not certainty. In some criminal cases, liberty may be involved; in some it may not. In some civil cases – as here – the issues may involve questions of character and reputation and the ability to pursue one's chosen career that can approach, if not transcend in importance even questions of personal liberty. The gravity of the allegations and the related probability or improbability of their occurrence become in effect part and parcel of the circumstances which must be weighed in deciding whether, on balance, they are true."* (CAS 2004/O/649, para 36 of interim decision)

154. The Panel finds that this jurisprudence is concretised in more recent CAS jurisprudence where it is specified that the standard of comfortable satisfaction is not a flexible standard, but that the reference to flexibility more specifically relates to confidence required in the quality of the evidence relied upon, as for example held in the following precedent:

> *"In the view of the Panel, this does not mean that there is some sort of "sliding scale" within the standard of "comfortable satisfaction" depending on the seriousness of the charge, but that in case of serious allegations, the adjudicatory body should have a high degree of confidence in the quality of the evidence.*

The Panel feels itself comforted in this analysis by the reasoning of another CAS panel:

> *"In assessing the evidence the Panel has borne in mind that the Player has been charged with serious offences. While this does not require that a higher standard of proof should be applied than the one applicable according to the UTACP, the Panel nevertheless considers that it needs to have a high degree of confidence in the quality of the evidence* [...]." (CAS 2018/A/5906, paras 69-70, published on the CAS website; and further reference)

155. The Panel agrees with the aforementioned interpretation and hence finds that FIFA bears the burden of establishing the Appellant's violation of Article 15 para 1 FCE and that the standard of comfortable satisfaction is applicable.

156. The Panel understands that FIFA's allegations against the Appellant revolve around four main points:

(1) The lack of tender or bidding process, the exclusive negotiations with LS and the opacity of the negotiation process;
(2) The ignorance of the offer presented by PS;
(3) The concealment of the ECA letter dated 29 June 2016;
(4) The exposure of CAF to sanctions imposed by several Egyptian and international authorities, for breaching national and international regulations of competition law.

157. These four issues are addressed in turn below, but the Panel considers it important to address one more general issue at the outset. The Appellant may be an important, if not the most important person in the organization, but he is not CAF. Accordingly, in order to hold him personally responsible for a violation of Article 15 para 1 FCE, there must be evidence of his personal wrongdoing: a mere *a posteriori* assessment of management decisions (which, incidentally, were not taken by the Appellant alone), does not suffice to establish a violation of Article 15 para 1 FCE.

158. In this regard, the Panel finds useful to resort to the so-called "business judgement rule", which, as pointed out by Prof. Probst, is used by the SFT to assess liability issues within corporate entities. In essence, this rule provides that *"when reviewing management decisions in hindsight, the Court ought to proceed with caution and restraint if such decisions were based on a correct decision process which relied on adequate information and was free from conflicts of interest"*. While CAF is not formally a corporation but an association, the Panel sees no reason why the generally restrictive attitude of courts in reviewing business decisions should not apply.

159. If leadership acts entire risk-averse out of fear for personal disciplinary repercussions this will likely adversely affect the success of a legal entity, or in the long term even the appetite of persons to be willing to take the responsibility of leading organisations such as CAF.

(1) The lack of a tender or bidding process, the exclusive negotiations with LS and the opacity of the negotiation process

160. FIFA submits that the 2015 MoU and subsequent negotiations with LS were conducted without adequately testing the market, contacting other competitors and conducting a tender or bidding process in order to secure the best possible offer. It blames the Appellant for getting CAF to agree to sell its commercial rights related to its 2017-2028 competitions for "only" USD 1 billion, namely a significantly lower value and a longer duration than its initial proposal/objective.

161. The Panel finds that it is not surprising that CAF initially turned to LS, given that this company had a preferential right pursuant to the First Agreement. Accordingly, CAF was legally required to approach LS first. Only if no agreement with LS would be reached within the one-year period between the first proposal of CAF to be submitted to LS by 31 December 2014 at the latest and 31 December 2015, CAF was allowed to turn to a tender or bidding process.

162. CAF established a Working Group and a Strategic Committee with respect to the potential extension of the First Agreement and the Appellant was no member of either.

163. While the Appellant maintains that the situation concerning the potential extension of the First Agreement was discussed at the 19/20 September 2014 CAF ExCo meeting, he did not provide evidence thereof. However, the Panel notes that the Appellant undertook reasonable efforts to obtain such evidence from CAF and cannot be blamed for CAF's failure to provide such documentary evidence.

Notwithstanding the absence of the minutes of the 19/20 September 2014 CAF ExCo meeting, the minutes of the CAF ExCo meeting of 11 November 2014 reflect that the Working Group's suggested approach was to make a proposal to LS, negotiate during the course of 2015, and if no agreement was reached with LS, potentially initiate a tender or bidding process as from January 2016. This approach was apparently confirmed by the CAF ExCo, so that the question of whether or not the potential extension was also discussed during the 19/20 September 2014 CAF ExCo meeting is irrelevant.

164. On 5 April and 26 May 2015, the CAF ExCo was informed of the ongoing negotiations with LS and that the members would be informed *"as soon as CAF and* [LS] *find an agreement on the essential points"*. On the basis of such minutes, and while the CAF ExCo could potentially have taken more ownership of the situation, the minutes reflect that the CAF ExCo was apparently content to leave the negotiations in the hands of the Strategic Committee and accepted to be informed on the essential points only after an agreement with LS had already been reached.

165. As it happened, CAF reached an agreement with LS on 11 June 2015, as a consequence of which no tender or bidding process was held.

166. The conclusion of the 2015 MoU was ratified by the CAF ExCo in its meeting of 6 August 2015, as recorded in the minutes:

> *"V. REPORT ON THE SIGNING OF A MOU BETWEEN CAF AND* [LS] *ON THE COMMERCIAL RIGHTS OF THE CAF COMPETITIONS FOR CYCLE 2017-2018*
>
> *The CAF President congratulated the Committee that worked hard with* [LS] *to secure a contract on the favour of CAF. This allowed the signature of a contract last June with* [LS] *with up to a billion dollars as a guaranteed minimum for 12 years, which is an exceptional amount guaranteeing the future of African football. The old contract was 150 million dollars as a guaranteed minimum for 8 years. The Executive Committee congratulated CAF and the President for this historic agreement."*

167. Against this background, the Panel finds that it cannot be concluded that the CAF ExCo was by-passed or held in the dark about the negotiations with LS, or indeed that this was due to the Appellant's personal conduct, but approved the conclusion of the 2015 MoU. Accordingly, even if the Appellant had negotiated the deal with LS personally, of which there is no evidence, the result of his negotiations was fully endorsed by the CAF ExCo.

168. As to the criticism expressed during the 27 September 2016 CAF ExCo meeting, this is reflected as follows in the minutes of this meeting:

> *"*[LS] *has the right of 1st refusal in the contract only. CAF and* [LS] *are now ready to sign.*
>
> *The CAF president added that there should be no sensitivities between the members of the Executive Committee, and that he is disappointed to hear members complaining that CAF negotiated the contract behind their backs, as if he had personal interests. He condemned this kind of regrettable attitude, especially since all the elements are shared in advance with the Committee for agreement.*
>
> *Since CAF has existed, the President himself has consistently refused to receive a salary since 1988, noting that he does not need to steal CAF's money. He therefore wishes to maintain mutual respect."*

169. The Panel finds that it is not unusual to discuss a contract with a value of USD 1 billion and that there may have been disagreement among the members of the CAF ExCo. Most relevantly, as reflected in the minutes of the CAF ExCo meetings of 5 April and 26 May 2015, the members were content to accept that they would be informed as soon as an agreement had been reached. In any event, the complaints did not rise to the level of a formal rejection or a subsequent challenge of the decision by one of the members of the CAF ExCo.

170. Furthermore, on the one hand, the witnesses' written and oral statements corroborate that sufficient information was provided to the CAF ExCo and due cooperation between the latter and the Working Group/Technical Committee took place. On the

other hand, FIFA did not present any witnesses maintaining that this would not have been the case.

171. As accepted by FIFA, any allegation of personal interest of the Appellant to the detriment of CAF with the conclusion of the 2015 MoU or the Second Agreement is to be dismissed in the absence of any evidence in this respect.

172. The Panel does not exclude that the Appellant may have played a certain role behind the scenes in negotiating the 2015 MoU with LS. However, FIFA did not establish (i) that the Appellant was directly involved in the negotiations with LS or played an important role in this respect; (ii) that the Second Agreement was suboptimal; (iii) if it was suboptimal, that this was the result of the Appellant's conduct; and iv) that he somehow acted behind the backs of the Working Group, the Strategic Committee and the CAF ExCo in doing so.

173. The mere fact that the Appellant signed the 2015 MoU and the Second Agreement was only his duty as President of CAF and does not make him personally responsible for the content of such agreements. There is no evidence for FIFA's allegation that, following the conclusion of the 2015 MoU, the Appellant personally "*negotiated the numerous clauses of the* [Second Agreement]".

174. The fact that CAF's offer to LS of 24 December 2014 referred to a higher annual amount (USD 750 million over an eight-year period/USD 1.2 billion over a twelve-year period) than the amount ultimately agreed (USD 1 billion over a twelve-year period) does not demonstrate anything, except that CAF was seeking to get the best offer by way of negotiation.

175. The Appellant also asserts that CAF relied on its own market expertise and contacted other potential partners to have an idea of the market price. This is confirmed by the testimonies of Mr El Amrani and Mr Patel, but also by an email from the Swiss company Infront to Mr Patel, where it referred to a minimum net profit guarantee of between USD 400 million and USD 500 million. It can therefore not be said that CAF did not explore the market.

176. Be this as it may, there is no evidence on file suggesting that it was the Appellant personally who decided not to (further) test the market. This responsibility was primarily for the Working Group and the Strategic Committee and they were apparently content to proceed with LS, which decision was endorsed by the CAF ExCo.

177. It was certainly not forbidden for CAF to initiate a bidding or tender process or to speak with other entities potentially interested and it may well have been wise to do so, especially in terms of transparency. Yet, it is not relevant what could have been done, but what should have been done.

178. It is worth mentioning that, under Swiss law, associations, as private entities, would not be subject to the law on public procurement, and their activity is generally

characterized by the principle of freedom of contract (see e.g. Article 4 of the Federal Act on Public Procurement; Articles 1 and 19 of the Swiss Code of Obligations).

179. Insofar CAF was allegedly required to initiate a tender or bidding process under Egyptian law, this will be addressed separately below.

180. Consequently, the Panel finds that the lack of a tender or bidding process of CAF does not constitute a breach of loyalty of the Appellant vis-à-vis CAF.

(2) The ignorance of the offer presented by PS

181. FIFA suggests that CAF could have benefitted from more favourable deals, such as that of PS, which was apparently willing to pay an additional USD 200 million for the same rights as were granted to LS over the same period of time.

182. The Appellant provided a convincing explanation as to why he had not paid further attention to PS' offer. He highlighted that such offer was not even delivered to the Appellant, but to Mr Patel in his hotel room on 26 September 2016, and that Mr Patel communicated this offer to the CAF ExCo at the meeting of 27 September 2016. However, the CAF ExCo decided not to proceed with PS' offer.

183. First of all, regardless the fact that the value of an offer is a very important element to be considered in order to achieve CAF's purposes, it is not the only one. This is particularly so given that CAF is a non-profit association, whose purpose is not the maximisation of profits but the promotion and development of the game of football and the increase of its popularity in Africa. This is also reflected in Article 46 of the Regulations Governing the CAF Statutes:

> *"The objectives of CAF shall be to ensure maximum media coverage and broadcasting of all of its competitions, by the different media, for the widest possible audience."*

184. As Prof. Probst points out in his Expert Report:

> *"Indeed even* [for] *profit-oriented companies the highest bid (=highest price offered) is not per se the best bid because – in the properly understood best interest of a company – other factors (such as professional experience, efficient organisation and cooperation, solvency of a potential partner) may well outweigh a difference in price."*

185. Accordingly, besides the financial aspects, other elements are important too, such as the positive experience of CAF with LS during the First Agreement, not least because LS apparently paid CAF three times more than the minimum net profit for CAF of USD 150 million agreed in the First Agreement. Furthermore, LS displayed numerous other advantages, including, to name a few, its international reach and ability to maximise media coverage, links to Paris stock exchange, financial stability, in-depth knowledge of the African continent and market and thorough

experience. Surely there are not many companies with such features, as confirmed by Mr El Amrani at the hearing.

186. Conversely, PS did not present its offer in a serious way (both by way of delivery as well as the content of the offer), and as argued by the witnesses, in particular Mr El Amrani, after PS had expressed interest in acquiring commercial rights from CAF competitions in July 2016 resulting in contacts between PS and LS regarding the possible sub-licensing of the media-rights, PS did not establish sufficient financial guarantees, was undercapitalised, and had a bad business reputation.

187. Notwithstanding the above, the Panel finds that there are other independent reasons that make it quite comprehensible that CAF ignored the "offer" presented by PS. First of all, because of the conclusion of the 2015 MoU, CAF was already committed to LS. Concluding an agreement with PS would possibly have resulted in a breach of CAF's obligations pursuant to the 2015 MoU.

188. Furthermore, even if the 2015 MoU would not have been binding on CAF, the Panel finds that it cannot seriously be contended that CAF should have terminated the sophisticated and detailed negotiations with LS based on a mere one-page "offer" being slipped under a hotel room door.

189. If there is anything opaque in the present proceedings it is an offer of a value of USD 1,2 billion being slipped under a hotel room door. A serious contender does not present an offer in such a way, let alone at that very advanced stage of the selection process. Such method of delivery leaves much to be desired, and the Panel finds that the Appellant could not have been blamed had he completely ignored such "offer".

190. However, to the credit of Mr Patel, despite being presented with such unorthodox offer in such unusual way, the offer was presented to the CAF ExCo in full transparency, as recorded in the minutes of the 12 January 2017 CAF ExCo meeting:

> "[...] *Mr. Patel had mentioned indeed that two days before the signing of the contract a company named Presentation had slipped under his door at Marriott Hotel a letter stating an "offer" of 1.2 billion US Dollars to acquire the same commercial rights as those for which* [LS] *had signed to be an exclusive agent of CAF.*
>
> *This offer was neither really discussed nor considered given that the entity Presentation offers no guarantees nor has a serious desire to work with CAF. The document sent was rather as a diversion and an attempt to destabilize the relationship between CAF and its agent.*
>
> *The minutes were approved taking into account the mentioned modification."*

191. Had any member of the CAF ExCo disagreed with such suggested approach, they could have objected, but the minutes make no reference to any objection.

192. In the light thereof, the Panel finds that the Appellant cannot be personally reproached for ignoring the offer presented by PS.

193. Insofar as FIFA suggests that the amendment of the minutes of the 27/28 September 2016 CAF ExCo meetings during the 12 January 2017 CAF ExCo was incorrect, there is no evidence whatsoever on file to draw such conclusion.

194. Additionally, it has not been successfully proven that the Appellant put his own interests ahead of those of CAF, ignored the offer of PS to the detriment of CAF, or benefited in any way from the situation, through undue advantages.

195. What is more, the acceptance of a USD 1 billion deal does not appear to the Panel to be, *per se*, disadvantageous to CAF, which has for its part never filed any legal proceedings against the Appellant, but instead decorated him Honorary President in January 2021. The financial damage concretely suffered by CAF, as alleged by FIFA, is not documented, since CAF's financial statements (2019) do not show any payment or reserve for the fine that was imposed by Egyptian authorities.

196. In fact, CAF's financial damage, if any, may result from (i) its inability to find a successor for LS, which, with the knowledge of hindsight, reinforces the conclusion that the 2015 MoU and/or the Second Agreement was not necessarily detrimental to CAF; and (ii) the early termination of the Second Agreement after the Appellant had stepped down as President of CAF, which led to the initiation of arbitration proceedings and, possibly, the need to pay damages to LS.

197. As for the potential reputational damage invoked by FIFA, the Panel again does not see how this can be blamed on the Appellant personally rather than on CAF as a legal entity.

198. Conversely, the Panel wonders what would have happened if CAF had accepted PS's offer, given the lack of financial guarantees offered by the latter.

199. In any event, the Adjudicatory Chamber and/or CAS shall not, as the Appellant points out, set themselves up as "super-supervisory authorities" and assess the appropriateness of purely business decisions. In the absence of legal irregularities, the Panel finds that it ought not to substitute its own discretion for the discretion of sports officials and managers who are in the best position to make such decisions.

200. Consequently, the Panel finds that the ignorance of the offer presented by PS does not constitute a breach of loyalty of the Appellant vis-à-vis CAF.

(3) The concealment of the ECA letter dated 29 June 2016

201. FIFA asserts that the Appellant *"completely ignored"* the warnings of the ECA, in particular the official communication of 29 June 2016 stating that the exclusive contractual relation with LS was in (potential) violation of Egyptian competition law

and had to be amended. He allegedly renounced to address and solve the matter or report it to the CAF ExCo.

202. Nevertheless, this letter is not part of the case file and cannot, therefore, be considered nor precisely assessed. In any event, CAF replied to it in a detailed manner through Mr El Amrani, and offered to provide more information, but did not hear back. CAF could therefore legitimately believe that the problem had been resolved.

203. The Panel accepts that the ECA sent a letter to CAF on 29 June 2016, because the letter from CAF to the ECA dated 6 November 2016 refers to such date, but the Panel finds that, in the absence of such letter, it cannot be determined whether such letter should have been brought to the attention of the CAF ExCo during the next CAF ExCo meeting.

204. Be this as it may, the actions of the Egyptian authorities were only brought to the attention of the CAF ExCo during the meeting of 12 January 2017 and not yet during the meeting of 27 September 2016.

205. In this respect, it is relevant to note that the 2015 MoU was a binding contract for CAF and LS. The Second Agreement is the full form agreement, but the essential points of the contractual arrangement had already been agreed in the 2015 MoU. It is therefore not clear what the CAF ExCo could concretely have done with the letter from the ECA, as CAF was already committed to the 2015 MoU.

206. Furthermore, as reflected in the minutes of the 12 January 2017 CAF ExCo meeting, the members supported the suggestion for CAF to defend itself against the allegations raised:

> *"After a debate on this issue, members demanded that CAF be able to defend its standing as an international non-governmental institution, and that Egypt as a host country should respect CAF after 60 years of exemplary cooperation. The President asked Mr Raouraoua to prepare a draft letter to be sent to the Head of State in order to summarize the situation and possibly organize a meeting at the highest level."*

207. In any event, even if it would be accepted that such letter from the ECA should have been shared at the next CAF ExCo meeting, still FIFA did not establish why such late reporting would be the personal fault of the Appellant.

(4) The exposure of CAF to sanctions imposed by several Egyptian and international authorities, for breaching national and international regulations of competition law

208. FIFA highlights the Egyptian Court of Appeal imposed a fine of 200 million Egyptian pounds (11.7 million Swiss francs) on the Appellant and Mr El Amrani and declared CAF jointly liable for breaching Egyptian competition law and imposing monopolistic practices.

209. Two other entities, COMESA and PwC, negatively assessed CAF's contractual relationship with LS. They both considered that the Second Agreement was detrimental and should have been terminated, respectively renegotiated.

210. Neither of the aforementioned instances however relied on a specific provision of Egyptian law requiring CAF to commence a tender or bidding process. Rather, the negative assessment of the 2015 MoU and the Second Agreement was premised on the overall circumstances relating to the extension, including the length of the relevant agreements, the alternative offer from PS and the alleged opacity of the negotiations, resulting in an alleged abuse of a dominant position pursuant to Article 8 of the Egyptian Competition Law.

211. FIFA did not contest the Appellant's argument that, unlike in most legal systems, competition law in Egypt is based on criminal law. Therefore, the (primary) criminal liability arising from a violation of competition law is attributed to the individuals in charge of the management of the legal entity concerned. The (joint and several) liability of the legal entity is incurred only in the event that it has benefitted from the infringement concerned.

212. While the Panel overall does not question the relevant decisions rendered by the Egyptian authorities and courts and its considerations with respect to monopoly and the length of the 2015 MoU and/or the Second Agreement (although the Panel does not share the finding in the Court of Appeal decision that *"*[PS] *had presented serious and competitive offers of higher value"* for the reasons set forth *supra*), it finds that it is not bound by the outcome thereof vis-à-vis the Appellant personally in the context of the present proceedings concerning alleged violations of the FCE.

213. The Panel decides these proceedings based on the FCE and finds that there must be specific conduct of the Appellant that is in violation of the FCE in order to sanction him. A legal presumption under Egyptian law that the Appellant is personally liable for competition law violations of CAF as such is not enough.

214. When dissecting the decision of the Court of Appeal, the Panel also did not find specific elements that would require holding the Appellant personally liable for a violation of Article 15 para 1 FCE. Insofar as the Investigatory Chamber maintained in the Final Report that "*the court deemed that it is undeniable that the members of the* [CAF ExCo] *were not even aware of the existence of an offer from* [PS] *in the amount of USD 1.2 billion. The general protest among the members of the* [ExCo] *demonstrates that the decisions were not made collectively, as not all the members detained the entirety of the information and offers available. For these reasons, the Court held the co-defendants liable for the monopolistic practices*", the Panel finds that such interpretation is not warranted because it overlooks the fact that the minutes of the CAF ExCo meeting of 27/28 September 2016 were amended on 12 January 2017 and that the offer of PS had therefore been discussed and rejected by the CAF ExCo, but not by Appellant personally.

215. With respect to the findings of the COMESA Competition Committee' and the PwC report of 2 December 2019, no elements are specifically attributed to the Appellant personally, but the decision rather focuses on CAF.

216. The Panel finds that there is no evidence suggesting that the Appellant personally played a meaningful role in CAF's business decision to conclude the Second Agreement with LS that was apparently in violation of Egyptian competition law. Given that the 2015 MoU and the Second Agreement were concluded, in accordance with the relevant procedure and were approved by the CAF ExCo, the Panel finds that the Appellant is not to be held personally responsible for this.

217. Consequently, the Panel finds that the Appellant did not violate Article 15 para 1 FCE.

(d) If the decision of the Adjudicatory Chamber is not annulled, should the sanction imposed on the Appellant be reduced?

218. In view of the above conclusion that the Appellant did not violate Article 15 para 1 FCE, no sanction is to be imposed on the Appellant and the Appealed Decision is to be set aside.

B. Conclusion

219. Based on the foregoing, the Panel holds that:

i) No due process rights of the Appellant were violated in the proceedings before the Investigatory Chamber and/or the Adjudicatory Chamber and any such alleged violations are in any event cured by the Panel's *de novo* competence.
ii) The Appellant did not violate Article 15 para 1 FCE.
iii) The Appealed Decision is set aside.

220. All other and further motions or prayers for relief are dismissed.

IX. Costs

221. The Panel observes that Article R65 CAS 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 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."*

222. 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 Court Office fee of CHF 1,000 paid by the Appellant prior to the filing of his Statement of Appeal, which is in any event retained by CAS.

223. Furthermore, pursuant to Article R65.3 CAS Code, and in consideration of the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the Parties, the Panel rules that FIFA shall bear its own costs and pay a contribution in the amount of CHF 5,000 towards the Appellant's 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 by Mr Issa Hayatou on 24 August 2021 against the decision of the Adjudicatory Chamber of the FIFA Ethics Committee of 17 June 2021 is upheld.

2. The decision of the Adjudicatory Chamber of the FIFA Ethics Committee of 17 June 2021 is set aside.

3. The award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Mr Issa Hayatou, which is retained by the CAS.

4. FIFA shall bear its own costs and pay to Mr Issa Hayatou an amount of CHF 5,000 (three thousand Swiss Francs) as a contribution towards his legal fees and other expenses incurred in connection with these arbitration proceedings.

5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 4 February 2022

THE COURT OF ARBITRATION FOR SPORT

Manfred P. Nan
President of the Panel

Hamid G. Gharavi
Arbitrator

José J. Pintó
Arbitrator

Alexandra Veuthey
CAS clerk