

**CAS 2022/A/9016 FC Shakhtar Donetsk v. FIFA**

**ARBITRAL AWARD**

**delivered by the**

**COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition**

**President:** Prof. Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy

**Arbitrators:** Prof. Jan Paulsson, Professor, Manama, Bahrain

Prof. Ulrich Haas, Professor, Zurich, Switzerland and Attorney-at-Law,  
Hamburg, Germany

*Ad hoc* Clerk: Mr Dennis Koolaard, Attorney-at-Law, Amsterdam, The Netherlands

**in the arbitration between**

**FC Shakhtar Donetsk, Ukraine**

Represented by Mr Josep Francesc Vandellos Alamilla, Mr Saksham Samarth and Ms Susanah Ng, Attorneys-at-Law, Vandellos Sports Law, Valencia, Spain, and Mr Andriy Kharytonchuk, Head of Legal Department, FC Shakhtar Donetsk, Kyiv Oblast, Ukraine

**Appellant**

**and**

**FIFA, Switzerland**

Represented by Dr. Jan Kleiner, Director of Football Regulatory, Mr Miguel Liétard Fernández-Palacios, Director of Litigation, and Mr Roberto Nájera Reyes, Senior Legal Counsel, Litigation Department, FIFA, Zurich, Switzerland

**Respondent**

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## **I. PARTIES**

1. FC Shakhtar Donetsk (the “Appellant” or “Shakhtar”) is a football club with registered office in Kyiv Oblast, Ukraine. Shakhtar is registered with the Ukraine Football Association (the “UAF”), which in turn is affiliated to the *Fédération Internationale de Football Association*.
2. The *Fédération Internationale de Football Association* (the “FIFA”) is the governing body of football at worldwide level, headquartered in Zurich, Switzerland. FIFA exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.
3. Shakhtar and FIFA are hereinafter jointly referred to as the “Parties”.

## **II. INTRODUCTION**

4. The present appeal arbitration procedure has its roots in the events caused by the military invasion of Ukraine, on 24 February 2022, by Russian armed forces.
5. In response to such events, the Bureau of the FIFA Council (the “Bureau”) adopted regulatory measures by means of a new Annexe 7 to the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”) containing “*Temporary rules addressing the exceptional situation deriving from the war in Ukraine*” (“Annex 7” or the “Temporary Rules”), intended to apply to all employment contracts of an international dimension concluded between players or coaches and clubs affiliated to the UAF or to the Football Union of Russia (the “FUR”). On 20 June 2022, the Bureau adopted a decision (the “Appealed Decision”) approving a revised text of the Temporary Rules (the “Amended Temporary Rules”) and extending its validity.
6. Shakhtar is challenging the Appealed Decision, maintaining, *inter alia*, that (i) it was not issued in accordance with the applicable law; (ii) it violates Article 101 of the Treaty on the Functioning of the European Union (the “TFEU”); (iii) it is discriminatory; and (iv) it is not suitable, adequate, and necessary to achieve FIFA’s objectives. Shakhtar further maintains that the Appealed Decision caused it damages in an amount of EUR 40,288,177.80, for which FIFA is liable.
7. FIFA maintains that CAS does not have jurisdiction to hear Shakhtar’s claim for damages and, in any event, applies for a confirmation of the Appealed Decision.

## **III. FACTUAL BACKGROUND**

8. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant,

in connection with the legal discussion.

**A. The adoption of Temporary Rules in March 2022**

9. As from 24 February 2022, once Russia’s war against Ukraine broke out, the domestic league in Ukraine was suspended. FIFA maintains to have immediately started discussions as to whether and, if so, how this tragedy had to be addressed from a regulatory perspective. According to FIFA, it quickly became clear that national football competitions would be gravely affected and that contractual relationships – at least potentially – would also be severely impacted.

10. On 2 March 2022, the World Leagues Forum and FIFPRO, acting respectively as representatives of the worldwide professional leagues and of the football players, sent a letter to FIFA as follows:

*“The undersigned stakeholders write to you in their capacity as representatives of the employers (the World Leagues Forum) and of the employees (FIFPRO) in professional football at world level.*

*The present letter is sent in the context of Russia’s invasion of Ukraine, also acknowledging the decision of the [Bureau] of 28 February 2022 suspending Russian teams from all international competitions.*

*The undersigned consider that consequences of the current conflict must also be addressed for foreign players who are currently employed by Russian clubs.*

*These foreign players may rightfully consider that they are not willing to represent any longer a Russian team and should be able to immediately terminate their contract with their employer without facing any sanction whatsoever from international bodies and to be registered in a new club without being restricted by transfer period regulations.*

*This must be done through the amendment of FIFA regulations and specifically the Regulations on the Status and Transfer of Players (RSTP) which rule international transfers.*

*As a result, with reference to art. 27 of the RSTP and following the agreement between FIFPRO and the World Leagues Forum, we urge FIFA to:*

- 1. Declare that any player employed by a club in Russia may immediately and unilaterally terminate his/her employment contract without consequences of any kind if they desire to do so. In particular, no compensation shall be due to any party and no sporting sanctions as per art. 17 of the FIFA RSTP shall be imposed on any party.*
- 2. Declare that any club wishing to engage a player who has terminated his/her employment contract with a club in Russia can do so without consequences of any kind. In particular, no compensation shall be due to any party and no sporting sanctions as per art. 17 of the FIFA RSTP shall be imposed on any party.*

3. *Authorise and facilitate the registration of any player previously employed in Russia or Ukraine with a new club outside the registration periods as defined in art. 6 of the FIFA RSTP and suspend for those players the limitation of number of clubs a player can be registered with (and play for), as per art. 5 par. 4 of the FIFA RSTP.*

*Lastly, as far as young Ukrainian players who are not in the age to fight and fled the country are concerned, we understand that they will be able to register without restriction in any foreign club of their choice whenever they have an opportunity to do so under the refugee status.”*

11. On 4 March 2022, a remote meeting was held between representatives of FIFA, the World Leagues Forum, FIFPRO, the European Club Association (“ECA”) and the Union of European Football Associations (“UEFA”).
12. On 6 March 2022, draft regulations intended to address the situation of foreign players and coaches in Russia and Ukraine were transmitted by FIFA to the World Leagues Forum, FIFPRO, ECA and UEFA, inviting their comments by midnight.
13. On 7 March 2022, the Bureau adopted Annex 7, which, in the part relevant to the present dispute, provided as follows:

***“1 Scope of application***

*This annexe applies to all employment contracts of an international dimension concluded between players or coaches and clubs affiliated to the Ukrainian Association of Football (UAF) or the Football Union of Russia (FUR).*

***2 Employment contracts of an international dimension with clubs affiliated to the UAF***

1. *Notwithstanding the provisions of these regulations and unless otherwise agreed between the parties, a contract of an international dimension between a player or a coach and a club affiliated to the UAF shall be considered automatically suspended until 30 June 2022.*
2. *The minimum length of a contract established under article 18 paragraph 2 of these regulations, does not apply to any new contract concluded by the professional whose contract has been suspended in accordance with paragraph 1 above.*

***3 Employment contracts of an international dimension with clubs affiliated to the FUR***

1. *Notwithstanding the provisions of these regulations and unless otherwise agreed between the parties, a contract of an international dimension between a player or a coach and a club affiliated to the FUR can be unilaterally suspended until 30 June 2022 by the player or the coach, provided that a mutual agreement with the club could not be reached before or on 10 March 2022.*

2. *The minimum length of a contract established under article 18 paragraph 2 of these regulations does not apply to any new contract concluded by the professional whose contract has been suspended in accordance with paragraph 1 above.*

#### **4 Consequences of the suspension**

*A player or coach whose contract has been suspended as per article 2 paragraph 1 or article 3 paragraph 1 above does not commit a breach of contract by signing and registering with a new club. Article 18 paragraph 5 of these regulations does not apply to a professional whose contract has been suspended as per article 2 paragraph 1 or article 3 paragraph 1 above.*

#### **5 Registration**

1. *Notwithstanding the provisions of article 5 paragraph 4 of these regulations, a player whose previous registration was in the UAF or FUR, may be registered with a maximum of four clubs during one season and is eligible to play official matches for three different clubs.*
2. *A club may register a maximum of two professional players who have benefited from the exceptions set out in this annexe.*

#### **6 Registration periods**

1. *Notwithstanding the provisions of article 6 paragraph 1 of these regulations, a player whose previous registration was in the UAF or in the FUR, has the right to be registered by an association outside a registration period, provided that such registration occurs before or on 7 April 2022.*
2. *Notwithstanding the provisions of Annexe 3, article 8.2 paragraph 7 in conjunction with Annexe 3, article 8.2 paragraph 4 b), in case the UAF or FUR reject an ITC request for a professional within the scope of this annexe, FIFA is competent to immediately authorise the provisional registration of the player at the new association for his new club. [...]*

14. On 9 March 2022, FIFA issued Circular Letter No. 1787, intended to set out the key elements of the Temporary Rules. *Inter alia*, it indicated that the Temporary Rules were aimed at addressing “*a number of difficult and technical regulatory questions relating to the ordinary application of the [FIFA RSTP]*” and had been approved in order to provide “*legal certainty and clarity on a number of elements*”.
15. On 10 and 11 March 2022, during the Football Law Annual Review in Buenos Aires, Argentina, FIFA presented the background, content and reasoning of the Temporary Rules and it publicly answered a series of questions about Annex 7.
16. On 15 March 2022, FIFA issued a document dated 16 March 2022, entitled “*Interpretative Note to Annexe 7 of the Regulations on the Status and Transfer of*

*Players*”, to provide guidance to the FIFA member associations and their stakeholders in relation to Annex 7.

17. On 24 March 2022, FIFA issued Circular Letter No. 1788 to confirm that Annex 7 had been modified by the Bureau on 16 March 2022 “*in order to provide clarification regarding the movement of Ukrainian players*”. As a result, it was clarified that Annex 7 applied to employment contracts of an international dimension concluded between players or coaches and clubs affiliated to the UAF or the FUR, as well as to all players previously registered at the UAF, regardless of their nationality.
18. On 26 April 2022, the UAF and its stakeholders decided that the domestic football season 2021/22 remained terminated.

**B. The adoption of the Amended Temporary Rules in June 2022**

19. On 3 May 2022, FIFA issued Circular Letter No. 1796, announcing amendments to the provisions of the FIFA RSTP concerning the loan of players in international football. In the “*July 2022 edition*” of the FIFA RSTP notified by means of this circular, it was indicated that the suspension of contracts under its Annex 7 applied only until 30 June 2022. This version of the “*July 2022 edition*” of the FIFA RSTP was later deleted from the website of FIFA and is publicly unavailable now.
20. On 25 May 2022 and 9 June 2022, new remote meetings were held between representatives of FIFA, the World Leagues Forum, FIFPRO, ECA and UEFA, to discuss the Temporary Rules “*and its consequences as from 1 July 2022*”.
21. On 10 June 2022, FIFA transmitted to the World Leagues Forum, FIFPRO, ECA and UEFA, an “*updated draft of Annexe 7 of the RSTP, which reflects the outcome of the discussions held*”, inviting comments by midnight.
22. On 13 June 2022, FIFA circulated a revised draft of the amended Temporary Rules with the World Leagues Forum, FIFPRO, ECA and UEFA.
23. On 15 June 2022, Mr Yuriy Zapisotskiy, the UAF’s General Secretary, informed FIFA as follows:

*“Further to FIFA proposals regarding the amendments to Annex 7 of FIFA RSTP the [UAF] kindly asks to consider the following request on this matter:*

1. *To extend the deadline for contractual negotiations between clubs and foreign players/coaches as from 30 June 2022 until 15 August 2022.*
2. *Taking into consideration, an ongoing discussion regarding the start of 2022/2023 Ukrainian domestic championship, UAF deems contract suspension right granted to foreign players and coaches not justified. As part of 2022/2023 Ukrainian domestic championship matches could be played abroad (e.g. in Poland) the foreign players and coaches have to resume their duties in the clubs subject to different arrangements between*



*the parties.*

*Thank you for your understanding and looking forward to further fruitful cooperation.”*

24. On 20 June 2022, the Bureau issued the Appealed Decision, approving the Amended Temporary Rules. The Amended Temporary Rules provide as follows, in the part relevant to the present dispute (deletions crossed out and additions marked in bold and underlined in comparison with the original Annex 7 as adopted on 7 March 2022):

**“1 Scope of application**

*This annexe applies to all employment contracts of an international dimension concluded between players or coaches and clubs affiliated to the Ukrainian Association of Football (UAF) or the Football Union of Russia (FUR), as well as to the registration of all players – regardless of their nationality – previously registered with the UAF.*

**2 Employment contracts of an international dimension with clubs affiliated to the UAF**

- 1. Notwithstanding the provisions of these regulations and unless otherwise agreed between the parties, a contract of an international dimension between a player or a coach and a club affiliated to the UAF ~~shall be considered automatically suspended until~~ can be unilaterally suspended until 30 June 2023 by the player or the coach, provided that a mutual agreement with the club could not be reached before or on 30 June 2022.*
- 2. The minimum length of a contract established under article 18 paragraph 2 of these regulations, does not apply to any new contract concluded by the professional whose contract has been suspended in accordance with paragraph 1 above.*

**3 Employment contracts of an international dimension with clubs affiliated to the FUR**

- 1. Notwithstanding the provisions of these regulations and unless otherwise agreed between the parties, a contract of an international dimension between a player or a coach and a club affiliated to the FUR can be unilaterally suspended until 30 June ~~2022~~2023 by the player or the coach, provided that a mutual agreement with the club could not be reached before or on ~~10 March~~30 June 2022.*
- 2. The minimum length of a contract established under article 18 paragraph 2 of these regulations does not apply to any new contract concluded by the professional whose contract has been suspended in accordance with paragraph 1 above.*

**4 Consequences of the suspension**

*A player or coach whose contract has been suspended as per article 2 paragraph 1 or article 3 paragraph 1 above does not commit a breach of*

*contract by signing and registering with a new club. Article 18 paragraph 5 of these regulations does not apply to a professional whose contract has been suspended as per article 2 paragraph 1 or article 3 paragraph 1 above.*

## **5 Registration**

- ~~1. Notwithstanding the provisions of article 5 paragraph 4 of these regulations, a player whose previous registration was in the UAF or FUR, may be registered with a maximum of four clubs during one season and is eligible to play official matches for three different clubs.~~
- ~~2. A club may register a maximum of two professional players who have benefitted from the exceptions set out in this annexe.~~

## **6 Registration periods**

- ~~1. Notwithstanding the provisions of article 6 paragraph 1 of these regulations, a player whose previous registration was in the UAF or in the FUR, has the right to be registered by an association outside a registration period, provided that such registration occurs before or on 7 April 2022.~~
- 2.1. *Notwithstanding the provisions of Annexe 3, article 8.2 paragraph 7 in conjunction with Annexe 3, article 8.2 paragraph 4 b), in case the UAF or FUR rejects an ITC request for a professional within the scope of this annexe, FIFA is competent to immediately authorise the provisional registration of the player at the new association for his new club. [...]*

25. On 21 June 2022, FIFA issued the revised July 2022 edition of the FIFA RSTP.
26. On 22 June 2022, FIFA issued Circular Letter No. 1800, setting out the content of the modifications to the Temporary Rules contained in the Amended Temporary Rules, and enclosing the June 2022 edition of the FIFA RSTP, which contained the Amended Temporary Rules.<sup>1</sup> It was, *inter alia*, indicated that “[f]ollowing the decisions taken in March 2022, ongoing developments in Ukraine concerning the uncertain duration of the conflict have led to a need for further clarification on the application of Annexe 7 to the RSTP, in particular on the suspension of employment contracts of foreign players and coaches with clubs affiliated to the [UAF] and [FUR] after 30 June 2022”.

### **C. Developments after the adoption of the Amended Temporary Rules**

27. On 22 June 2022, Mr Sergiy Palkin, Shakhtar’s General Director, issued a letter to FIFA, providing as follows:

*“[Shakhtar] is one of the leaders of Ukrainian football, thirteen-time Ukrainian Premier League Title Holder, thirteen-time Ukrainian Cup*

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<sup>1</sup> As noted by Shakhtar, the June 2022 edition of the FIFA RSTP was communicated after the July 2022 edition of the FIFA RSTP had been released.

*Winner, 2009 UEFA Cup Winner and regular participant in the UEFA Champions League.*

*In 2014, due to the war in Ukraine the Club was forced to leave its home arena in Donetsk and relocate to Lviv (2014-2016) and to Kharkiv (2017-2020). In May 2020, the Club started to play home matches in Kyiv.*

*Newly-built stadium “Donbass Arena” and training center “Kirsha” were left in Donetsk. Hence the Club has lost more than half of a billion Euros of its investments in the football infrastructure.*

*Yesterday [sic], FIFA announced Bureau of the Council decision allowing the foreign players and coaches to suspend their contracts with Ukrainian clubs until 30 June 2023 unless they agree on different arrangements on or before 30 June 2022 (hereinafter – “FIFA Decision”).*

*Further to this announcement four foreign players immediately withdrew from further negotiations regarding their potential transfers from Shakhtar to European clubs. The Player’s agents advised them to withdraw from negotiations in order to leave the Club without any compensation, which would allow them to secure more lucrative arrangements with new employers. Because of FIFA Decision, [Shakhtar] has lost a chance to transfer 4 foreign players for the total amount about 50 million Euros.*

*We believe FIFA Decision was taken not in the best interests of Ukraine, its clubs and Ukrainian football. This is even more fair considering that difficult moment for Ukraine in its history. On contrary, the only beneficiaries of FIFA Decision are players’ agents. They will be able to structure the outgoing transfers for maximizing own unfair enrichment. In other words, 50 million Euros unpaid to Shakhtar will flew to the pockets of agents.*

*We feel frustration because FIFA decided in arbitrary manner acting against the interests of Ukrainian football. [Shakhtar] and the UAF tried to convey their common position to FIFA. However, FIFA adopted its decision without hearing of the voice of Ukrainian stakeholders.*

*Therefore, [Shakhtar] calls FIFA being a main regulator of football market for the emergent action to find a solution aiming to resume a functionality of Ukrainian football market (for foreign players). In this moment, more than 60 foreign players are registered with the clubs of Ukrainian Premier League. Hence this letter expresses a common position of all Ukrainian Premiere League clubs.*

*In a case if there is no solution, we will be forced to seek redress before the competent courts of Switzerland.”*

28. On 2 July 2022, FIFA issued Circular Letter No. 1804 to address issues regarding players registered with the UAF. Such Circular Letter reads, in the pertinent portions, as follows:

*“FIFA is aware that, given the current conflict in Ukraine, Annexe 7 may result in a larger number of outgoing transfers from Ukraine than would*

*otherwise be the case. It follows that the [UAF] and its affiliated clubs may have to deal with a non-negligible number of outgoing transfers caused by the Russian invasion of Ukraine and the ongoing war. This is, however, an inevitable consequence of the situation in Ukraine, as well as the decision by the FIFA Council to create a temporary derogation from the generally applicable rules set out in the RSTP in order to protect the legitimate interests of foreign players and coaches currently employed on Ukrainian territory.*

*In these exceptional circumstances, to ensure that all international transfers involving players registered with the UAF are conducted in compliance with the FIFA regulations and also to protect the legitimate interests of both players and clubs in Ukraine, FIFA wishes to clarify that, should a player be transferred from a club in Ukraine to a club affiliated to another member association in application of article 2 of Annexe 7 to the RSTP, the engaging club should enter the relevant transfer instruction in TMS no earlier than 1 August 2022.*

*Should an engaging club attempt to enter the transfer instruction prior to this date, member associations may not request the International Transfer Certificate from the UAF, as a consequence of which the international transfer of the player may not take place under the conditions set out in Annexe 7 to the RSTP. For the avoidance of doubt, foreign players and coaches employed in Ukraine remain free to unilaterally suspend their contracts if no mutual agreement was reached with their club prior to or on 30 June 2022. The administrative procedure outlined in this circular letter simply gives Ukrainian clubs and foreign players and coaches employed by them the maximum opportunity to reach mutually acceptable solutions, provided that there is a common interest in doing so.”*

29. On 6 July 2022, Shakhtar’s General Director sent another letter to FIFA, providing as follows:

*“In addition to my previous letter of 22 June 2022 I would like to update you on the matter at stake.*

*As I wrote you earlier after an announcement of new Annex 7 to FIFA RSTP and FIFA Circular 1800 few foreign players immediately withdrew from ongoing negotiations regarding their transfer from FC Shakhtar to another club.*

*In order to make it more clear I am providing you with few examples. The player Manor Solomon stopped his permanent transfer to Fulham FC and notified Shakhtar regarding suspension of his employment contract with Shakhtar for season 2022/2023. Exactly the same has happened with the transfer of the player Mateus Cardoso Lemos Martins to Olympique Lyonnais. Both mentioned Players had 18 months of remaining contract with Shakhtar. Hence their contracts will stay suspended 12 months out of 18 and they probably would have to come back to FC Shakhtar for 6 months’ period after the end of suspension.*

*The Swiss club FC Sion had our Player Marcos Robson Cipriano on loan for season 2021/2022 with the possibility to buyout. FC Sion offered Shakhtar to buyout the Player for a lower amount than was initially agreed and immediately withdrew from further discussions on terms of such transfer as soon as new Annex 7 to FIFA RSTP was published. Obviously, this happened because Player's contract with Shakhtar will end after 12 months. I am quite sure the Player will suspend his contract with Shakhtar until its natural expiry.*

*The new FIFA Circular 1804 had no impact on the described above transactions. We have to notice that newly adopted additional measures prohibiting players' registration until 1 August were not of particular help because they have not changed the economic landscape of the transfers. Therefore, those measures were insufficient.*

*I believe more meaningful support initiative to Ukrainian clubs is needed from FIFA.*

*In absence of any reaction from FIFA until 11 July 2022, FC Shakhtar Donetsk will have no choice but to seek for damages compensation from the competent courts."*

30. FIFA did not directly respond to Shakhtar's letters dated 22 June and 6 July 2022.
31. On 20 July 2022, i.e., after Shakhtar had commenced proceedings before CAS, as set forth in more detail below, the Ukrainian Premier League approved the start of the domestic championship on 23 August 2022, which decision was subsequently confirmed by UAF.

#### **IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

32. On 11 July 2022, Shakhtar filed a Statement of Appeal with CAS, challenging the Appealed Decision, in accordance with Articles R47 and R48 of the 2021 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In this submission, Shakhtar named FIFA as the sole respondent and nominated Prof. Jan Paulsson, Professor in Manama, Bahrein, as arbitrator.
33. On 19 July 2022, FIFA nominated Prof. Dr. Ulrich Haas, Professor in Hamburg, Germany, as arbitrator.
34. On 25 August 2022, Shakhtar filed with the CAS Court Office its Appeal Brief, in accordance with Article R51 CAS Code. Shakhtar's submission contained a request to the Panel to "*order the Respondent to produce the agenda and the minutes of the meeting [of the Bureau where the Appealed Decision was adopted] and all related documents forming part thereof to see what measures were part of the discussion before the adoption of the Appealed Decision*".

35. On 8 September 2022, the CAS Court Office informed the Parties that, pursuant to Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel appointed to decide the present case was constituted as follows:  
  
President: Prof. Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy;  
Arbitrators: Prof. Jan Paulsson, Professor, Manama, Bahrain;  
Prof. Ulrich Haas, Professor, Zurich, Switzerland and Attorney-at-Law, Hamburg, Germany.
36. On the same date, 8 September 2022, Shakhtar informed the CAS Court Office that it had come to its attention that Prof. Fumagalli had also been appointed as President of the Panel in a parallel arbitration (CAS 2022/A/9017). Shakhtar indicated that, because such proceedings also concerned a challenge brought by clubs affiliated to the FUR against certain provisions of Annex 7, it did not feel comfortable with Prof. Fumagalli as President of the Panel, and invited him to reconsider his position.
37. On 9 September 2022, Prof. Fumagalli informed the CAS Court Office that he saw no reason to reconsider his decision to accept the appointment as President of the Panel in the present proceedings.
38. On 12 September 2022, Shakhtar formally challenged Prof. Fumagalli on the basis of Article R34 CAS Code.
39. On 14 September 2022, Prof. Haas and Prof. Paulsson indicated that they did not see any grounds to challenge Prof. Fumagalli's appointment.
40. On 19 September 2022, Prof. Fumagalli and FIFA filed their comments with respect to the challenge, requesting that it be dismissed.
41. On 22 September 2022, Shakhtar informed the CAS Court Office that it maintained its challenge.
42. On 31 October 2022, FIFA filed with the CAS Court Office its Answer, in accordance with Article R55 CAS Code, *inter alia*, contesting the jurisdiction of CAS to deal with Shakhtar's claim for damages.
43. On 7 November 2022, following an invitation from the CAS Court Office to file its written submissions on the jurisdiction of CAS, Shakhtar indicated that it had anticipated such argument and had already made extensive submissions on this aspect in its Appeal Brief.
44. On 7 and 8 November 2022 respectively, following an invitation from the CAS Court Office to express their views in this respect, FIFA indicated that it did not consider it necessary to hold a hearing, whereas Shakhtar indicated that it considered it crucial to hold a hearing.

45. On 11 November 2022, the CAS Court Office provided the Parties with the reasoned decision issued by the Challenge Commission of the International Council of Arbitration for Sport, containing the following operative part:
- “1. *The petition for challenge against the appointment of Prof. Fumagalli as President of the Panel filed by FC Shakhtar Donetsk is rejected.*
2. *The costs of the present Order shall be determined in the final award or in any other final disposition of this arbitration.*”
46. On 22 November 2022, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing by video conference and that Mr Dennis Koolaard, Attorney-at-Law in Amsterdam, The Netherlands, had been appointed as *Ad hoc* Clerk.
47. On the same date, 22 November 2022, Shakhtar requested the Panel to reconsider the format of the hearing and hold a hearing at the CAS Court Office in Lausanne, Switzerland.
48. On 23 November 2022, the CAS Court Office proposed the Parties that only the President of the Panel would attend the hearing in person, whereas the co-arbitrators and the *Ad hoc* Clerk would attend remotely, inviting the Parties to comment.
49. On 23 and 24 November 2022 respectively, Shakhtar confirmed its agreement with respect to the proposed modalities of the hearing, whereas FIFA requested that the hearing be held fully virtually.
50. On 29 November 2022, the CAS Court Office informed the Parties that the proposal concerning the modalities of the hearing of 23 November 2022 were confirmed.
51. On 30 November and 1 December 2022 respectively, Shakhtar and FIFA returned duly signed copies of the Order of Procedure provided to it by the CAS Court Office on the same date. Shakhtar indicated that it maintained its challenge of Prof. Fumagalli and reserved its legal rights in this regard.
52. On 6 December 2022, the CAS Court Office informed the Parties as follows on behalf of the Panel with respect to Shakhtar’s evidentiary request in its Appeal Brief:
- “*The Panel notes that FIFA replied to such request by producing some documents relating to the decision-making process of the Bureau (Exhibits 20, 21 and 23), and denied the existence of additional documents. In light of these circumstances, the Panel considers such Appellant’s request moot and, in the absence of evidence as to the existence of any additional documents, it is, therefore, denied.*”
53. On 16 December 2022, FIFA informed the CAS Court Office that it may wish to ask questions to Prof. Cattaneo with respect to four papers listed on his *curriculum vitae*.

54. On 22 December 2022, a hybrid hearing was held at the CAS Court Office in Lausanne, Switzerland. At the outset of the hearing, FIFA confirmed that it had no objection to the constitution and composition of the Panel, whereas Shakhtar reiterated its objection with respect to Prof. Fumagalli.
55. In addition to the members of the Panel (the President of the Panel in person and both co-arbitrators by video link), Mr Antonio de Quesada, CAS Head of Arbitration (in person), and Mr Dennis Koolaard, *Ad hoc* Clerk (by video link), the following persons attended the hearing:
- a) For the Appellant:
    - 1) Mr Sergiy Palkin, Shakhtar’s General Director (in person);
    - 2) Mr Andriy Kharitonchuk, Shakhtar’s Head of Legal Department (in person);
    - 3) Mr Josep Francesc Vandellos Alamilla, Counsel (in person);
    - 4) Mr Saksham Samarth, Counsel (in person).
  - b) For the Respondent:
    - 1) Dr. Jan Kleiner, FIFA Director of Football Regulatory (in person);
    - 2) Mr Miguel Liétard Fernández-Palacios, FIFA Director of Litigation (by video link).
56. The following expert and witnesses were heard, in order of appearance:
- 1) Mr Sergiy Palkin, Shakhtar’s General Director, witness called by Shakhtar (in person);
  - 2) Mr Alexey Belikov, Shakhtar’s Head of Audit, witness called by Shakhtar (by video link);
  - 3) Prof. Andrea Cattaneo, Senior Lecturer in European Union Law, Member of the Centre for Sports Law Research at Edge Hill University, expert called by Shakhtar (by video link).
57. 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. Shakhtar and FIFA had full opportunity to examine and cross-examine the expert and the witnesses.
58. During the hearing, Shakhtar informed the CAS Court Office in writing that Mr Yuriy Zapisatskiy, UAF’s General Secretary, witness called by Shakhtar, was summoned in court in Ukraine and that it was uncertain whether he would be available to testify. Shakhtar provided documentary evidence demonstrating that Mr Zapisatskiy was indeed summoned in court.
59. At the end of the evidentiary phase of the hearing, Shakhtar indicated orally that Mr Zapisatskiy was not available to testify. Shakhtar indicated, *inter alia*, that the only



reason to hear Mr Zapisatskiy was for him to confirm that the UAF was not invited to the table by FIFA to discuss the possibility of extending the Temporary Rules. However, a discussion then arose as to the content of Shakhtar's letter to FIFA dated 15 June 2022 and whether this letter demonstrated that Shakhtar had specific knowledge of the proposals being discussed concerning the extension of the Temporary Rules.

60. Shakhtar raised the option for the Panel to address questions to Mr Zapisatskiy in writing. The Panel indicated to the Parties that it would assess the matter and that the Parties would be informed of its decision in writing.
61. Both Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the members of the Panel.
62. Before the hearing was concluded, both Parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.
63. On 27 December 2022, the CAS Court Office informed the Parties that the Panel had decided not to hear Mr Zapisatskiy as a witness.
64. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

## **V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF**

### **A. The Appellant's Appeal Brief**

65. Shakhtar's submissions may be summarised as follows:

#### ***The Appealed Decision is ultra vires***

- FIFA's mandate is defined by its Statutes. FIFA has the power to regulate football in general through its rules and regulations, but it has no authority to unilaterally amend the key terms and conditions of employment contracts governed by a domestic law, to which it is not a party, as doing so would violate the *pacta sunt servanda* principle and interfere with *res inter alios acta*.
- FIFA's response to the COVID-19 pandemic is evidence of FIFA's express admission of its lack of authority in that regard. It also evidences the obligation of FIFA to respect national laws, even in a *force majeure* situation faced by football in general. The interference of FIFA in employment relationships between a football club and its players and coaches is limited by the respect to the employment laws and their supremacy in regulating employment relationships. As a result, FIFA had always, in the FIFA RSTP, subjected substantive employment matters to national laws. It is clear that FIFA never

had the power or the intention to regulate substantive employment matters through its regulations, at least not by ignoring mandatory provisions of national law.

- In the Appealed Decision, however, FIFA arbitrarily extended the effects of Article 2.1 of Annex 7 until 30 June 2023. Whilst recognising that a final decision on the football season 2022/23 in Ukraine had not been undertaken when the Appealed Decision was adopted, the arbitrary suspension until 30 June 2023, without any proviso for its early lifting in the event of resumption of the league, is simply outrageous and without any reasonable and proportionate basis.
- In addition, the Appealed Decision is *ultra vires* because it failed to take into account and acknowledge its subjection to Ukrainian employment law.
- Since Shakhtar and its foreign players and coaches had expressly referred to Ukrainian employment law in the employment contracts, the following fundamental question is to be answered under Ukrainian employment law: is a unilateral suspension of an employment contract by an employer possible when the employer is able to provide work, remuneration and fulfil all other employment objectives? Under the current employment law of Ukraine “*On Organization of Labor Relations under Martial Law*” No. 2136-IX, suspension of an employment contract is permitted in the event a military aggression is undertaken against Ukraine, which makes it impossible to perform work. This suspension implies that an employer temporarily ceases to provide an employee with work tasks and an employee temporarily stops fulfilling work under the concluded employment agreement. Contrary to the Appealed Decision, the suspension right is not granted to the employee, but it is vested in the hands of the employer. This right was implemented into Ukrainian Labour Law in response to the ongoing war in Ukraine due to the Russian invasion.
- It is worthwhile to note that under the COVID-19 regulations, in the event the club and the player could not reach an agreement to vary their employment contract, and national law and collective bargaining agreements did not address the situation, then, as an alternative, the employment contract could be suspended during any interruption of competition. Thus, under those regulations, the employment contract could no longer be suspended, since the football season 2022/23 started 23 August 2022.
- Not only did FIFA act *ultra vires* when it adopted the Appealed Decision beyond its statutory powers without taking into account Ukrainian employment law, but it also adopted rules that violate mandatory dispositions of Ukrainian employment law, rendering the Appealed Decision null and void.
- The same conclusion would be reached if Swiss law were applied.
- Under Swiss law, an individual right to suspend an employment contract does not exist in principle. However, a collective right to suspend an employment

contract exists only in some exceptional situations, such as during strikes or lockouts. The employee bears the burden of establishing that the strike against an employer is for a legitimate reason or purpose. Outside this situation, the strike and consequently the suspension is not permitted.

- Whilst Article 2.1 of Annex 7 purports to require the parties to try to reach a mutual agreement by 30 June 2022, FIFA never gave the parties to the employment contract sufficient incentive or time to negotiate or require the foreign players and coaches to produce evidence of negotiations before exercising the unilateral suspension. Instead, it motivated abusive stances from foreign players/coaches and third clubs towards Shakhtar, which had no bargaining power, rendering any negotiation moot.
- Additionally, it was highly questionable (when the Appealed Decision was adopted) whether the imposition of a 1-year suspension was proportionate. FIFA never analysed the sporting situation of Shakhtar and other clubs and in fact ignored the letter it received from the Ukraine football stakeholders on this point before the Appealed Decision was rendered.
- Lastly, if one looks at Article 82 of the Swiss Code of Obligations (the “SCO”), a party to a bilateral contract may not demand performance until he has discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date. Thus, the order of performance under Article 82 SCO somewhat echoes the *rationale* behind a suspension (in the reverse). Therefore, once an employer is able to perform its obligations, the employee must then perform his/her part of the contract.
- The conclusion that can be derived from Ukrainian and Swiss law is clear: the suspension of employment contracts can only be done in specific circumstances, namely when the employer is unable to provide the employee with work for reasons not attributable to the employer and that once such a condition is no longer in place, the suspension must be lifted.

### ***The Appealed Decision violates Article 101 TFEU***

- The Appealed Decision significantly impacts Article 101 TFEU and has an impact on the market for the transfer of players. The restriction imposed, i.e., the Appealed Decision, is not proportionate to pursue the objectives.
- Prof. Andrea Cattaneo’s conclusions may be summarised as follows:
  - *“The Appealed Decision is capable of negatively conditioning the competition on the market to such an extent that it can be considered a restriction by object;*
  - *In effect, the Appealed Decision is capable of significantly affecting the nature, intensity and pattern of competition between the affected clubs and the other clubs in the European market for the transfer of players;*
  - *The Appealed Decision is not suitable and necessary to achieve the*

*objectives; and*

- *The Appealed Decision is not a proportionate means to achieve its objective, and affects the integrity of competitions.”*

### ***The legal effects of the Appealed Decision***

- The object of the present appeal is limited to a challenge of the extension of the temporary amendments to the FIFA RSTP with Annex 7, and not Annex 7 itself.
- As a point of departure to test the legality of the Appealed Decision, one must look at the justification behind Circular Letter Nos. 1800 and 1804. According to FIFA, these circulars were aimed to achieve abstract goals described as “*legal certainty and clarity on a number of important regulatory matters*” and “*in order to protect the legitimate interests of foreign players and coaches currently employed on Ukrainian territory*” respectively. Neither Circular, however, addresses what the alleged lack of clarity or legal certainty consisted of (if any), and why these should not be treated on an individual case-by-case basis, contract by contract, or why the legitimate interests of Ukrainian clubs, including Shakhtar, have not been given any consideration.
- Shakhtar is aware of the burden of proof it carries in respect of the allegations brought in this appeal and of the freedom to govern itself that FIFA enjoys under the autonomy of associations pursuant to Swiss law. However, it is also conscious of the limitations established by CAS jurisprudence. A detailed analysis of Circular Letter Nos. 1800 and 1804 and of the specific circumstances in which they were enacted should lead the Panel to conclude that the Appealed Decision is in violation of the FIFA Governance Regulations, of fundamental principles enshrined in the FIFA RSTP, of several constitutional freedoms, and of substantive public policy in Switzerland. Furthermore, the Appealed Decision has been adopted as a result of an excessive misuse of powers and is neither proportionate, adequate, or necessary to achieve FIFA’s alleged objectives.

#### **A. Violation of the right to be treated equally and prohibition of discrimination**

- The Appealed Decision treats similar cases differently. There are unfortunately numerous examples around the world of acts of war, yet FIFA has often not adopted any measure whatsoever, and specifically not against the clubs affiliated to the national associations concerned by the conflicts. The different treatment by FIFA of certain armed conflicts (e.g., Israel and Palestine, Yemen, Afghanistan, Armenia and Azerbaijan, Sudan) and the current situation in Ukraine is due to the fact that the latter is happening in Europe. Therefore, the discrimination is based solely on the fact that the clubs concerned are based in Ukraine.
- FIFA justifies the extension of Annex 7 due to a need “*for further clarification [...] after 30 June 2022*” and the “*uncertain duration of the conflict*”, but such

motive is insufficient to be considered a serious ground justifying the Appealed Decision.

- It is undeniable that the situation in Ukraine remains volatile to date. However, it is also a known fact that Ukrainian clubs (Shakhtar included) are taking part in UEFA's club competitions and that the Ukrainian Premier League had approved the calendar for the season 2022/23. The interference by FIFA is unsolicited and should not override the decisions adopted by the UAF, especially when the UAF was not even consulted to understand the challenges it could face in organising the league in Ukraine or help it to organise the league in a different country. The same can be said with reference to the employment contracts affected by the Appealed Decision, all of which contain specific clauses addressing situations of *force majeure*, rendering completely moot the alleged need to bring legal certainty or clarity. The principle of collaboration between FIFA, the confederations and the member associations stems from Article 22.1 FIFA Statutes and Article 15 FIFA Regulations Governing the Application of the Statutes (the "FIFA RGAS"), dictating that decisions must be taken with due respect and as closely as possible to the affected parties. FIFA instead adopted the Appealed Decision without relying on reports of experts. It does not seem reasonable or professional to adopt a harsh decision solely based on what appears in the news or presumably through a couple of "Zoom meetings" or emails exchanged with ECA and FIFPRO, without consulting directly the affected parties or summoning its own internal competent committees.
- The distinction between national and foreign players and coaches serves to expose the factually and legally flawed argument of FIFA. If the "*uncertain duration of the conflict*" was deemed a serious ground to allow certain players and coaches to suspend their contracts unilaterally, then the measure should have been extended equally to national players and coaches, which FIFA has not done.
- The cancellation of the 2021/22 season due to the Russian invasion amounted to exceptional circumstances and justified the adoption of the Temporary Rules. The same, however, cannot be said for their extension. The "*uncertain duration of the conflict*" invoked in the Appealed Decision does not amount to exceptional circumstances as mentioned in Circular Letter No. 1804, precisely because the very notion of exceptional circumstances necessitates the discovery of new facts, which could not be anticipated before or were not known to the party invoking them.
- Considering the above, it appears that the extension of the temporary amendments to the FIFA RSTP with regards to Annex 7 is discriminatory in its object and its effects. FIFA has irresponsibly adopted a very harmful measure without due diligence and a comprehensive evaluation of the situation.

**B. Violation of the FIFA RSTP, misuse of discretionary power and**

### **the principle of sanctity of contracts**

- The Commentary to the FIFA RSTP (the “FIFA Commentary”) places *pacta sunt servanda* in the category of fundamental principles and the importance of such principle has been endorsed in CAS jurisprudence.
- By depriving Shakhtar of its fundamental right to contractual stability and of the opportunity to address the situation of each player on a case-by-case basis, FIFA shattered the legitimate expectations and the right of Shakhtar to transfer players, while, at the same time, leaving intact the contractual obligations assumed by Shakhtar towards the other parties related to the transfers of such players.
- The principle of *pacta sunt servanda* is not absolute. However, exceptions and limitations are only to be applied with restraint and in a proportionate manner, which has not been the case in the present circumstances. As a result, the players who, before the Appealed Decision came into force, had agreed to be transferred, refused overnight to engage in further negotiations and walked out of their contracts with Shakhtar on a free basis.
- FIFA clearly acted arbitrarily and failed to account for the interests of all Ukrainian clubs (including Shakhtar) also because the Appealed Decision has no substantial or valid justification.
- The Appealed Decision and FIFA’s interference in contractual relations, *inter alia*, preventing Shakhtar from operating in the football market in normal conditions, violates the prohibition of excessive commitment as laid down in Swiss law (Article 27 Swiss Civil Code – the “SCC”) and fundamental principles of substantive law. As such, it violates Swiss public policy.

### **C. Excessive curtailment of the economic freedom of Shakhtar**

- Shakhtar’s right to economic freedom, as protected by Article 27 of the Federal Constitution of the Swiss Confederation (the “Swiss Constitution”), is violated. Shakhtar follows a transfer policy whereby it invests in certain players for a year or two and then seeks a profit through their transfer to more established clubs in Europe. This policy is designed to produce a profit in cycles of two/three years and has a major impact on Shakhtar’s budget (approximately 38%). Having invested a lot in buying players in 2020 and 2021, Shakhtar expected to transfer players out in 2022, which it cannot do due to the Appealed Decision.

### **D. Impact on integrity of competitions**

- Integrity of competitions in football is directly linked to the authenticity of results. Article 2(g) FIFA Statutes has integrity as one of its objectives. In the present case, by extending the effects of Article 2.1 of Annex 7 to a period in which Shakhtar will be participating in the domestic league and in the UEFA Champions League, FIFA has restricted Shakhtar from fielding its best players, since its foreign players are allowed to suspend their contracts without

any legal basis. This compromises the position of Shakhtar in the competitions in which it participates and affects the commercial revenue of Shakhtar. No other club participating in the UEFA Champions League suffers from the same restrictions. Shakhtar is being treated differently, without any basis.

### **E. Proportionality**

- The length of the suspension is disputable, especially because the circumstances have changed since March 2022, when FIFA adopted Annex 7 for the first time. At the time, footballing activities had been suspended. Hence, the automatic suspension of contracts could have been an immediate solution for all parties involved, i.e., the players could go and sign with other clubs and play for the remainder of the season, while Shakhtar was relieved of its obligation to pay remuneration. The equilibrium was maintained in those extraordinary circumstances. In June 2022, however, the circumstances changed, although not with respect to the war, but with regard to the organisation of the domestic league and the participation of Shakhtar in the UEFA Champions League. Under such circumstances, FIFA could not unilaterally allow foreign players and coaches to suspend their contracts for a year. As a result, the Appealed Decision is not suitable, adequate, and necessary to achieve the legitimate objectives that FIFA might have sought.
- As recognized in CAS jurisprudence, the principle of proportionality dictates that the most extreme sanction must not be imposed if other less onerous sanctions are available. FIFA could have imposed less harmful or alternate measures to achieve its intended objective.
- The failure to explore other avenues makes the Appealed Decision arbitrary. Even though it is not legally mandatory for Shakhtar to test the Appealed Decision against less harmful measures, Shakhtar can demonstrate that alternative options existed:
  - FIFA could have required players and coaches who opted to suspend their employment contract to extend the term of their contract for a period equal to its suspension, in order to restore the parity between the parties to the employment contract. This would not have altered the equilibrium of Shakhtar in the transfer market and would have allowed it to transfer those players after their suspension expired on 30 June 2023.
  - Given that the resumption date of the Ukrainian Premier League was yet to be confirmed, FIFA could have initially extended the suspension only until 31 July 2022 or 15 August 2022, as suggested by the UAF in its letter dated 15 June 2022.
  - Alternatively, the suspension could have only been implemented until 31 December 2022 to enable a reassessment of the situation and to explore the best possible options for players and coaches and Ukrainian clubs.

- Alternatively, FIFA could have enacted some sort of compensation mechanism for Shakhtar, and other clubs affected by the Appealed Decision (for example, from FIFA/UEFA or from the clubs interested in engaging players from Ukraine) since the Appealed Decision only serves to protect the interests of players and coaches and completely ignores the interests of clubs and the financial impact it has on clubs. The mere fact that clubs do not need to pay salaries does not tantamount to protecting their interests, as these clubs are in a position to fulfil this obligation due to their participation in football competitions. FIFA however forgot to consider that clubs paid transfer fees for acquiring foreign players more often than not. New clubs are being unjustly enriched.
- Moreover, FIFA could have temporarily suspended the obligations of Ukrainian clubs towards third parties like other clubs, agents, etc. to ease the burden on the Ukrainian clubs and the effects would have been partially shared by the football community as a whole.
- When the Appealed Decision was notified, all clubs that were engaged in negotiations regarding temporary or permanent transfers of Shakhtar's foreign players ceased all such negotiations as it was very easy for them to request the player they were interested in to suspend his existing contract and sign with them for free for the period of the suspension and in some cases thereafter, as some players only had 6 or 12 months remaining on their employment contracts.
- The Appealed Decision was also not necessary, because the situation of *force majeure* has been addressed by the Ukrainian Martial Law and, in the case of Shakhtar, in the contracts it signed with its foreign players.
- In any event, foreign players and coaches (as well as national players and coaches) could have attempted to resort to the doctrine of *rebus sic stantibus* to modify the terms of their contracts, if they considered it necessary, through a proceeding before the competent bodies, which would have afforded Shakhtar the chance to defend itself on a case-by-case basis.
- Shortly after the adoption of the Appealed Decision, FIFA realised the havoc it had created and, in an attempt to mitigate its financial impact on clubs like Shakhtar, enacted Circular Letter No. 1804, which in practice is redundant. All third clubs ceased negotiations with Shakhtar from 22 June 2022, as it was very convenient for such clubs to wait until 1 August 2022 to request the ITC and register players for free, for which they were initially willing to pay a huge transfer fee.
- None of the foreign players Shakhtar was trying to sell even attempted to reach a mutual agreement with Shakhtar, but, together with their potential new club, waited until 1 August 2022 to formalise their employment relationship (and make a request for the ITC). It is disingenuous that FIFA even pretended to believe that a potential third club would continue negotiations with Shakhtar



after the announcement of the Appealed Decision, especially for the players that had up to 6 months left on their contracts after 30 June 2023 as this does not make any business sense.

***The claim for damages***

- Shakhtar has suffered damages for which FIFA must be held liable based on Article 41 SCO, as these damages are a direct result of the Appealed Decision. All prerequisites for such liability are met.
- The requirement of an unlawful act or omission is satisfied based on the following unlawful actions of FIFA:
  - Failure to analyse the sporting situation of Shakhtar and Ukrainian clubs in general whilst extending the effects of Article 2.1 of Annex 7.
  - Failure to account for Article 19 of Switzerland’s Private International Law Act (“PILA”).
  - Failure to consider mandatory provisions of Ukrainian employment law, thereby forcing Shakhtar to violate mandatory national law.
  - Failure to consider Swiss law.
  - Violation of *pacta sunt servanda* and contractual freedom.
  - Violation of Shakhtar’s personality rights resulting in a threat to the economic existence of Shakhtar.
  - Violation of public policy.
  - Violation of FIFA Statutes, namely the principle of discrimination.
  - Violation of Article 101 TFEU.
  - Failure to consider the principle of proportionality and whether it is necessary, suitable, and adequate to achieve its aim.
  - Failure to respect the principles of good governance thereby acting *ultra vires* whilst exercising its autonomy under Swiss law.
- Fault is the failure or will to perform a duty or an obligation. Fault is linked to the subjective aspect of liability, and wrongfulness constitutes the objective aspect. The negligence of FIFA is evident, as the Bureau failed to consult the Football Stakeholders Committee. While having all the resources and expertise available, FIFA chose not to make use of such resources when choosing to adopt the Appealed Decision. FIFA should also have involved and given a voice to the UAF, the Ukrainian League organiser and even a representative from Shakhtar, as they are all directly affected by the Appealed Decision. From the Appealed Decision it is evident that it was never the intention of FIFA to protect or even consider the interests of Ukrainian clubs, as it merely assumed that the sporting situation would remain the same for one more year, without reassessing the situation.
- The misuse of discretionary power by FIFA not only instigated foreign players to suspend their contracts without any valid reason, but it also allowed third

clubs to cease negotiations with Shakhtar for a temporary/permanent transfer. Due to the unlawful and arbitrary act of FIFA, Shakhtar suffered damages amounting to EUR 40,288,177.80 net. This amount is derived from the *pro rata* loss of transfer fees, agent fees, solidarity contribution/training compensation paid for the 6 foreign players who have suspended their contracts and signed for free with new clubs that were initially in negotiations with Shakhtar and were willing to pay a fee. Additionally, Shakhtar also lost the chance to permanently transfer these players when it had valid offers and was in negotiations with potential third clubs. In addition, Shakhtar also suffered damages whilst attempting to replace one of its players and was forced to engage a Ukrainian player for a fee of EUR 2,000,000 net, plus solidarity contribution.

- Finally, there is natural and adequate causation. For these requirements to be met, there is no need for the relevant act to have been the sole cause for the ultimate outcome. The element of natural causation is evident as, but for the Appealed Decision, Shakhtar would not have suffered the damages it is incurring now and the ones it will incur in the future, which cannot be quantified at this stage. As Shakhtar is participating in both domestic and international football competitions, the foreign players would have been provided with work tasks, training facilities and would have been paid monthly salaries regularly. For players who did not wish to continue with Shakhtar for any reason whatsoever, Shakhtar would have had an opportunity to permanently transfer these players to other clubs. Moreover, there are numerous adequate causes, i.e., the failure of FIFA to analyse whether Shakhtar can fulfil its current/near future employment obligations as opposed to the situation in March 2022, the failure to comply with the FIFA Statutes, the failure to adopt an effective mechanism to protect the interests of all affected parties and so forth. The failure of FIFA to adequately consider and analyse all underlying factors has resulted in the damages suffered by Shakhtar, for which FIFA is to be held liable in full.

66. On this basis, Shakhtar in its Appeal Brief submitted the following prayers for relief:

- i. To declare that the CAS is competent to adjudicate the present matter.*
- ii. To declare the appeal admissible.*
- iii. To partially annul and set aside the Appealed Decision. In particular, to annul and/or order the Respondent to annul Article 2.1 of Annexe 7 of the FIFA RSTP June and July 2022 editions and its effects arising from the Appealed Decision which includes Circulars 1800 and 1804.*
- iv. In the alternative to point iii, to annul and/or order the Respondent to annul the effects of Article 2.1 of Annexe 7 of the FIFA RSTP June and July 2022 editions on the Appellant.*
- v. As a consequence of the Appealed Decision, in all scenarios, to order the Respondent to pay the Appellant damages in the amount of EUR*

**40.288.177,80 NET** (forty million two hundred eighty-eight thousand one hundred seventy-seven euros and eighty cents) or an amount that the Panel deems appropriate in light of the evidence submitted.

- vi. *In the alternative to point iii, to reduce and/or order the Respondent to reduce the length of the unilateral suspension under Article 2.1 of Annexe 7 of the FIFA RSTP June and July 2022 editions from 30 June 2023 to 31 December 2022.*
- vii. *In all events, to condemn the Respondent to the payment of all costs related to the present arbitration proceedings.*
- viii. *In all events, order the Respondent to pay the Appellant a sum of EUR 100,000 NET (one hundred thousand euros), in order to pay all legal fees and costs of any nature incurred by the Appellants as a consequence of the present proceedings.”*

## **B. The Respondent’s Answer**

67. FIFA’s submissions may be summarised as follows:

### ***Preliminary remarks***

- One can, in principle, understand that Shakhtar disagrees with Annex 7 and/or with the Appealed Decision. While this is a comprehensible position, it is not a legal argument. Whenever FIFA adopts regulations, there may be some entities that disagree. There may also be parties that feel that they are negatively affected on an economic and/or sporting level. However, even if this is the case, this does not render the regulations unjustified, let alone illegal. Shakhtar’s claim for damages quite openly reveals the true motivation behind this appeal: Shakhtar is unhappy that a small number of foreign players decided to suspend unilaterally their employment contracts and its main concern is that it cannot currently obtain any transfer fee for these players. It is regrettable that Shakhtar ignores the reasons why these players have chosen to leave: because there is an on-going war. Shakhtar only takes an economic perspective. It complains about agents’ commissions, transfer fees, lost opportunities, etc., while it shows no understanding to these very legitimate concerns of its own players. Be this as it may, it will be demonstrated that both the initial decision to adopt Annex 7, and the subsequent decision to extend its validity in time (the Appealed Decision) are proportionate, reasonable and necessary regulatory steps to address the extremely challenging circumstances caused by Russia’s war against Ukraine.
- Shakhtar wants to make the Panel believe that the Appealed Decision was issued or rendered without any reasoning or justification. This is wrong, and indeed misleading. The reasoning of the Appealed Decision has been openly communicated on repeated occasions.
- When Annex 7 was adopted for the first time, there was no objection, comment, or concern of Shakhtar, of any other club in Ukraine, of the UAF, or of the Ukraine Premier League. Shakhtar even confirms that it does not – and did not –

challenge Annex 7 as such. The argument that FIFA acted *ultra vires* does not aim at the extension of Annex 7, but at the content of Annex 7 as such and against the competence of the concerned FIFA body to adopt such regulations. The same applies to the argument that FIFA somehow violated employment or antitrust law, to the alleged violation of the principles of equal treatment and non-discrimination, and to the violation of principles of the FIFA RSTP. Today, however, Shakhtar completely changed its position. This is a schoolbook example of *venire contra factum proprium* and these arguments should have been brought forward when Annex 7 was adopted.

***No decision “ultra vires”***

- As its main argument, Shakhtar submits that the Appealed Decision was taken *ultra vires*. This is difficult to comprehend. A decision is taken *ultra vires* if the subject matter of that decision falls outside the competence of the body that rendered it. The key issue is therefore whether the Bureau had the competence to amend the FIFA RSTP, which is squarely the case. FIFA complied with all formal and statutory requirements to validly pass the Appealed Decision, in particular with Articles 34(11) and (12) and 38(1) and (2) FIFA Statutes. Given the obvious urgency of these regulatory steps, it was clear that a formal in-person Bureau meeting could not be convened “*within an appropriate period of time*”, simply because this issue required an immediate decision.
- Finally, for the sake of completeness, this case has nothing to do with the COVID-19 regulatory framework of FIFA and has no bearing whatsoever on this case. This case also does not have anything to do with provisions of Ukrainian employment law, since it is about an extension of Annex 7 of the FIFA RSTP, governed by FIFA regulations and Swiss law. This case, finally, also does not have anything to do with the legal requirements for a strike under Swiss employment law.

***FIFA’s regulatory steps were reasonable, proportionate and fully within FIFA’s autonomy***

- Russia’s war against Ukraine triggered, first of all, a human tragedy. Right after Russia’s invasion started, FIFA was forced to urgently address the extraordinary and unforeseen circumstances and the legal uncertainty, which had been caused, because a number of complex regulatory questions arose. FIFA decided to be proactive to provide as much regulatory guidance as possible, and do this within a very short timeframe. FIFA immediately engaged in discussions with all relevant stakeholders. Based thereupon, FIFA decided to adopt the temporary rules incorporated in Annex 7, and it subsequently decided to extend their temporal validity.
- All these steps were proportionate, legal, and fully justified. They were, indeed, a compromise between all various interests of the concerned stakeholders, and the most proportionate and pragmatic way to address a highly complex situation in a very pressing timeframe. From a technical and legal perspective, there can

be no doubt that these steps were fully within the regulatory autonomy FIFA enjoys as an association under Swiss law. Swiss law grants a wide margin of discretion to associations in the exercise of such autonomy, and CAS never interferes in this discretion. CAS confirms that deference must be given to the autonomy of sports governing bodies and the decision which their competent bodies take. In the matter at stake, Shakhtar has not even made the effort to explain why, in their view, CAS should exceptionally interfere in FIFA's autonomy.

#### ***No breach of Article 101 TFEU***

- Even on the premise that it produces effects restrictive of competition (which is denied), the Appealed Decision plainly satisfies the requirements articulated by the CJEU in the seminal case of *Meca-Medina*. In particular, the Appealed Decision was adopted in the context of the war in Ukraine, with its attendant urgency and risk to life. Its objectives are to ensure legal certainty, whilst protecting the welfare of players and coaches and the interests of Ukrainian clubs. FIFA was reasonably entitled to consider that any consequential effects on competition were inherent in the pursuit of its objectives and proportionate to those objectives.
- It cannot be seriously suggested that the Appealed Decision is anti-competitive “*by object*”, and Shakhtar fails to put forward any convincing analysis as to why it should be anti-competitive “*by effect*”. In any event, applying the standards developed in the leading case of *Meca-Medina*, it is plainly evident that the Appealed Decision pursues legitimate objectives, that the alleged restrictions are inherent in the pursuit of those objectives, and that the alleged restrictions are proportionate to those objectives. For these reasons, any argument developed on the basis of Article 101 TFEU is devoid of any merit.

#### ***No discrimination***

- Shakhtar tries to suggest that FIFA treats “*similar cases differently*” and that therefore, the Appealed Decision is discriminatory. To this effect, Shakhtar makes rather far-fetched comparisons, for example with missile assaults in Gaza or with the war in Yemen. Every single one of these conflicts is tragic, as is every armed conflict in the world. However, it is a fact that the war of Russia against Ukraine is of a completely unprecedented scale. What is more, clubs in Ukraine and Russia employ a very large number of foreign professionals, and many of these clubs regularly participate in international club competitions. Clubs in Ukraine and Russia are among the most active on the international transfer market. This corroborates that from a regulatory perspective, these are different circumstances, which cannot be compared at all. Therefore, one cannot seriously think that this has to do with any unequal treatment, let alone discrimination.

#### ***No violation of FIFA Regulations***

- As to Shakhtar's suggestion that the Appealed Decision violated “*FIFA Regulations*”, more precisely, Article 13 and the principle of *pacta sunt*

*servanda*, this point is difficult to understand. The purpose and content of the Appealed Decision is to extend the validity of Annex 7 and it was taken by the body that had the competence to pass such an amendment. Such an amendment to the FIFA RSTP cannot be considered a breach of the FIFA RSTP.

***No violation of economic freedom or excessive commitment***

- Shakhtar’s suggestion that the Appealed Decision limits the economic freedom of Shakhtar in a way that amounts to an excessive commitment in the meaning of Article 29 SCC is groundless. Under Swiss law, an excessive commitment exists only in extremely limited circumstances. Shakhtar fails to explain, let alone prove, how it would have given up its economic freedom or how the very foundation of its economic existence would be removed. A simple reference to Shakhtar’s “*transfer policy*” or that it apparently “*expected to transfer players out in 2022*” is insufficient by far.

***No violation of personality rights***

- Shakhtar seems to suggest that FIFA violated its personality rights under Article 28 SCC. However, no such violation occurred. Shakhtar does not substantiate at all how it’s supposed personality rights were allegedly breached. Moreover, even if personality rights of Shakhtar were affected, *quod non*, such a limitation in personality rights is in any event justified by consent or by overriding private or public interests.
- By participating in organised football under the auspices of FIFA, Shakhtar has consented to the regulatory authority of FIFA. Accordingly, Shakhtar has agreed to be subject to the rules and regulations of FIFA, and thus to FIFA’s regulatory authority. This may naturally cause some limitations to Shakhtar’s economic freedom, or its rights or interests. However, any such limitation is justified by consent in the meaning of Article 28(2) SCC. Further, this Answer has already explained in detail the fundamental general interest to provide regulatory guidance and to address the legal uncertainty caused by Russia’s war against Ukraine. Therefore, in addition to Shakhtar’s consent, there is also a clearly overriding private and public interest in that FIFA may validly pass the regulations as enshrined in Annex 7 and, for the matter at hand, to extend the validity of those regulations.

***No violation of public policy***

- Shakhtar also suggests that the Appealed Decision violated public policy, more precisely the concept of *pacta sunt servanda*. This argument is groundless. A violation of *pacta sunt servanda* exists only in extremely limited circumstances. This does not apply to the matter at hand. Even if Annex 7 has a certain impact on existing contracts, it is simply wrong to state that FIFA in any way violated the principle of *pacta sunt servanda*. What these regulations do is to provide exceptional measures to provide regulatory guidance and some relief to players and clubs affected by Russia’s war. That has nothing to do with violating the concept of *pacta sunt servanda*.

***No basis for any claim for damages***

- CAS does not have jurisdiction to hear the Shakhtar’s completely new claim for damages brought against FIFA. In any event, such claim is without merit. Not even one of the four cumulative requirements for damages to be awarded is met:
  - Shakhtar failed to substantiate, let alone prove, that it suffered any damage at all. Shakhtar presents assumptions, conjectures, and extremely vague and unsubstantiated statements about a supposed “*direct damage*”, but nothing more. In several instances, the factual allegations concerning damage are objectively inaccurate and even contradicted directly by evidence submitted by Shakhtar.
  - Shakhtar bases its claim on Article 41 SCO, i.e., on a legal provision for a tort claim. However, under Swiss law, purely financial damage cannot, in principle, be compensated under this provision.
  - Shakhtar fails to demonstrate the alleged illegality of FIFA’s regulatory action.
  - Shakhtar does not explain at all how FIFA, in its regulatory activities, should have been at fault, i.e., why the decision of FIFA to provide a specific regulatory framework should somehow constitute wilful intent to cause damage, or that it could be qualified as negligent behaviour.

68. On this basis, FIFA in its Answer submitted the following prayers for relief:

*“Based on the foregoing, FIFA respectfully requests CAS to issue an Award:*

- (a) declaring that CAS does not have jurisdiction to hear the Appellant’s Request for Relief (v.);*
- (b) rejecting the reliefs sought by the Appellant, insofar as they fall within the jurisdiction of CAS and are admissible;*
- (c) confirming the Appealed Decision;*
- (d) ordering the Appellant to bear the full costs of these arbitration proceedings; and*
- (e) ordering the Appellant to make a contribution to FIFA’s legal costs.”*

**VI. JURISDICTION**

69. Article R47 CAS Code provides as follows:

*“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 it prior to the appeal, in accordance with the statutes or regulations of that body. [...]”*

70. Pursuant to Article 56(1) FIFA Statutes, FIFA recognises the CAS jurisdiction to “*resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents*”.
71. Further, pursuant to Article 57(2) FIFA Statutes, “*recourse may only be made to CAS after all other internal channels have been exhausted*”.
72. FIFA does not dispute that CAS has, in principle, jurisdiction to hear an appeal against final decisions rendered by FIFA. However, it maintains that it is impossible to combine an appeal against a final decision of FIFA with a claim for damages. According to FIFA, this is confirmed by CAS jurisprudence, as the very nature of CAS appeal arbitration proceedings is to review a decision issued by a previous instance of FIFA. CAS can only review the content of the Appealed Decision, but it cannot go beyond and decide new matters. Factual or legal issues that have not been part of the proceedings before the previous instance – such as Shakhtar’s claim for damages – cannot be part of an appeal procedure and they fall, *ratione materiae*, outside the scope of CAS appeal jurisdiction.
73. Shakhtar contends that Articles 56 and 57 FIFA Statutes allow CAS to rule on all disputes related to appeals against final decisions passed by FIFA’s legal bodies, including on a claim for damages caused by a challenged FIFA decision. As a result, there is no factual or legal reason for the Panel to declare itself incompetent to adjudicate on a claim for damages which are intrinsically linked to and stem from the Appealed Decision. Article 57 FIFA Statutes does not establish any limit to the substantive scope of the appeal. In addition, the Swiss Federal Tribunal (the “SFT”) has repeatedly stated that, once the existence of an arbitration agreement is acknowledged, one must assume that the parties intended to give it a broad scope of application. A general reference to “*disputes related to the agreement*” may extend to claims arising out of ancillary or connected contracts, provided that those contracts do not contain different dispute resolution clauses, and therefore covers Shakhtar’s claim for damages. In addition, CAS has on previous occasions confirmed that it has jurisdiction to entertain and rule on a claim for damages against FIFA.
74. The Panel notes that, based on Article 57(1) FIFA Statutes, it has undoubtedly jurisdiction to hear the appeal brought by the Appellant against the Appealed Decision. The Parties do not dispute such finding. The question discussed in this arbitration concerns the CAS jurisdiction to decide on Shakhtar’s claim for damages.
75. However, the Panel does not consider this to be a matter concerning the jurisdiction of CAS, but rather an issue concerning the admissibility of the appeal, more specifically whether Shakhtar has exhausted the internal legal remedies available to it within FIFA before turning to CAS. The Panel subscribes itself to CAS jurisprudence in this respect:

*“It is debated in legal doctrine whether exhausting internal legal remedies is an admissibility requirement (pro: RIGOZZI/HASLER, Article R47 CAS Code,*



*in: Arroyo (Ed.), Arbitration in Switzerland, Vol. II, 2018, p. 1583) or a matter of jurisdiction (pro: MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 391). According to Rigozzi/Hasler ‘[i]t must be emphasized that although the “exhaustion of internal remedies rule” constitutes a mere admissibility requirement, it is treated as a precondition for CAS jurisdiction in the context of actions to set aside CAS awards based on Art. 190(2) (b) PILS, meaning that the issue can be reviewed with unfettered powers by the Swiss Supreme Court.’ (RIGOZZI/HASLER, Article R47 CAS Code, in: Arroyo (Ed.), Arbitration in Switzerland, Vol. II, 2018, p. 1584).*

*The Panel favours considering the issue as an admissibility requirement. First, this is in line with the Parties’ written and oral submissions that considered it to be an issue of admissibility. Second, because the requirement does not serve to distinguish the Panel’s mandate from the Parties’ access to justice before state courts. By submitting to CAS jurisdiction, the Parties wanted to exclude any kind of recourse to state courts. In particular, they did not want to enable a party to file an appeal before state courts in all matters, in which a CAS panel finds that the requirements for a ‘decision’ within the meaning of Article R47 CAS Code are not fulfilled. Consequently, the issue whether or not a decision is appealable (within the meaning of Article R47 of the CAS Code) is not aimed at limiting the CAS jurisdiction vis-à-vis state courts. Instead, it is an admissibility issue, since – at the end of the day – the response to the question at stake is dictated by procedural principles such as procedural efficiency. This Panel finds itself comforted in its view by a comparison with the procedural rules regulating appeals before state courts. In such context whether or not a (preliminary) decision from a previous instance is appealable or not to a higher instance is a procedural matter of admissibility.” (CAS 2019/A/6298, para. 77-78)*

76. The Panel will therefore address FIFA’s arguments in this respect in the context of the admissibility of the appeal in the section below.
77. In the absence of any other arguments based on which CAS would allegedly lack jurisdiction, the Panel finds that it is competent to adjudicate and decide on the matter at hand.

## **VII. ADMISSIBILITY**

78. Article R49 CAS Code provides as follows:

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

79. Since the Appealed Decision was notified on 22 June 2022, and Shakhtar filed its

appeal with CAS on 11 July 2022, the appeal duly complied with the time limit to appeal provided for in the FIFA Statutes.

80. FIFA indicates that the admissibility of the appeal, as such, is not contested. However, FIFA maintains that, insofar Shakhtar brings forward legal arguments not directed against the Appealed Decision, but against the adoption of Annex 7 as such, it is challenging a decision which was taken back in March 2022. Any such challenge, and argumentation, is manifestly late and inadmissible.
81. Shakhtar maintains that the circumstances have changed since the adoption of the initial version of Annex 7 and that it should be allowed to challenge the Appealed Decision.
82. The Panel finds that the mere fact that Shakhtar did not challenge the initial version of Annex 7 does not bar it from challenging the Appealed Decision. The Panel, in fact, notes that by the Appealed Decision the Bureau did not simply reiterate the Temporary Rules, but amended them, extending the period for which foreign football players and coaches were allowed to suspend their contracts with clubs affiliated to the UAF. In other words, the Amended Temporary Rules produced effects on the clubs affiliated to the UAF which were different from those, more limited in time, deriving from the original version of Annex 7. There has been no acquiescence in the Temporary Rules and their effects that would have the consequence of preventing the raising of a claim against the Amended Temporary Rules.
83. As to FIFA's argument that this Panel cannot hear Shakhtar's claim for damages, the Panel agrees that the scope of CAS appeal arbitration proceedings is in principle determined by the scope of the proceedings before the previous instance. In the matter at hand, the Appealed Decision is the decision of the Bureau to adopt the Amended Temporary Rules. Shakhtar's damages claim did not form part of the Appealed Decision or the process resulting in such decision.
84. However, the Panel finds that there are no legal remedies available within FIFA to decide on a claim for damages filed by Shakhtar arising out of the alleged illegitimate issuance of the Appealed Decision by the Bureau. Accordingly, the Panel finds that it cannot be held against Shakhtar that it would somehow have failed to exhaust FIFA's internal legal remedies before turning to CAS. Indeed, the only forum competent to adjudicate and decide on any damages claim of Shakhtar against FIFA is undoubtedly CAS, as Article 57 FIFA Statutes excludes the competence of ordinary courts of justice. FIFA explicitly confirmed during the hearing that CAS would be competent to examine such claims for damages, albeit in separate ordinary arbitration proceedings.
85. What is debated therefore is whether such claim is to be decided under the *aegis* of the CAS Appeals Arbitration Division, or of the CAS Ordinary Arbitration Division.
86. Given that the present Panel is undisputedly competent to assess the validity of the

Appealed Decision, the Panel finds that it would be procedurally efficient to also adjudicate and decide on any damages claim arising directly out of the alleged illegitimate enactment of the Amended Temporary Rules. Otherwise, should the present Panel conclude that the Appealed Decision is to be set aside, Shakhtar would subsequently have to re-submit its damages claim before CAS. The panel constituted under the *aegis* of the Ordinary Arbitration Division would then be confronted with a final and binding decision determining that the Appealed Decision is annulled, restricting it to solely quantify the purported damages of Shakhtar. Such a process would be very inefficient, unnecessarily burdensome and time consuming for both Shakhtar as well as FIFA. Most importantly, FIFA is by no means prejudiced if this Panel addresses the substance of Shakhtar’s damages claim in the context of the present appeal arbitration proceedings, or at least it has failed to establish that it would somehow be prejudiced. Indeed, it would actually *be advantaged* if the outcome were that no damages are recoverable in the circumstances of this case, as it would not have to incur the cost and distraction of a second arbitration. Furthermore, the term “appeal” within the meaning of Article R47 CAS Code must be construed broadly. It covers all claims that aim at establishing the illegality of a “*decision of a federation, association or sports-related body*”. The Panel finds that also the claim of damages in the case at hand serves the same purpose. The idea that Shakhtar should have submitted the damage claim to FIFA first, amounts to excessive formalism, since FIFA in the Appealed Decision refuted to have acted in an illegal manner. Consequently, FIFA also refuted implicitly any damages arising from an alleged illegality of the Appealed Decision.

87. Finally, the Panel notes that at least one other CAS panel has previously admitted the possibility to decide on a claim for damages arising directly out of an alleged erroneous appealed decision:

*“The Panel observes that UEFA’s argument is two-fold. On the one hand it argues that the Club’s claim shall be dismissed because the claim for damages was not a part of the matter in dispute in the Appealed Decision. On the other hand, UEFA maintains that the Club would have to lodge a claim for compensation against UEFA in ulterior proceedings.*

*As to the first argument, the Panel finds that the Club could not have claimed compensation from UEFA before the start of the proceedings before CAS since at that time the damage was not yet incurred. The damage arguably arose because UEFA sanctioned the Club, but did not agree to conduct expedited proceedings before CAS, thereby preventing the Club from being reinstated in the 2014/2015 UEFA Champions League, should CAS have concluded in favour of the Club. Against this background, the Panel finds that the Club should not be prevented from submitting a claim for damages for the sole reason that this claim was not yet included within the scope of the dispute before the UEFA CEDB and the UEFA Appeals Body.*

*As to the second argument, the Panel finds that whereas the alleged fielding of an ineligible player is a disciplinary offence, the claim for damages is not.*

*The latter issue is merely a civil dispute between the Club and UEFA and the Panel finds that it could not be required from the Club to first file such claim for damages with UEFA only to exhaust the internal remedies available to it in order to prevent its claim to be deemed inadmissible in the subsequent proceedings before CAS, since it is obvious that UEFA would deny such claim.*

*Consequently, the Panel finds that it is competent to adjudicate the Club's claim for damages and that the Club's claim is therefore admissible.” (CAS 2014/A/3703, paras. 53-56 of the abstract published on the CAS website)*

88. A relevant factor in assessing whether to adjudicate and decide on a damages claim is the extent to which it is connected with the subject matter of the Appealed Decision. In the matter at hand, the Panel finds that the claim for damages is inextricably linked to and stems from the Appealed Decision. Consequently, the Panel finds that procedural efficiency dictates that the Panel does not limit itself to assessing the Appealed Decision as such, but that it should also adjudicate and decide on Shakhtar's damages claim allegedly arising directly out of the Appealed Decision.
89. Consequently, the Panel finds that Shakhtar's appeal against the Appealed Decision is admissible.

## **VIII. APPLICABLE LAW**

### **A. The Principle**

90. Article R58 CAS Code provides as follows:

*“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.”*

91. Article 56(2) FIFA Statutes (2021 Edition) provided the following:

*“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.”*

92. The Parties agree that, pursuant to Article R58 CAS Code, read in conjunction with Article 56(2) FIFA Statutes, the present dispute is to be adjudicated and decided primarily on the basis of the various regulations of FIFA, and that Swiss law shall be applied should the need arise to fill a possible gap in the regulations of FIFA.

93. With respect to the FIFA RSTP, the Appellant contends that specific attention should be paid to Article 1.3(c), which provides as follows:

*“Each association shall include in its regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements. In particular, the following principles must be considered:*

- article 13: the principle that contracts must be respected;*
- article 14: the principle that contracts may be terminated by either party without consequences where there is just cause;*
- article 15: the principle that contracts may be terminated by professionals with sporting just cause;*
- article 16: the principle that contracts cannot be terminated during the course of the season;*
- article 17 paragraphs 1 and 2: the principle that in the event of termination of contract without just cause, compensation shall be payable and that such compensation may be stipulated in the contract;*
- article 17 paragraphs 3-5: the principle that in the event of termination of contract without just cause, sporting sanctions shall be imposed on the party in breach.”*

94. Shakhtar however maintains that issues that are not governed by the FIFA RSTP cannot be subject to Swiss law. According to the Appellant, in fact, the express choice, made in the employment contracts between Shakhtar and its foreign players, to have their relationship governed by the FIFA RSTP and Ukrainian employment law shows their intention to make sure that their employment relationship was subject not only to the FIFA RSTP, but also to Ukrainian law. As a result, Shakhtar contends that the Appealed Decision could not ignore Ukrainian employment law rules having a mandatory nature and their potential application to the affected parties. Shakhtar further argues that, should the Panel disagree with the foregoing, it should in any case apply not only the FIFA RSTP, but also the mandatory provisions of Swiss law. Finally, Shakhtar maintains that mandatory rules of EU law, and chiefly the antitrust provisions contemplated by the TFEU, shall also be applied in this case.

95. FIFA maintains that Ukrainian law plays no role in these proceedings, since the dispute before CAS is not about an employment relationship between a club and a player, but concerns the validity of a regulatory step taken by FIFA and rules enacted by FIFA in its role as governing body of football at a worldwide level. Ukrainian law has no bearing whatsoever on this topic. As to EU law, according to FIFA, Shakhtar presented no argument whatsoever why, in arbitration proceedings under Chapter 12 PILA, it would have any relevance.

96. The Panel considers it important to highlight that the present appeal arbitration is not about individual employment relationships between Shakhtar and its foreign football

players and coaches. Rather, the present procedure concerns the valid adoption of a regulatory framework, implemented and subsequently extended by FIFA in its capacity as the global governing body of football, *vis-à-vis* Shakhtar, an indirect member of FIFA, through its affiliation to the UAF, which in turn is affiliated to FIFA.

97. It is therefore immaterial whether and to what extent individual employment contracts between Shakhtar and its foreign players and coaches are governed by Ukrainian law. Indeed, Ukrainian law may well be applicable to determine contractual disputes between players and clubs, according to their terms: therefore, in the event of a dispute regarding a contract, Ukrainian law might apply in light of the specific circumstances of such dispute; and the exercise of contractual freedom (or even any choice-of-law provision therein contained) might be verified according to Ukrainian law and its mandatory rules. It is to be noted, in that respect, that the terms and conditions of each and every employment contract may be different, including the extent to which Ukrainian law or the FIFA RSTP are applicable.
98. The validity of resolutions adopted by FIFA, even when they focus on the specific situation of one of its member federations and they set a regulatory framework intended to apply to some of its indirect members (such as the clubs affiliated to the UAF), is governed primarily by the rules and regulations of FIFA, and by Swiss law, in accordance with Article R58 CAS Code and Article 56(2) FIFA Statutes. FIFA's regulatory measures, if intended to affect employment relationships (as the FIFA RSTP and its Annexes do), are inevitably applicable to employment contracts concluded between clubs (as indirect members of FIFA) and their employees. The *validity* of such regulatory measures as such is not governed by the laws of any State in which they are applied. Only their actual *application* in any given case might be verified on the basis of domestic laws, also in light of any applicable mandatory rules, but compliance with those rules is not a prerequisite for the validity of the decision of FIFA to adopt the regulations in question.
99. In other words, the fact that the introduction and extension of Annex 7 may result in a foreign player invoking Annex 7 to suspend his employment contract with Shakhtar in violation of Ukrainian law is a matter to be assessed on a case-by-case basis. Indeed, as indicated above, this may depend on the extent to which such employment relationship is governed by Ukrainian law and/or the FIFA RSTP. The FIFA RSTP and Ukrainian labour law are two distinct regulatory/legal frameworks. The FIFA RSTP does not impact on Ukrainian labour law and does not deal with claims arising under Ukrainian law. If Ukrainian law is directly applicable, the player concerned may well have acted inappropriately. However, if such employment contract is primarily governed by the FIFA RSTP, the Player may have acted appropriately.

## **B. The Application of EU Law**

100. With regard to EU law, the Panel notes that compliance with competition law rules must be taken into account by this Panel either if the law of a EU member State or of

an associate State applies on the merits (which is not the case here) or insofar as they constitute foreign mandatory rules (“*dispositions imperatives du droit étranger*”), pursuant to Article 19 PILA.

101. Article 19 PILA provides as follows in an unofficial translation into English published on the website of the Swiss Government:

- “1. If interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of a law other than the one referred to by this Act may be taken into consideration, provided the situation dealt with has a close connection with that other law.*
- 2. In deciding whether such a provision is to be taken into consideration, consideration shall be given to its purpose and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law.”*

102. An arbitral tribunal sitting in Switzerland, such as is the case in this arbitration pursuant to Article R28 CAS Code, must therefore take into consideration foreign mandatory rules where three conditions are met:

- i. such rules belong to a special category of norms which need to be applied irrespective of the law applicable to the merits of the case;
- ii. there is a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force;
- iii. in view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must lead to a decision which is appropriate.

103. The Panel is ready to follow in this case the reasoning followed by the CAS panel in the award rendered on 20 August 1999 in CAS 98/200, AEK Athens and Slavia Prague v. UEFA (paras. 40-43), and to accept that the mentioned conditions are satisfied. Indeed:

- i. EU competition law provisions are largely regarded as pertaining to the category of mandatory rules by courts and scholars within the EU;
- ii. a connection between (a) the territory on which EU competition law provisions are in force and (b) the subject matter of the dispute could be seen to result from the fact that the challenged FIFA regulations affect the competitive behaviour of clubs with their seat in the EU territory with respect to players and coaches employed by clubs affiliated to the UAF. In addition, the Panel notes that Shakhtar competes in European competitions governed by UEFA, together with clubs registered in EU member states;
- iii. the Swiss legal system shares the interests and values protected by EU

competition law; and

iv. the SFT stated the following:

*“It is generally recognized that Swiss civil courts or arbitrators, when deciding the validity of a contractual agreement affecting the EU market, shall examine this issue in the light of Art. 81 EC Treaty [now Article 101 TFEU]. They shall do so even if the parties have contractually agreed to apply Swiss law to their contractual relationship. This examination is compulsory where a party invokes the nullity of the contractual agreement before the court or the arbitrator.”* (SFT 4P.119/1998)

104. On this basis, the Panel is content to accept the need to test whether the Amended Temporary Rules are compatible with Article 101 TFEU.
105. In summary, the Panel finds that the present proceedings are primarily governed by the various rules and regulation of FIFA and, additionally, Swiss law. While the TFEU is applicable, there is in principle no scope for the application of Ukrainian law.

## **IX. PRELIMINARY ISSUES**

### **C. The Panel’s Decision Not to Hear Mr Zapisatskiy as Witness**

106. On 27 December 2022, the CAS Court Office informed the Parties that the Panel had decided not to hear Mr Zapisatskiy as a witness.
107. The reasoning behind such decision is that the Panel did not consider Mr Zapisatskiy’s evidence to be relevant to decide the matter at hand.
108. During the hearing, Shakhtar, *inter alia*, indicated that the only reason to hear Mr Zapisatskiy was for him to confirm that the UAF was not invited by FIFA to discuss the possibility of extending the Temporary Rules.
109. While this factual allegation was initially not contested, at the hearing FIFA hinted that the wording of the UAF letter dated 15 June 2022, signed by Mr Zapisatskiy (see para. 23 above), could suggest that the UAF was involved in the consultation process, as it indicates that the UAF was aware of a draft text of the Amended Temporary Rules.
110. The Panel, however, finds that even if it were to accept that the UAF was not involved in the consultation process this would not be determinative for its decision on the validity of the Appealed Decision, because the participation of the UAF in the urgent decision-making process of the Bureau was not required under the FIFA Statutes.
111. In any event, Article R44.2 CAS Code, which is also applicable to CAS appeal



arbitration proceedings pursuant to Article R57 CAS Code, provides as follows:

*“Each party is responsible for the availability and costs of the witnesses and experts it has called.”*

112. It was therefore the responsibility of Shakhtar to secure the availability of Mr Zapisatskiy to testify at the hearing. Shakhtar was reminded of such responsibility in the tentative hearing schedule, in the CAS Court Office letter dated 29 November 2022 as well as in the Order of Procedure, which Shakhtar signed for acceptance.
113. Finally, based on the documentary evidence presented by Shakhtar, the Panel is prepared to accept that Mr Zapisatskiy attended a court hearing in Ukraine on 22 December 2022. However, the evidence submitted by Shakhtar does not indicate when Mr Zapisatskiy had been summoned for such domestic hearing. It seems unlikely that he was only summoned in the morning of 22 December 2022 without prior consultation as to his availability. Also no evidence is presented demonstrating that Mr Zapisatskiy informed the Ukrainian court of his unavailability due to the CAS hearing upon having been summoned. Shakhtar only informed the CAS Court Office of Mr Zapisatskiy’s potential unavailability to testify in the morning of 22 December 2022, i.e. the day of the CAS hearing. On this basis, the Panel finds that Shakhtar did not establish that exceptional circumstances barred Mr Zapisatskiy from attending the CAS hearing and that the responsibility and consequences of his absence are therefore for Shakhtar to bear.
114. Consequently, the Panel decided not to hear Mr Zapisatskiy as witness.

**D. The Panel’s Decision to Issue the Operative Part of the Award prior to the Reasons**

115. While Shakhtar asked for the operative part of the Award to be issued before the reasons, FIFA requested that a fully motivated Award be issued concurrently with its operative part.
116. The CAS Code provides in Article R59(3) CAS Code that the Panel “*may decide to communicate the operative part of the award to the parties, prior to the reasons*”. It is, thus, within the discretion of the Panel to issue either the full award or the operative part only. In view of the Panel it was in the interest of good administration of justice to issue the operative part of the award first, because it considered that Shakhtar had a legitimate interest in knowing the outcome of the present arbitration before the end of the January 2023 transfer window. Had Shakhtar been successful in its appeal this would have potentially protected it from further foreign football players and coaches suspending their employment contracts and from incurring further financial damages.
117. Consequently, the Panel decided to issue the operative part of the Award prior to the reasons.

**X. MERITS**

**A. The Main Issues**

118. The issues to be resolved by the Panel are the following:

- i. Was the Appealed Decision issued in accordance with the formal requirements set by FIFA to issue regulations?
- ii. Was the Appealed Decision necessary and proportionate in the pursuit of a legitimate objective?
- iii. Was the Appealed Decision issued *ultra vires*?
- iv. Was the Appealed Decision issued in violation of Article 101 TFEU?
- v. Was the Appealed Decision issued in violation of any rules or regulations of FIFA, Swiss law or general principles of law?
- vi. Is Shakhtar entitled to damages from FIFA?

*i. Was the Appealed Decision issued in accordance with the formal requirements set by FIFA to issue regulations?*

119. The power of the FIFA Council to issue regulations derives from Article 34 FIFA Statutes (entitled “*Powers of the Council*”), which provides, *inter alia*, as follows:

*“11. The Council shall issue regulations generally and, in particular, the FIFA Governance Regulations.*

*12. The Council shall deal with all matters relating to FIFA that do not fall within the sphere of responsibility of another body, in accordance with these Statutes.”*

120. This power of the FIFA Council is reiterated specifically in the context of the FIFA RSTP, based on Article 27 thereof, which provides as follows:

*“Any matters not provided for in these regulations and cases of force majeure shall be decided by the FIFA Council whose decisions are final.”*

121. The powers of the Bureau are set forth in Article 38 FIFA Statutes (entitled “*Bureau of the Council*”), which provides, *inter alia*, as follows:

*“1. The Bureau of the Council shall deal with all matters within the competence of the Council requiring immediate decision between two meetings of the Council. The Bureau of the Council shall consist of a maximum of seven members. The FIFA President and the six confederation presidents are ex officio members of the Bureau of the Council.*

2. *The President shall convene meetings of the Bureau of the Council. If a meeting cannot be convened within an appropriate period of time, decisions may be passed through other means of communication. Such decisions shall have immediate legal effect. The President shall notify the Council immediately of the decisions passed by the Bureau of the Council.*
3. *All decisions taken by the Bureau of the Council shall be ratified by the Council at its next meeting.”*

122. On this basis, the Panel accepts that the FIFA Council was entitled to introduce the Amended Temporary Rules. By extension, the Bureau was also vested with such competence, provided that an immediate decision between two meetings of the FIFA Council was required.
123. It is neither contested by Shakhtar that the FIFA Council, or more specifically the Bureau, was generally entitled under the FIFA Statutes to issue the Appealed Decision, nor was it contested that the urgency of the situation permitted the Bureau to pass the Appealed Decision by email. The Panel accepts that the wartime events between Russia and Ukraine required immediate action.
124. On 17 June 2022, the members of the Bureau, consisting of the President of FIFA and the Presidents of the six confederations (AFC, CAF, CONCACAF, CONMEBOL, UEFA and OFC) were informed by the FIFA Secretary General of the proposed Amended Temporary Rules. All seven members of the Bureau approved the proposal by email between 17 and 20 June 2022, thereby issuing the Appealed Decision.
125. On 23 June 2022, the FIFA Secretary General informed the FIFA Council of the Appealed Decision issued by the Bureau, indicating, *inter alia*, that “[i]n accordance with article 38 paragraph 3 of the FIFA Statutes, the above decisions of the Bureau shall be ratified by the Council at its next meeting”.
126. Shakhtar relies on Article 43 FIFA Statutes in submitting that the Bureau erred in failing to consult the Football Stakeholders Committee. Article 43 FIFA Statutes (entitled “*Football Stakeholders Committee*”) provides as follows:

*“The Football Stakeholders Committee shall deal with football matters, particularly the structure of the game and the relationship between clubs, players, leagues, member associations, confederations and FIFA as well as with issues relating to the interests of club football worldwide, draw up regulations governing these matters, and also analyse the basic aspects of football training and technical development.”*
127. Pursuant to Article 39(1) and (2) FIFA Statutes, the Football Stakeholders Committee is a standing committee that “*shall advise and assist the Council in their respective fields of function*”. However, neither this provision nor the FIFA Statutes in general require a specific consultation process to take place with the Football Stakeholder Committee for decisions to be issued by the FIFA Council, let alone by the Bureau. The Panel does not

consider this to be surprising or unreasonable, because decisions issued by the Bureau are necessarily urgent. Indeed, if a situation would not require immediate action, the Bureau would not be competent to decide. As a corollary, in a situation where immediate action is required, it would be inefficient to require a sophisticated consultation process.

128. In addition, the Panel notes that the proceedings leading to the adoption of the Appealed Decision were not of a disciplinary nature, which might have required affording a right to be heard to those prejudiced by that decision. Rather, the Appealed Decision was issued by FIFA in its capacity as an association governing the sport of football, in which area it has a considerably discretion to govern the sport and its members as it deems fit, restricted merely by principles of international public policy and mandatory rules of law.
129. This notwithstanding, and although formally not required to do so, various stakeholders were consulted. In particular, FIFA discussed the Amended Temporary Rules with FIFPRO, the World Leagues Forum, ECA and UEFA, before the Bureau issued the Appealed Decision. They had been invited to participate in a video-conference, a draft version of the Amended Temporary Rules was shared with them and they were invited to comment.
130. Given the time constraints, the Panel does not consider it unreasonable for FIFA not to directly involve the UAF and/or Ukrainian clubs (including Shakhtar) in this consultation process. The present proceedings relate to Shakhtar, and no evidence has been presented that Shakhtar attempted to intervene in the consultation process prior to the implementation of the Amended Temporary Rules. At the time, Shakhtar was a member of ECA and the latter was involved in the consultation process. Considering the circumstances and the urgency required, the Panel finds that it was reasonable of FIFA to keep the number of stakeholders limited to a minimum and that it only involved ECA, and to a certain extent World Leagues Forum, as the representative organisations of clubs and leagues respectively, including Shakhtar.
131. Accordingly, the Panel finds that the Bureau issued the Appealed Decision in accordance with all formal requirements set forth in the FIFA Statutes. However, this formal validity does not preclude any evaluation concerning the substantive validity of the Appealed Decision. Indeed, it may well be that, although issued in accordance with all formal prerequisites, Annex 7 is still to be invalidated, because, e.g., it is discriminatory or otherwise in violation of legal principles encompassed in international public policy. Whether this is the case will be assessed below.

*ii. Was the Appealed Decision necessary and proportionate in the pursuit of a legitimate objective?*

132. The Panel notes that Shakhtar raises numerous legal arguments based on which it challenges the Appealed Decision. Although all arguments raised by Shakhtar will be addressed individually below, the Panel finds that the present proceedings can basically be reduced to one fundamental question: was the Appealed Decision necessary and proportionate in the pursuit of a legitimate objective?

133. In answering this fundamental question, the Panel first resorts to FIFA's purported objective underpinning the Appealed Decision, before subsequently turning to the necessity and proportionality of the measures taken to achieve such objective.

*a. FIFA's objective behind the Appealed Decision*

134. According to FIFA, Russia's invasion of Ukraine caused legal uncertainty in relation to the stability of employment contracts entered into between Ukrainian clubs (including Shakhtar) on the one hand, and foreign football players and coaches registered with such clubs on the other hand. According to FIFA, contrary to the COVID-19 situation, this matter could not be left to be resolved under local laws, at least not for international employment relationships.

135. FIFA argues that the legal uncertainty was of an unprecedented magnitude, since – differently from other armed conflicts around the world – many foreign football players and coaches were affected by the war. FIFA also submits that foreign football players and coaches registered with Ukrainian clubs (including Shakhtar) were facing security risks. In addition, FIFA notes that the situation at the moment the Appealed Decision was issued was far from stable. To the contrary, the war was evolving and had the potential of further escalation.

136. Contrary to the contentions of Shakhtar, the Panel finds that no particular expert reports or investigations were required for FIFA to support a finding that the safety of people in Ukraine in general, including of foreign football players and coaches, was jeopardised by the Russian invasion. Reliable news outlets reported about the Russian invasion and the welfare of human beings in Ukraine was clearly threatened. As addressed further below, for instance, among others, the government of the United States of America called upon its citizens to leave Ukraine due to the imminent security threat.

137. The Panel finds that there can be little doubt that, besides being a threat to the life of Ukrainian residents, the war also caused legal uncertainty in employment relationships in football. Given the significant number of foreign football players and coaches employed in (Russia and) Ukraine, the Panel finds it reasonable that FIFA explored options to address the situation in a general manner, in an attempt to provide general regulatory guidance for all stakeholders affected by the war. This happened not least because the World Leagues Forum and FIFPRO, the international representative organisation for professional football players, jointly urged it to undertake action (albeit that such request was directly aimed at foreign football players and coaches employed in Russia, not Ukraine).

138. Given the threats caused by the war, the Panel finds that it was reasonable for FIFA to provide general regulatory support for those foreign football players and coaches willing to leave Ukraine. On the contrary, it would have been unreasonable to expect that foreign football players and coaches would be required to fulfill their employment contracts as if nothing had happened. The consequence of leaving the country without reference to any legal justification would have in fact implied the abandonment of their workplace,

exposing them to the risk of potential contractual claims by their employers. While such contractual disputes could be eventually overcome, and the breach of contract justified, it is well-known that football players involved, or facing a threat of being involved, in contractual disputes encounter difficulties in finding new employment. The main reason for this is the principle of joint liability set forth in Article 17(2) FIFA RSTP, i.e., the threat that such new club be declared jointly liable with the player to pay damages to the player's former club. This liability could result in liability for millions of Euros, as a consequence of which clubs generally try to steer clear of registering such players.

139. Furthermore, the FIFA RSTP does not provide for a mechanism for football players to seek prior permission to terminate employment contracts. Rather, whether a player or a club had just cause to terminate the employment relationship is only determined retrospectively, with the obvious legal risks this approach implies.
140. In the circumstances, while emphasising again that individual cases are to be examined on a case-by-case basis, the Panel finds that FIFA's objective in providing general legal guidance in times of exceptional and unprecedented legal uncertainty was legitimate and justified. This was certainly a reasonable basis at the time the initial version of Annex 7 was introduced; the Panel finds, moreover, that it was still valid at the time of the Appealed Decision. Indeed, at the time of issuance of the Appealed Decision, the armed conflict raged on and the future developments remained unpredictable.

***b. Was the Appealed Decision necessary and proportionate in achieving the objective?***

141. The Panel finds that FIFA's assessment of the factual situation underlying the adoption of the Appealed Decision is sufficiently accurate and that therefore FIFA was entitled to strike a balance between the legitimate interests of Ukrainian clubs (including Shakhtar) and the legitimate interests of foreign football players and coaches by application of regulatory measures.
142. In coming to this conclusion, the Panel accepts that the autonomy of associations is larger in the field of regulatory measures than in that of disciplinary decisions. The Panel finds that the solution adopted by FIFA to allow foreign football players and coaches to unilaterally suspend (not terminate) their employment contracts remains within the acceptable margin of a federation's discretion.

**1) The priority of providing foreign football players and coaches with the option to leave Ukraine**

143. The Appealed Decision's primary focus is to address the existing security risks of foreign football players and coaches in Ukraine. While the Panel considers this to be legitimate, it entails unavoidable disadvantages for Ukrainian clubs as such measures had the potential of depriving them of the services of their foreign football players and coaches.

144. The Panel finds that Shakhtar did not put forward any feasible alternative measure that would have ensured the safety of foreign football players and coaches while continuing to perform their duties as employees of Shakhtar.
145. Accordingly, in assessing the proportionality of the Amended Temporary Rules one has to start from the presumption that foreign football players and coaches could not be required to continue performing their employment contracts as normal. The question is rather if and how reparation should be given to Ukrainian clubs in view of the potential loss of services by their foreign football players and/or coaches and of the opportunity of Ukrainian clubs (including Shakhtar) to transfer players to third-party clubs for a transfer fee. The implied issue is whether the absence in Annex 7 of an appropriate reparation in favour of Ukrainian clubs makes the Appealed Decision illegal.

## 2) Financial reparation for Ukrainian clubs

146. In this respect, one might think that financial compensation to mitigate the damages incurred by Ukrainian clubs as a result of the Russian invasion and FIFA's measures in response could be contemplated in the Amended Temporary Rules. However, who should pay such compensation, if any? FIFA, the foreign football players and coaches entitled to invoke the Amended Temporary Rules, agents/intermediaries, and/or the third-party clubs that might register the foreign football players and coaches following the suspension of their employment contracts?
147. The Panel, as a preliminary remark, notes that any regulatory measures may impact the economic conditions or the financial interests of their addressees: if the FIFA system is considered, for instance, the rules contained in the FIFA RSTP allowing the players to terminate employment contracts for sporting just cause have an effect on existing employment contracts; or the rules on the release of players to allow them to play with national teams prevent clubs from requesting the sporting performance by players during the period for which they have been released or should have been released pursuant to the provisions of the FIFA RSTP (Annexe 1), plus an additional period of five days (Article 5 of such Annexe). Such impact, however, does not necessarily imply that reparation for any adverse effect of economic nature is to be paid in all such situations. As a result, and in other words, the fact that the Amended Temporary Rules allowed players and coaches to suspend for a limited period of time performance under the existing employment contracts, in the pursuit of a legitimate objective, does not make the Appealed Decision *per se* illegal even though they might have caused a financial prejudice to the Ukrainian clubs.
148. Commencing with FIFA, the Panel finds that, even though the Amended Temporary Rules are enacted by FIFA, FIFA does not financially profit from them. In such circumstances, the Panel also does not consider it appropriate to require FIFA to compensate Ukrainian clubs financially. FIFA may obviously do so as a token of support, but there is no legal requirement to do so.
149. Turning to the foreign football players and coaches that may invoke the Amended

Temporary Rules to suspend their employment relationships, the Panel finds that they in principle also do not necessarily derive a financial profit. Indeed, by suspending their employment contracts, they at least temporarily forfeit their entitlement to receive a salary. At the same time, had FIFA remained inactive, the players (who did not dare take the risk of a legal dispute for breach of contract and remained with the Ukrainian clubs) would have risked remaining without a salary, in light of the uncertain situation in Ukraine. This would have been a financial prejudice, rather than a profit. In an attempt to accommodate these players and not deprive them of the possibility to earn an income, the Amended Temporary Rules allowed them to temporarily register with other teams.

150. In addition, not all foreign football players and coaches may be in the fortunate position of immediately finding alternative temporary employment to recuperate their loss of income. Also, knowing that foreign football players and coaches that have invoked the Amended Temporary Rules find themselves in a situation of unemployment, potential new clubs acquiring their services may well exploit their stronger bargaining position by offering lower salaries than the foreign football players and coaches would otherwise have been able to receive.
151. At the same time, the Panel recognizes the possibility that some foreign football players and/or coaches financially benefitted from invoking the Amended Temporary Rules to suspend their employment contract with Ukrainian clubs (including Shakhtar) and subsequently concluding an employment contract under more favourable financial terms. The Panel finds that this possibility does not change the financial condition of Shakhtar. If players or coaches suspend their employment relation because of fear of wartime dangers, or because they receive an offer for a higher income, the employment contract would be in any case suspended. Indeed, the Panel finds it difficult to link potentially significant financial damages for Ukrainian clubs (including Shakhtar) deriving from the suspension of an employment contract to the financial conditions agreed between a player or a coach suspending the employment contract and a third club.
152. Against such background, however, the Panel finds that an abstract scenario could be imagined under which Ukrainian clubs (including Shakhtar) file claims for unjust enrichment against such players and/or coaches, to recoup at least part of the financial profits made, thereby more equally dividing the financial setback as a result of the Russian invasion and FIFA's regulatory measures in response. Although such claims for unjust enrichment would have to be examined on their own merits depending on the specific facts and circumstances of each case, Article 62(1) *et. seq.* SCO appears to provide Ukrainian clubs (including Shakhtar) with options in this respect:

*“A person who has enriched himself without just cause at the expense of another is obliged to make restitution.”*

153. The same observations can be made with respect to agents and/or intermediaries, who may also have potentially enriched themselves at the expense of Ukrainian clubs



(including Shakhtar) on the basis of Annex 7.

154. Finally, the Panel notes that the clubs registering players who have invoked Annex 7 to suspend their employment contracts could potentially profit from Annex 7. Indeed, such clubs have the opportunity to acquire foreign football players and/or coaches on a temporary basis, without the consent of the club of prior (and pending) registration and without any transfer fee being payable. The Panel notes in addition that it may also happen that the employment contracts in question, temporarily suspended, expire during their suspension period, depriving the Ukrainian clubs of the opportunity or chance to transfer such players and/or coaches to third-party clubs for a transfer fee. The Panel considers it a possible scenario that clubs, that have initially temporarily registered foreign football players and/or coaches that suspended their employment contracts with Ukrainian clubs on the basis of Annex 7, eventually register such employees on a permanent basis. Accordingly, from a financial perspective, such clubs have the potential of financially benefitting, in a significant manner, from Annex 7.
155. The Panel finds however that, as argued by FIFA, requiring such clubs to pay a predetermined loan fee (and/or transfer fee) would have been difficult to incorporate in a set of rules such as Annex 7, not least because this would create a significant hurdle for foreign football players and coaches to leave Ukraine in the exceptional wartime circumstances, and find suitable alternative employment. As a result, on balance, the Panel holds that the absence of any mechanism in the Appealed Decision to prevent new clubs from gaining an advantage to the detriment of Ukrainian clubs does not affect the validity of the Amended Temporary Rules *per se*.
156. Nonetheless, the Panel finds it disturbing that such new clubs may potentially obtain a financial advantage in the form of the registration of football players and/or coaches for which they did not have to pay any transfer fee to acquire their services, while potentially making significant profits on such players and/or coaches by subsequently transferring them to other clubs for a transfer fee.
157. Again, from a general fairness perspective, the Panel would find it difficult to justify a situation in which only Ukrainian clubs (including Shakhtar) would be suffering potentially significant financial losses from the suspension of an employment contract, while the new clubs would profit from it financially. Therefore, although highly speculative and entirely subject to the individual circumstances of each case, the Panel finds it conceivable (without asserting it with certainty) that in the above-mentioned scenarios Ukrainian clubs (including Shakhtar) may seek to be compensated by such clubs, if they indeed unduly enriched themselves. From a general fairness perspective, it would certainly not be unreasonable that such clubs may be called to share at least part of the windfall profits they would not have been able to realise if not for the introduction of the Amended Temporary Rules.
158. The matter can however be left open. The Panel finds in fact that these considerations do not make the Amended Temporary Rules *per se* unreasonable, as these rules primarily serve the purpose of permitting foreign football players and coaches to leave

the country for safety reasons, which is a justifiable objective.

### 3) Potential cases of abuse of the Amended Temporary Rules

159. The Panel finds that the above considerations also apply with respect to potential cases of abuse of the Amended Temporary Rules, when players, agents/intermediaries or other clubs invoke Annex 7 for illegitimate purposes, i.e., for purposes other than those for which the Appealed Decision was adopted.
160. The Amended Temporary Rules do not deal exhaustively with any and all types of questions arising from the circumstances at the basis of its adoption. However, in the event that the opportunity offered by Annex 7 is exploited for illegitimate and/or disingenuous purposes, Ukrainian clubs (including Shakhtar) could have access to justice, and seek a remedy against such persons or entities, *inter alia*, on the basis of Article 2 SCC, which provides as follows:
- “1. Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.
  2. The manifest abuse of a right is not protected by law.”
161. Whether there is any abuse must be ascertained by properly constituted adjudicatory tribunals or courts in light of the individual circumstances of each case; all particular contingencies cannot be covered by general rules.
162. In terms of situations of abuse, one could for example think of foreign football players and/or coaches exerting undue pressure on Ukrainian clubs (including Shakhtar) shortly before the start of a match to demand additional payments in exchange for waiving their right to suspend their employment contract. Demanding an additional payment may not *per se* be unreasonable, but the content of the demand and the moment of making it and other facts and circumstances may make it unreasonable. Also, generally speaking, the longer a foreign football player or coach waits to suspend his employment contract, the less likely it becomes that Annex 7 is invoked for legitimate purposes. Indeed, should one come to the conclusion that a foreign football player or coach merely exploited the option to suspend his employment contract under the Amended Temporary Rules to obtain an excessive amount of additional compensation without any genuine fear for his welfare being at stake, this may well lead to a conclusion that the rules were invoked in a manner inconsistent with its purposes. Whether this is the case is to be assessed on a case-by-case basis.
163. Another example of potential abuse would be a foreign football player or coach that has received a contractually agreed sign-on fee, i.e., a lump sum payment per season, but subsequently invokes Annex 7 to suspend his employment contract without paying back the relevant *pro rata* part of the sign-on fee.
164. A final example of potential abuse could be that of a foreign football player or coach who unreasonably refuses to discuss a possible extension of the term of the employment

contract temporarily suspended that has not expired when Annex 7 ceases to have effect, for the period during which the employment contract was suspended.

165. Again, while the above may provide some restoration to Shakhtar, the Panel finds that none of the circumstances mentioned above affect the substantive validity of the Amended Temporary Rules as such, because these rules are aimed to protect foreign football players and coaches who invoke Annex 7 for legitimate purposes, not the ones invoking them for illegitimate purposes.

#### **4) The temporal scope of the Amended Temporary Rules**

166. Another element of the Amended Temporary Rules that is challenged by Shakhtar is the temporal scope of the Amended Temporary Rules, maintaining that the Bureau should not have extended the validity of Annex 7 until 30 June 2023, but that the extension should have been limited to a shorter period.
167. In this respect, the Panel finds that it was indeed reasonable for the Bureau to extend the validity of Annex 7 until 30 June 2023, because this is when the football seasons in Ukraine (and Russia) end. It is therefore a natural moment to re-evaluate the necessity of potential further measures, while limiting interference with squad compositions during the football season.
168. The Panel also remarks that it was not desirable to leave foreign players in doubt as to whether they would be required to return to Ukraine in accordance with their employment contracts in the course of the football season. The extended one-year validity provides a certain stability for all impacted by the Russian invasion. Indeed, the Panel finds that it was not unreasonable for the Bureau to assume that the war would not end before 30 June 2023.
169. In addition, the mere fact that it was announced approximately one month after the Appealed Decision that the Ukrainian Premier League would resume playing again does not make any difference. While matches of the Ukrainian Premier League have been played, they have on occasions been interrupted due to civil defence sirens and the accompanying threat to security. The Panel finds that this is clearly insufficient to establish that Ukraine was a safe territory for foreign football players and coaches for the entire 2022/2023 season. In any case, in the Circular Letters it issued (Nos. 1787, 1788, 1800 and 1804), FIFA emphasized that Annex 7, adopted as a result of the war in Ukraine, would be periodically reviewed and removed accordingly, and that it would continue to monitor the situation in Ukraine closely.

#### **5) Persons / entities disadvantaged by the Amended Temporary Rules**

170. The Panel further notes that Shakhtar argues that the Amended Temporary Rules are solely in favour of foreign football players and coaches. The Panel does not consider this to be the case. Indeed, the Amended Temporary Rules also have advantages for

Ukrainian clubs (including Shakhtar).

171. First of all, a suspension of an employment contract also temporarily relieves Ukrainian clubs (including Shakhtar) of their burden to pay salaries to the foreign football players and coaches concerned. Although this may not compensate Ukrainian clubs for the loss of chance to transfer these players for a transfer fee, it does compensate them for the loss of services. Actually, the suspension of an employment contract releases both parties from their duties, as a consequence of which the *quid pro quo* of the employment relationship remains balanced.
172. Furthermore, the Amended Temporary Rules prevent foreign football players and coaches from terminating their employment contracts with Ukrainian clubs, a scenario the Panel considers to have been realistic if not for the implementation of the Amended Temporary Rules. Indeed, although specifically demanded in the context of Russia (and not Ukraine), FIFPRO and the World Leagues Forum requested FIFA to issue regulations permitting foreign football players and coaches to terminate their employment contracts with just cause. Such measure would have been significantly more prejudicial for Ukrainian clubs than the compromise currently implemented. The Panel finds that this is demonstrative of the fact that the Bureau did not blindly follow the demands of some of its stakeholders, but that it also duly considered the interests of the clubs concerned.
173. In fact, by only permitting foreign football players and coaches to suspend their employment contracts, the possibility was kept open for such foreign football players and coaches to resume their contractual relations after the expiration of the suspension and/or allowing Ukrainian clubs to monetize on the market value of the foreign football players by transferring them for a transfer fee.
174. Furthermore, unlike in the Temporary Rules, the Amended Temporary Rules also provide Ukrainian clubs, foreign football players and coaches with the discretion to opt out of the suspension mechanism by reaching alternative arrangements. The Panel finds that this is another important element demonstrative of the fact that FIFA was not blind for the interests of Ukrainian clubs.
175. Related to this point is that the transfer market was not foreclosed to Ukrainian clubs. Indeed, despite the adoption of the Amended Temporary Rules, new foreign players joined the ranks of Shakhtar. Specifically, a Brazilian player joined Shakhtar on loan for a loan fee of about EUR 200,000 and a Croatian player joined Shakhtar as a free agent, as confirmed by Mr Palkin at the hearing. What is more, football players and/or coaches acquired after the introduction of Annex 7 may well be deemed to have waived their right to invoke Annex 7 to suspend their employment contracts. Indeed, concluding a new contract is in principle to be considered as an alternative arrangement permitted by the Amended Temporary Rules. Whether this is indeed the case in an individual situation depends on the specific facts and circumstances.
176. Finally, the Panel also notes that the Amended Temporary Rules only apply to

international employment relationships and therefore do not impact the employment contracts concluded between Ukrainian clubs (including Shakhtar) and domestic football players and coaches. While FIFA is primarily competent to govern the international aspects of the sport, the UAF is primarily competent to govern its domestic dimension in Ukraine. This limit to FIFA's power raises doubts as to the possibility for FIFA to extend the scope of the Amended Temporary Rules also to domestic employment relationships; on the contrary, not doing so and refraining from exercising any pressure on the UAF to implement similar rules at domestic level must have provided some relief to Ukrainian clubs.

177. In view of the above, the Panel finds that the Amended Temporary Rules were not only in the interest of foreign football players and coaches, but that they also produced some beneficial effects to the Ukrainian clubs.
178. In general, the Panel finds that Shakhtar did not suggest viable alternative measures that would have achieved the objective behind the Appealed Decision, all the while being less burdensome for Ukrainian clubs. The Panel, in fact, does not consider a prolongation of the existing employment contracts for a period equal to the suspension to be a suitable alternative, reducing its impact on Ukrainian clubs, as such measure would unduly interfere with the contractual freedom of the parties, modifying only one of the elements (the term) of an agreement originally entered into in consideration of a plurality of factors. Also, given that the war may continue for a longer period of time, this would entail that employment contracts would be extended for significant periods of time, potentially even beyond their original date of expiry. The Panel finds that this would cause less as opposed to more legal certainty, thereby undermining the main goal of Annex 7.

#### **6) Resumption of the Ukrainian Premier League**

179. The sole fact that the Ukrainian Premier League resumed after the Appealed Decision was pronounced does not have an impact on the Panel's analysis.
180. First of all, the decision to resume competitions was only taken by the Ukrainian Premier League on 20 July 2022, i.e. a full month after the Appealed Decision had been adopted. Accordingly, the Bureau could obviously not have taken this fact into consideration when issuing the Appealed Decision.
181. This is not a trivial point, but in fact put forward by Shakhtar as its main argument: “[t]he major fallacy of the Appealed Decision is that [the Bureau] did not consider whether Shakhtar would take part in football competitions in the new football season 2022/23 as against the situation from 24 February 2022 when competitions were suspended”. As it turns out, the Bureau could not have taken this into account when it issued the Appealed Decision.
182. Second, the Panel finds that, at the moment of adoption of the Appealed Decision, the Bureau had to consider the scenario that the armed conflict would escalate further,

thereby continuing to jeopardise the safety of foreign football players and coaches. Accordingly, the Panel finds that, even if the Bureau had known that the Ukrainian Premier League would resume, the security situation was insufficiently stable to assume that the Ukrainian Premier League would run its course in an ordinary and safe fashion. Under such circumstances, it could not be reasonably expected from foreign football players and coaches that they remain in Ukraine and be required to comply with the obligations under their individual employment contracts as if there was no war.

*c. Conclusion*

183. Consequently, in view of the above assessment, the Panel finds that the Appealed Decision was necessary and proportionate in the pursuit of a legitimate objective and is valid as such.
184. Overall, the Panel finds that FIFA with the Appealed Decision struck a justified and proportionate balance between competing interests in order to achieve the objective of providing regulatory guidance to avoid legal uncertainty in an extraordinarily dramatic situation, duly considering the expectations of foreign football players and coaches as well as Ukrainian clubs.
185. This conclusion however comes with some caveats. As emphasised above, the mere fact that the Amended Temporary Rules are valid, does not mean that all foreign football players or coaches that have invoked Annex 7 to suspend their employment contracts did so for legitimate reasons. Whether this is the case must be assessed on a case-by-case basis in view of all the specific circumstances of such individual employment relationship. Potential cases of abuse of Annex 7 are not to be condoned.
186. Also in the absence of abuse, in some situations mentioned above, Shakhtar may still have recourse against persons or entities that benefitted financially from the Amended Temporary Rules to the detriment of Shakhtar. This does not only concern the foreign football players or coaches that have invoked Annex 7 to terminate their employment contracts, but also to agents/intermediaries and third-party clubs that may potentially have obtained undue financial advantages because of Annex 7. This may include claims for unjust enrichment on the basis of Articles 62 *et seq.* SCO.

*iii. Was the Appealed Decision issued ultra vires?*

187. Having confirmed the general substantive validity of the Amended Temporary Rules, the Panel now turns to the specific arguments raised by Shakhtar.
188. As indicated above, the Panel finds that the Appealed Decision was issued in accordance with all formal prerequisites set forth in the relevant rules and regulations of FIFA.
189. The Panel however understands that Shakhtar's argument with respect to the Appealed Decision being issued *ultra vires* is more related to FIFA's competence to

interfere in bilateral employment relationships between Shakhtar and the foreign football players and/or coaches employed by it. Shakhtar further maintains that such employment relationships are governed by Ukrainian law and that FIFA lacks the authority to interfere therein.

190. First of all, it is to be underlined that the Panel finds that individual disputes between Ukrainian clubs (including Shakhtar) and foreign football players and/or coaches employed by it are to be decided by the competent tribunals or courts on a case-by-case basis.
191. However, given that such individual disputes might potentially be adjudicated and decided in first instance by the FIFA's internal dispute resolution bodies, the Panel does not consider it inappropriate *per se* for FIFA to set general standards and provide guidance with regard to the employment relationships between Ukrainian clubs and foreign football players and/or coaches. The situation may be different for employment relationships purely governed by Ukrainian law, because Annex 7 would in principle not even apply to such employment relationships in the first place. However, for employment relationships governed by the FIFA RSTP, the Panel does not consider it inappropriate for FIFA to provide regulatory guidance in times of legal uncertainty.
192. The Panel considers it undeniable that the livelihood of Ukrainian residents was at risk. This is, *inter alia*, exemplified by the announcements of government websites, calling upon their citizens to leave Ukraine. In this respect, counsel for FIFA referred to the travel warning for Ukraine on the government website of the United States of America, providing, *inter alia*, as follows:
- “The Department of State continues to advise that U.S. citizens not travel to Ukraine due to active armed conflict. Those U.S citizens in Ukraine should depart if it is safe to do so using commercial or other privately available ground transportation options.”*
193. In addition, for US citizens nonetheless deciding to travel to Ukraine, *inter alia*, the following advice is given:
- *Draft a will and designate appropriate insurance beneficiaries and/or power of attorney.*
  - *Discuss a plan with loved ones regarding care/custody of children, pets, property, belongings, non-liquid assets (collections, artwork, etc.), funeral wishes, etc.*
  - *Share important documents, login information, and points of contact with loved ones so that they can manage your affairs if you are unable to return as planned to the United States.*
  - *Leave DNA samples with your medical provider in case it is necessary for your family to access them.”*

194. The Panel finds that this demonstrates the significant security risks faced by people in Ukraine.
195. Under such circumstances, the Panel considers it reasonable and fair that FIFA tried to contribute in facilitating a (temporary) departure of foreign football players and coaches, or at least to remove obstacles in this respect. The mere fact that Ukrainian clubs (including Shakhtar) would be able to provide work to the foreign football players and coaches due to the resumption of the Ukrainian Premier League is a relevant factor to be taken into account, but does not eliminate the safety risks.
196. At the same time, the war between Russia and Ukraine can be easily distinguished from the COVID-19 pandemic. As the word “pandemic” already suggests, COVID-19 was a global crisis, whereas the war between Russia and Ukraine is geographically limited. Since the security situation in Russia and Ukraine clearly deviated from the security situation in other countries, the Panel does not consider it *per se* unreasonable that Annex 7 only applied to Russian and Ukrainian clubs and their employees.
197. Shakhtar in particular refers to the FIFA COVID-19 FAQs providing, *inter alia*, as follows:
- “FIFA understands and recognises that it is not a party to the employment agreements between clubs and their employees (in particular, players and coaches) [...] FIFA has no authority pursuant to any national law, FIFA regulations, or national football regulations to unilaterally amend the terms and conditions of such agreements.*
- As a matter of principle, existing employment agreements shall be governed by the national law referred to in the agreement and/or existing collective bargaining agreements and the contractual autonomy of the parties.”*
198. The Panel finds that the Russian invasion of Ukraine presented an unprecedented situation in which FIFA had the opportunity of providing general guidance as to what foreign football players and coaches were entitled to do. Although FIFA’s adjudicatory bodies would remain competent to decide on individual cases, the decision taken in the Amended Temporary Rules that foreign football players and coaches were entitled to unilaterally suspend their employment contracts falls within FIFA’s discretion, insofar as FIFA’s internal dispute resolution bodies would ultimately be competent to adjudicate and decide such issue. By providing such guidance *ex ante* rather than only *ex post*, FIFA tried to provide more legal certainty.
199. The Panel finds that Shakhtar has in any event not established that the Amended Temporary Rules or the permission granted to foreign football players and coaches to unilaterally suspend their employment contracts was in violation of Ukrainian law.
200. It is not clear from the evidence on file whether, and, if so, to what extent, FIFA assessed the content of Ukraine’s employment law “*On Organization of Labor Relations under Martial Law*” No. 2136-IX (the “Martial Law”) in issuing the



Amended Temporary Rules.

201. Article 13(2) of the Martial Law provides, *inter alia*, as follows:

*“Suspension of the labour contract shall be executed by the employer’s decision (instruction), which, inter alia, shall contain information about the reasons for suspension, including the inability of both parties to perform their duties and the manner of exchange of information, the period of suspension, [...]”*

202. Accordingly, the right of suspending employment contracts under the Martial Law is granted to employers rather than to employees.

203. Regardless of whether the Bureau took the Martial Law into account in its considerations, the Panel finds that it was not illegitimate or unreasonable for the Bureau to determine that foreign football players and coaches had the right to suspend their employment contract. The Martial Law may provide for a different solution, but Shakhtar did not establish that FIFA’s mechanism violated any specific provision of Ukrainian law with respect to foreign employees of clubs affiliated to the UAF.

204. In any event, in fact, the Panel finds that certain elements of general domestic employment relationships in Ukraine may be distinguished from employment relationships between Ukrainian football clubs and foreign football players and coaches. The Martial Law appears to have the aim of protecting employees by not allowing employers to terminate or suspend employment contracts too easily. In the context of foreign football players and coaches, other interests play a role, in particular due to the international nature of such employment relationships.

205. The Panel finds it to be perfectly understandable and reasonable that foreign employees faced with security threats in Ukraine prefer to leave the country and return home.

206. Also, ordinary employees in Ukraine might not represent a value on the balance sheets of their employers, like football players and coaches. Further, Ukrainian employment law likely does not contain a concept of joint liability for a new employer to pay damages to the employee’s previous employer in case he or she is held liable for breach of the employment relationship. Another particularity of employment relationships in football is that employment contracts are invariably fixed-term employment contracts.

207. The Panel finds that all the mentioned elements make it reasonable for FIFA to implement its own rules in providing general regulatory guidance in response to the Russian invasion.

208. As indicated above, the Panel finds that the solution adopted by FIFA to allow foreign football players and coaches to unilaterally suspend (not terminate) their employment

contracts remains within the acceptable margin of a federation's discretion.

209. Again, the Panel finds that FIFA tried to strike a balance between the interests of Ukrainian clubs and foreign football players and/or coaches. Unlike argued by Shakhtar, FIFA's measures are not purely in favour of foreign football players and/or coaches. For example, and as already mentioned, FIFA did not allow foreign football players and/or coaches to unilaterally terminate their employment contracts with just cause. Had FIFA allowed this, the foreign football players and/or coaches would have been granted maximum freedom in finding new employment. However, FIFA decided to restrict such freedom, by only allowing a temporary suspension, in principle requiring the foreign football players and/or coaches to return to their employer in Ukraine once the suspension is lifted.
210. FIFA also did not require Ukrainian clubs to comply with their contractual commitment to pay salary to the foreign football players and/or coaches during the suspension of their employment contracts.
211. FIFA also allowed Ukrainian clubs and foreign football players and/or coaches the possibility of deviating from the Amended Temporary Rules by individual agreement.
212. Although the Panel accepts that Ukrainian clubs have an interest in being able to transfer football players, the Panel finds that such financial interest clearly does not prevail over the interest of foreign football players and/or coaches to leave a country at war.
213. Again, if there are foreign football players and/or coaches that have invoked Annex 7 for illegitimate purposes or if persons or entities exploiting the dire situation of Ukrainian clubs by obtaining undue benefits, the Panel finds that they must have access to legal remedies, in particular access to the FIFA DRC/PSC.
214. In such concrete case-by-case disputes, due regard should be taken of the individual employment contracts and the extent to which Ukrainian law is applicable. However, insofar Ukrainian law is not applicable, the Panel finds that FIFA was entitled to issue and extend the validity of Annex 7 by means of the Appealed Decision.
215. The Panel finds that Shakhtar's reliance on Swiss law in this respect is irrelevant. The rules governing collective suspension of employment contracts in case of strikes or lockouts are not material for the matter at hand. The fact that Swiss law currently does not contain an individual right to suspend employment contracts does not mean that such right could not be established by a regulator such as FIFA if circumstances so warrant.
216. Moreover, Shakhtar's reference to Article 82 SCO is not considered relevant by the Panel. This provision reads as follows:

*“A party to a bilateral contract may not demand performance until he has*

*discharged or offered to discharge his own obligation, unless the terms or nature of the contract allow him to do so at a later date.”*

217. The Panel does not consider this provision to be relevant to Shakhtar’s case, because the foreign football players and coaches invoking Annex 7 to suspend their employment contracts do not demand performance of the employment contract by Shakhtar. Indeed, Shakhtar is no longer required to pay salary as soon as the employment contract is suspended.
218. To the contrary, the Panel finds that one of the duties of an employer is to provide a safe working environment for its employees. Although due to no fault of its own, the Panel finds that Shakhtar can currently not guarantee a safe working environment due to the ongoing war. Accordingly, given that Shakhtar cannot comply with its duties as an employer, it also cannot demand performance of the employment contract by foreign football players and coaches. Potentially, if not for the Amended Temporary Rules, foreign football players and coaches could arguably have terminated their employment contract on this basis. As a corollary, if it would be sufficient ground for a termination of an employment contract, it would certainly be permissible to suspend an employment contract.
219. Overall, the Panel finds that the Amended Temporary Rules are not in violation of Ukrainian or Swiss law and that FIFA did not go beyond its mandate in issuing the Amended Temporary Rules.
220. Consequently, the Panel finds that the Appealed Decision was not issued *ultra vires*.

***iv. Was the Appealed Decision issued in violation of Article 101 TFEU?***

221. Article 101 TFEU provides as follows:

*“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or*

*according to commercial usage, have no connection with the subject of such contracts.*

2. *Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*
3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
  - *any agreement or category of agreements between undertakings,*
  - *any decision or category of decisions by associations of undertakings,*
  - *any concerted practice or category of concerted practices,**which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
  - (a) *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
  - (b) *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”*

222. Shakhtar summarised the expert report of Prof. Cattaneo as follows:

*“The Appealed Decision is capable of negatively conditioning the competition on the market to such an extent that it can be considered a restriction by object;*

*In effect, the Appealed Decision is capable of significantly affecting the nature, intensity and pattern of competition between the affected clubs and the other clubs in the European market for the transfer of players;*

*The Appealed Decision is not suitable and necessary to achieve the objectives; and*

*The Appealed Decision is not a proportionate means to achieve its objective, and affects the integrity of competitions.”*

223. FIFA justifies the Appealed Decision with, *inter alia*, the following reasoning:

*“[T]he Appealed Decision was adopted in the context of the war in Ukraine, with its attendant urgency and risk to life and limb. Its objectives are to ensure legal certainty, whilst protecting the welfare of players and coaches and the interests of Ukrainian clubs. FIFA was reasonably entitled to consider that any consequential effects on competition were inherent in the pursuit of its objectives and proportionate to those objectives.”*

224. At the outset, the Panel is prepared to accept that FIFA is an association of undertakings in the sense of the TFEU, comprised of national member federations, including the UAF. This is confirmed in a judgment of the Court of First Instance of the European Union (the “General Court”) of 26 January 2005, in *Laurent Piau v.*

*Commission of the European Communities*, T-193/02 [2005] ECR II-209, para. 72.

225. FIFA maintains that Shakhtar failed to consider the requirements set forth in the jurisprudence of the Court of Justice of the European Union (the “CJEU”) in the *Meca-Medina* case, providing as follows:

“[...] *Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Art. [101(1)] [...] For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effect and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives [...] and are proportionate to them.*” (Case C-519/04 P, *Meca-Medina v Commission*, EU:C:2006:492, para. 42)

226. The Panel considers the afore-mentioned approach set forth in *Meca-Medina* to be the correct assessment and conducts its analysis on such basis.
227. Turning first to defining the relevant market that is allegedly affected by the Amended Temporary Rules, the Panel notes that Prof. Cattaneo concludes as follows in his expert report:

“*The relevant market for the Contested Rule is therefore the market comprising the supply and demand for services of football players for clubs capable of taking part to European competitions. [...] Indeed, the Contested Rule affects principally the market for the services of football players that participate in European competitions.*”

228. The Panel is not convinced that the market of the “*supply and demand for services of football players for clubs capable of taking part to European competitions*” is impacted by the Amended Temporary Rules. The supply is not affected, because the Amended Temporary Rules do not have as a consequence that there are less football players or coaches on the market. Nor is the demand affected, because the Amended Temporary Rules do not foreclose Shakhtar’s access to services of football players. Indeed, despite the Amended Temporary Rules, Shakhtar was still able to attract the services of two foreign football players. It may well be that foreign football players and coaches are less interested in being employed by Ukrainian clubs, but the Panel finds that the primary reason for this is the ongoing armed conflict, rather than the Amended Temporary Rules as such. The Panel does not see, and Shakhtar failed to establish, why the Amended Temporary Rules would make Ukrainian clubs less attractive for foreign football players and coaches.
229. Upon questioning at the hearing, Prof. Cattaneo modified the conclusion on his

definition of the relevant market, by arguing that the relevant market was the international transfer market of football players, as opposed to the market for the services of football players. It is true that Prof. Cattaneo did not entirely modify his position, because in his expert report he also maintained that “[f]or the purposes of assessing the Contested Rule, the relevant market for the product has to be identified as the international market for the transfer of players”. While no reference is made to the international market for the transfer of players in his conclusions, the Panel remarks that it is sufficiently clear that the transfer market for football players and coaches was a relevant part of his analysis.

230. However, the Panel finds that Prof. Cattaneo insufficiently addressed the particularities of the international market for the transfer of football players, which is characterised by elements that require a specific analysis. While the value of football players may be included in the balance sheets of football clubs, the business of transferring football players is obviously not the same as the purchase and sale of goods or commodities, not least because the players’ consent is required for the transfer.
231. In fact, unlike goods or commodities, football players themselves need to consent to their transfer, be it permanent or temporarily. Even though a football player’s transfer value may be estimated at tens or hundreds of millions of Euros and although two clubs may agree to transfer the player between them for a certain transfer fee, if such player refuses and opts to execute his employment contract until its expiration and refuses to extend it, he becomes a free agent and the club that held his registration does not receive any transfer fee.
232. Although the Panel is prepared to accept that the Amended Temporary Rules have a negative impact on Shakhtar’s business of transferring football players, there is no guarantee that football players registered with Shakhtar, who have invoked the Amended Temporary Rules to suspend their employment contracts, would otherwise have entitled Shakhtar to transfer fees. At best, Shakhtar has been deprived of the chance to monetize the transfer value of the foreign football players registered with it, which only equates to a loss of opportunity or chance.
233. In addition, according to FIFA, the alternative to the Appealed Decision was a floodgate of cases about possible termination under *force majeure* and that players involved in such disputes would face difficulties in finding new employment.
234. The Panel even goes a step further. The Panel finds that, generally, in a situation of war where the welfare of football players and coaches is clearly in danger, as is the case in the matter at hand, there is a significant likelihood that such hypothetical cases concerning the termination of employment contracts would be decided in favour of the foreign football players and coaches. This counterfactual scenario would likely have been more prejudicial to Ukrainian clubs than the current Amended Temporary Rules, as the foreign football players and coaches would then have been free agents right away, whereas under the Amended Temporary Rules they can only suspend

employment contracts, in principle requiring them to return after the suspension, following which Shakhtar potentially still has a chance to transfer the players and/or coaches concerned.

235. The Panel finds that the absence of a detailed assessment of such counterfactual scenario in Prof. Cattaneo’s report is fatal, as it does not put the Panel in a position to consider all relevant aspects in its assessment of whether the Amended Temporary Rules infringe Article 101 TFEU.
236. Furthermore, the Panel finds that it must be borne in mind that the Amended Temporary Rules are implemented in response to the Russian invasion of Ukraine and that the rules are only valid for a 1-year period. The Russian invasion put the livelihood and welfare of Ukrainian residents in jeopardy. As addressed above, the Panel finds that FIFA established that the Amended Temporary Rules are implemented to protect such persons, by permitting them to leave Ukraine and addressing the ensuing legal uncertainty that would flow from potential (but likely) employment-related disputes.
237. Generally, the Panel finds that protecting the welfare of foreign football players and coaches clearly outweighs the financial disadvantages arising from the Amended Temporary Rules for Ukrainian clubs (including Shakhtar).
238. As argued by FIFA, in assessing the compatibility of the Amended Temporary Rules with Article 101 TFEU, the Panel finds that the *“Joint statement by the European Competition Network (ECN) on the application of competition law in the context of the war in Ukraine”*, published on 21 March 2022, is relevant. This statement provides, *inter alia*, as follows:
- “Considering the current circumstances, cooperation measures to mitigate the effect of severe disruptions would likely either not amount to a restriction of competition under Article 101 TFEU/53 EEA or generate efficiencies that would most likely outweigh any such restriction. In any event, in the current circumstances, the ECN will not actively intervene against strictly necessary and temporary measures specifically targeted at avoiding the aforementioned severe disruptions caused by the impact of the war and/or of sanctions in the Internal Market.”*
239. The Panel finds that the Amended Temporary Rules fall in such category of *“necessary and temporary measures specifically targeted at avoiding severe disruptions”*.
240. What is more, the Amended Temporary Rules provided Ukrainian clubs and foreign football players and coaches with the possibility of deviating from the unilateral right to suspend employment contracts. No evidence is presented by Shakhtar demonstrating that it attempted to conclude such alternative arrangements with its foreign football players and coaches.

241. As to the proportionality *strictu sensu* of the Amended Temporary Rules, the Panel notes that Prof. Cattaneo maintains the follows:

*“FIFA’s margin of discretion is undisputed. In this regard, the use of such discretion is conditional on ensuring that any restriction is proportionate to its objective, and to the detriment caused to those suffering its effects. The level of scrutiny exercised by Panels and authorities should therefore focus on the procedure followed in the decision-making process, rather than on the substance of the decision. To this effect, to justify the proportionality of the restriction, the procedure must have considered the extent of the restrictive effects caused in the context of the decision taken, and the interests of those who are affected the most by the decision.”*

242. In this respect, FIFA maintains that Prof. Cattaneo’s suggestion to conduct some form of “procedural review” does not reflect the law and that it is not the function of competition law to impose or police procedural standards on sports governing bodies, nor should a substantively proportionate rule be struck down because the process of its adoption failed to meet some procedural standard.

243. In this respect, the Panel sides with FIFA. The key issue to be assessed by the Panel is whether the substance of the Amended Temporary Rules is proportionate in the light of Article 101 TFEU, not to examine whether procedural standards were complied with. In any event, as assessed above, the Panel finds that the procedural standards applicable were satisfied, since FIFA consulted ECA, the World Leagues Forum, FIFPro and UEFA. Even if the Panel followed Prof. Cattaneo’s suggestion to focus on the procedure rather than on the substance, the Panel would find that, given the consultation process undertaken, the margin of discretion afforded to FIFA in the matter is particularly wide.

244. Unlike argued by Shakhtar, on the basis of all the above, the Panel finds that the Appealed Decision was inherent in the pursuit of FIFA’s legitimate objectives and proportionate to them.

245. Consequently, the Panel finds that Shakhtar failed to establish that the Appealed Decision violated Article 101 TFEU.

***v. Was the Appealed Decision issued in violation of any rules or regulations of FIFA, Swiss law or general principles of law?***

246. Shakhtar maintains that it is aware that it carries the burden of proof in respect of its allegations in this respect and the privilege that FIFA enjoys governing itself pursuant to the autonomy of associations under Swiss law. However, Shakhtar relies on CAS jurisprudence in submitting that there are limits to this discretion:

*“In accordance with the fundamental Swiss legal principle of freedom of association (Vereinsautonomie), an association has the right to freely*



*organise itself and establish its own regulatory system, being thus free to establish the provisions that it deems convenient regarding its organisation and membership. This freedom of association involves not only the right to create its own rules, but also the right to apply and enforce these associative rules, being only these rights limited by the due respect to Swiss law and, in particular, to personality rights. It will only be possible for the CAS to review an association's decision in case it is unlawful because, for example, it entails arbitrariness, a misuse of its discretionary power, leads to discrimination or breaches any relevant mandatory legal principle or if the decision entails a violation of the association's own statutes and rules. In the framework of such an assessment, the CAS panel will always consider and check whether the decision taken by the association was necessary as a matter of last resort and if the limits of the decision does not go beyond the necessary in order to achieve the legitimate goal of the intervention.” (CAS 2018/A/5888, para. 6 of the summary at the outset of the abstract published on the CAS website)*

247. Shakhtar contends that a detailed analysis of FIFA Circular Letters No. 1800 and No. 1804 is required to assess whether the specific circumstances in which these were enacted should lead the Panel to conclude that the Appealed Decision is in violation of the FIFA Governance Regulations, fundamental principles enshrined in the FIFA RSTP, several constitutional freedoms, and material public policy in Switzerland.

248. The Panel accepts this premise and will in turn assess the various individual arguments raised in this respect by Shakhtar below, insofar as they have not been addressed already. The Panel notes that a certain overlap in legal reasoning is unavoidable considering the close correlation between the various arguments raised.

***a. Is the Appealed Decision issued in violation of the right to be treated equally and/or the prohibition against discrimination?***

249. In respect of this argument, Shakhtar primarily relies on Article 4 FIFA Statutes (entitled “*Non-discrimination, equality and neutrality*”), which provides as follows:

*“1. Discrimination of any kind against a country, private person or group of people on account of race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason is strictly prohibited and punishable by suspension or expulsion.*

*2. FIFA remains neutral in matters of politics and religion. Exceptions may be made with regard to matters affected by FIFA's statutory objectives.”*

250. Shakhtar also relies on Article 8 of the Swiss Constitution. This provision is entitled “*Equality before the law*” and provides as follows:

*“1. Every person is equal before the law*

2. *No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability.*”

251. It is clear that Annex 7 only applies directly to football clubs based in Ukraine and Russia and foreign football players and coaches employed by such clubs.
252. In that sense, clubs from Ukraine and Russia are treated differently from clubs based in other countries, where foreign football players and coaches do not have a regulatory right to unilaterally suspend their employment contracts.
253. However, the Panel finds that there are good reasons justifying FIFA’s approach. In particular, given the invasion of Ukraine by Russian armed forces, the livelihood and physical wellbeing of human beings in Ukraine was threatened. At the time of issuance of the Appealed Decision, this threat remained limited to Ukraine and Russia.
254. The damages incurred by Russian and Ukrainian clubs are primarily caused by the Russian invasion, not by FIFA’s introduction and extension of Annex 7 as such. Rather, the Panel finds that such damages had likely been more severe but for the introduction and extension of Annex 7. Indeed, had FIFA not introduced Annex 7, foreign football players and coaches would likely have decided to leave Ukraine in any event and terminate their employment contracts, invoking just cause. As indicated above, any individual case would have to be adjudicated and decided on its own merits, but the Panel finds that, given the imminent security threat, they would likely have been permitted to terminate their employment contracts, albeit probably without receiving any compensation – not because of any improper behaviour of Ukrainian clubs, but because of the threat to their welfare.
255. Against this background, the Panel does not consider it unreasonable for FIFA to have limited the scope of Annex 7 to the clubs from the two countries directly involved in the war.
256. Although this is certainly not the only armed conflict in the world, the Panel accepts FIFA’s explanation that the situation in Russia and Ukraine is special, given the significant number of foreign football players registered in those countries and the number of transfers taking place each year. FIFA’s allegation that Russia and Ukraine had a total of 250 incoming and 200 outgoing transfers in 2021 remained uncontested by Shakhtar.
257. By comparison, Palestine had 38 incoming and no outgoing international transfers in 2017, Ethiopia had 42 incoming and 8 outgoing, Yemen had 44 incoming and 13 outgoing, Eritrea had no international transfers, and Somalia only had 2 outgoing transfers.

258. In addition, the Panel finds that the situation in Ukraine and Russia can also be distinguished from other armed conflicts, because the war started quite abruptly and at a scale that indeed posed an immediate and significant security threat for human beings in Ukraine, including foreign football players and coaches. Armed conflicts in other countries may have been lingering for longer periods of time, permitting football players and coaches to weigh the advantages and disadvantages of being employed in a country at war. However, foreign football players and coaches employed in Russia and Ukraine at the time the war broke out could not reasonably have foreseen the risk of an armed conflict at the time of entering into their employment contracts.
259. To the extent the armed conflict in Russia and Ukraine is dealt with differently compared to other armed conflicts, the Panel is satisfied to accept that such different treatment is justified.
260. Consequently, the Panel finds that the Appealed Decision is not in violation of the right to be treated equally and/or the prohibition against discrimination.

***b. Is the Appealed Decision issued in violation of the legal principle of pacta sunt servanda?***

261. In respect of this argument, Shakhtar relies on Article 13 FIFA RSTP (entitled “*Respect of contract*”), which provides as follows:
- “A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.”*
262. Shakhtar also relies on Article 2 SCC, which provides as follows:
- “1. Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.  
2. The manifest abuse of a right is not protected by law.”*
263. The Panel finds that FIFA indeed set rules eventually falling to be applied with respect to employment relationships between Ukrainian clubs and foreign football players and coaches. However, it did so for justified reasons.
264. As recognised by Shakhtar, however, the legal principle of *pacta sunt servanda* is not absolute.
265. In particular, the Panel finds that the contractual stability was already jeopardised because of the armed conflict between Russia and Ukraine. FIFA merely attempted to address the consequences of said conflict by seeking to strike a general and fair balance between the interests of foreign football players and coaches fleeing Ukraine as a direct consequence thereof and Ukrainian clubs.
266. Again, the Panel finds that Annex 7 was not merely issued in favour of foreign football players and/or coaches and against Ukrainian clubs. Rather, FIFA attempted

to strike a general balance.

267. Insofar as Shakhtar argues that FIFA “*shattered to pieces the legitimate expectations and right of the former in transferring players*”, the Panel finds this to be exaggerated. First of all, FIFA did not take away Shakhtar’s right to transfer players. The Panel notes that such right does not exist in general terms, as it is in any case subject to the player’s consent. In addition, however difficult it is to transfer a player while his employment contract is suspended, and conceding that such condition would likely impact on the transfer fee received, the possibility of a transfer still exists. Further, the Amended Temporary Rules allow for individual contractual deviations from the right of foreign football players and coaches to suspend their contracts. Once such agreement is reached, Annex 7 loses its impact on the employment relationship at stake.
268. Insofar as the Appellant relies on Article 2 SCC, the Panel finds that Shakhtar might be entitled to invoke this provision in a dispute with foreign football players or coaches if it believes that they have disingenuously invoked Annex 7 to suspend their employment contracts. However, such potential abuse did not have to be specifically provided for in the Amended Temporary Rules, because it is already prohibited by Swiss law.
269. Consequently, the Panel finds that the Appealed Decision did not violate the legal principle of *pacta sunt servanda*.

***c. Does the Appealed Decision excessively curtail Shakhtar’s economic freedom and/or does it violate Shakhtar’s personality rights?***

270. In respect of this argument, Shakhtar relies on Article 27 of the Swiss Constitution, which provides as follows:
- “1. *Economic freedom is guaranteed.*
  2. *Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.*”
271. Shakhtar also relies on Article 27 SCC, which reads as follows:
- “1. *No person may, wholly or in part, renounce his or her capacity or his or her capacity to act.*
  2. *No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.*”
272. As addressed above in the context of the assessment of a potential violation of Article 101 TFEU, the Panel finds that the industry of transferring football players is somewhat peculiar. While a value corresponding to the services of players may be included in the balance sheets of football clubs, a transfer of a football player is

obviously not the same as the purchase and sale of goods or commodities, since, *inter alia*, football players need to consent themselves to their transfer, be it on a permanent or a temporary basis.

273. In addition, as indicated above, the implementation of the Amended Temporary Rules did not exclude Shakhtar from the transfer market. Indeed, despite the Amended Temporary Rules, Shakhtar was successful in acquiring the services of two foreign football players.
274. In any event, even without the introduction and/or extension of the Amended Temporary Rules, the transfer value of football players and/or coaches registered with Ukrainian clubs was likely impacted by the armed conflict already. Indeed, absent the implementation of the Amended Temporary Rules, the Panel finds that it was likely that foreign football players and coaches would have terminated their employment contracts with Ukrainian clubs, by invoking a just cause.
275. Finally, the Panel reiterates all the arguments set forth above with respect to the justification and proportionality of the measures implemented by FIFA in response to the armed conflict in Russia and Ukraine in temporarily curtailing the rights of Ukrainian clubs.
276. Consequently, the Panel finds that the Appealed Decision does not excessively restrict Shakhtar's economic freedom and/or is in violation of its personality rights.

***d. Does the Appealed Decision invalidly impact on the integrity of competitions?***

277. Although the Panel acknowledges that the Appealed Decision might impact on national competitions, in particular on the Ukrainian Premier League, it finds that the integrity thereof is not jeopardised.
278. Indeed, for domestic competitions in Ukraine, the impact of Annex 7 is in principle the same for all clubs. Although it is of course true that certain clubs have more foreign football players, or a coach, as employees than others, the rule applies equally to all.
279. In any event, the mere fact that one club has more foreign football players, or a coach, under contract than other clubs does not mean that all those foreign football players or coaches invoke Annex 7 to suspend their employment contracts. Also, Annex 7 specifically allows clubs to conclude alternative arrangements with foreign football players or coaches.
280. Likewise, if there is a consistent number of foreign football players and/or coaches leaving Ukraine, this is primarily caused by the armed conflict, and not because of Annex 7 as such. The foreign football players and coaches that have invoked Annex 7 might also have ceased performance of their employment contracts without the

introduction and extension of Annex 7.

281. In terms of international competitions, the Panel finds that Ukrainian clubs (including Shakhtar) are indeed treated differently in comparison with clubs from other countries. However, also here, the Panel finds that this is primarily caused by the armed conflict and not because of Annex 7 as such. Annex 7 is aimed at finding a general solution that allows foreign football players and coaches to leave Ukraine for safety reasons, while mitigating the negative consequences thereof for Ukrainian football clubs as much as possible.
282. Consequently, the Panel finds that the Appealed Decision does not invalidly impact on the integrity of competitions.

*vi. Is Shakhtar entitled to damages from FIFA?*

283. The Panel finds that the introduction and extension of Annex 7 was necessary to achieve the legitimate objectives of FIFA and proportionate to them. As a result, the Panel finds that Shakhtar is not entitled to damages from FIFA, because no illegal action, as committed by FIFA, has been established.
284. As a result, the Panel does not consider it necessary to assess whether Shakhtar suffered any damages and to what extent such damages arose from the Amended Temporary Rules, rather than from the Russian invasion.
285. Consequently, the Panel finds that Shakhtar is not entitled to damages from FIFA.

**B. Conclusion**

286. Based on the foregoing, the Panel holds that:
- i) The Bureau issued the Appealed Decision in accordance with all formal requirements set forth in the FIFA Statutes.
  - ii) The Appealed Decision was necessary and proportionate in the pursuit of a legitimate objective and is valid as such.
  - iii) While confirming the substantive validity of the Amended Temporary Rules, the Panel finds it to be important that Ukrainian clubs (including Shakhtar) have access to justice to seek a remedy in any potential disputes related to the Amended Temporary Rules.
  - iv) The Appealed Decision was not issued *ultra vires*.
  - v) Shakhtar failed to establish that the Appealed Decision violated Article 101 TFEU.
  - vi) The Appealed Decision is not in violation of the right to be treated equally and/or the prohibition against discrimination.
  - vii) The Appealed Decision is not issued in violation of the legal principle of *pacta*

*sunt servanda.*

- viii) The Appealed Decision does not excessively curtail Shakhtar's economic freedom and/or is in violation of its personality rights.
- ix) The Appealed Decision does not invalidly impact on the integrity of competitions.
- x) Shakhtar is not entitled to damages from FIFA.

**XI. COSTS**

(...).

\* \* \* \* \*

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by FC Shakhtar Donetsk on 11 July 2022 against the decision rendered by the Bureau of the FIFA Council on 20 June 2022 is dismissed.
2. The decision rendered by the Bureau of the FIFA Council on 20 June 2022 is confirmed.
3. (...).
4. (...).
5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Operative part notified: 13 January 2023

Date: 3 May 2023

## **THE COURT OF ARBITRATION FOR SPORT**

Prof. Luigi Fumagalli  
President of the Panel

Prof. Jan Paulsson  
Arbitrator

Prof. Dr. Ulrich Haas  
Arbitrator

Dennis Koolaad  
*Ad hoc* Clerk