Arbitration CAS 2020/A/6912 Cristian Nasuti v. AEK Athens FC & Fédération Internationale de Football Association (FIFA), award of 22 February 2021

Panel: Mr Rui Botica Santos (Portugal), President; Mr Gustavo Albano Abreu (Argentina); Mr Sofoklis Pilavios (Greece)

Football
Reopening of disciplinary proceedings closed for res judicata
Concept of res judicata
Principle of good faith
Form of a decision

1. ***Res judicata*** **is the legal principle that precludes a subsequent legal action involving the same claim, demand, or cause of action to be redecided once it has been judged / decided on the merits. The *res judicata* principle avoids the occurrence of two contradicting decisions, which would be contrary to public policy. *Res judicata* exists when there is (i) an identical claim from a substantive point of view; (ii) the same parties were involved in the proceedings; and (iii) the matter was solved based on the same facts and evidence at the time of the first judgment. This is the so-called triple identity test.**

2. **According to the principle of good-faith, citizens are protected in the legitimate trust they have in the declarations or the behaviour of authorities. These latter must not act in a contradictory or abusive manner. This principle, although stemming from public law, can be applied by analogy.**

3. **The form of a communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal. In principle for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addresses of the decision or other parties. A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects. An appealable decision of a sport association or federation is normally a communication of the association directed to a party and based on an *"animus decidendi"*, i.e. an intention of a body of the association to decide on a matter. A simple information, which does not contain any "ruling", cannot be considered a decision.**

I. PARTIES

1. Cristian Javier Nasuti ("Appellant" or "Player") is an Argentinean professional football player.

2. AEK Athens FC ("First Respondent", "New AEK", "New Entity" or the "Club") is a Greek football club incorporated in July 2014, which is affiliated to the Hellenic Football Federation ("HFF").

3. The Fédération Internationale de Football Association ("Second Respondent" or "FIFA") is an international governing body of football. FIFA exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, and players belonging to its affiliates. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code with headquarters in Zurich, Switzerland.

4. The Player, New AEK and FIFA are collectively referred to as the "Parties" and New AEK and FIFA collectively referred to as the "Respondents".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award ("Award") only to the submissions and evidence it considers necessary to explain its reasoning.

A. The dispute between the Player and the former football club AEK Athens FC

6. In 2010 the Player initiated an employment relationship with AEK Athens FC ("Old AEK" or "Debtor Club").

7. On 20 July 2012, for reasons that are not relevant for this appeal, the FIFA Dispute Resolution Chamber ("DRC") ordered the Old AEK – affiliated at that time to the HFF – to pay the Player, within 30 days as from the date of notification of the decision, the amount of EUR 176,000 plus 5% interest *p.a*, as of 1 April 2012 until the date of effective payment of the outstanding amount ("FIFA DRC Decision").

8. On 27 July 2012, the findings of the FIFA DRC Decision were communicated to the Player and Old AEK and none of them requested the relevant grounds. Therefore, the FIFA DRC Decision became final and binding.

9. On 11 March 2013, the Player informed FIFA that the Old AEK failed to comply with the FIFA DRC Decision.

10. On 2 May 2013, the FIFA Disciplinary Committee ("FDC") invited the Old AEK to comply with the FIFA DRC Decision or it would proceed with disciplinary sanctions against it.

11. On 2 August 2013, the HFF informed FIFA that the Old AEK was dissolved and was under liquidation. In consequence, the Old AEK was disaffiliated from the HFF.

12. On 9 October 2013, the FDC informed the Appellant that due to the disaffiliation of the Old AEK, it was no longer able to intervene in the enforcement of the FIFA DRC Decision ("FDC Decision of 9 October 2013"). FIFA sent to the Appellant the relevant correspondence exchanged with the HFF (including the contact of the liquidator) in order to assist the Appellant to take any legal actions he might have deemed appropriate. The Player did not appeal from this decision.

a. The dispute between the Player and the New AEK – based on "sporting succession"

13. The New AEK was incorporated in July 2014.

14. On 10 January 2015, the Appellant informed FIFA that the respondent was playing in the second division of the Greek League and requested the continuation of the disciplinary proceedings with the aim to enforce the FIFA DRC Decision.

15. On 26 February 2015, the FDC informed the Appellant that according to the information provided by the HFF, the Debtor Club was still disaffiliated and that the AEK participating in the Greek League was an amateur club, different from the Old Club and would not be able to proceed with the case ("FDC Decision of 26 February 2015"). The Player did not appeal from this decision.

16. On 9 November 2015, the Appellant insisted that the New Entity affiliated to the HFF was the same or the sporting successor of the Old Club.

17. On 16 March 2016, the FDC reinforced its previous decision, concluding that the New AEK was not the sporting successor of the Old Club ("FDC Decision of 16 March 2016"). The Player did not file an appeal against this decision.

18. On 27 May 2016 and, subsequently, on 28 November 2016 and on 21 January 2020, the Appellant insisted that the matter should be re-analysed as the New Club was the sporting successor of the Old AEK.

19. On 17 March 2020, FIFA notified the Parties of the decision of the FDC ("FDC Decision of 17 March 2020" or the "Appealed Decision"). The Appealed Decision states, *inter alia*, the following:

"(…) On behalf of the Chairman of the Disciplinary Committee, it is noted that the matter had already been dealt with by the Chairman of the Disciplinary Committee, as notified to the parties on 16 March 2016. Specifically, the Chairman of the Disciplinary Committee considered that the new club AEK FC, is "a new entity".

In light of the above, and after a careful analysis of all the facts and documents related to the present case, the Chairman of the Disciplinary Committee has decided that the claimant has not brought forward any new elements that may sustain the claim as to reopen the disciplinary proceedings in accordance with article 52 of the FIFA Disciplinary Code (2019 ed.), and, consequently, the above mentioned decision taken by the Chairman of the Disciplinary Committee on 16 March 2016 shall prevail. This must be understood in line with the general legal principle of res judicata, in the extent that the Disciplinary Committee is not in a position to deal again with the merits of the present matter.

As a consequence of the foregoing and on behalf of the Chairman of the Disciplinary Committee, we inform you that the present disciplinary proceedings remain closed.

Finally, please note that the present decision is final and subject to the legal remedies foreseen by article 49 of the FIFA Disciplinary Code (2019 ed.). (…)".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 5 April 2020, in accordance with Article R47 of the Code of Sports-related Arbitration ("CAS Code"), the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport ("CAS") challenging the Appealed Decision.

21. On 16 April 2020, in accordance with Article R51 of the CAS Code, the Appellant filed the Appeal Brief with the CAS.

22. On 28 July 2020, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel had been constituted as follows:

    President: Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal

    Arbitrators: Mr Gustavo Albano Abreu, Professor, Buenos Aires, Argentina (nominated by the Appellant)

    Mr Sofoklis Pilavios, Attorney-at-Law, Athens, Greece (jointly nominated by the Respondents)

23. On 26 and 31 August 2020, in accordance with Article R55 of the CAS Code, the New AEK and FIFA filed their respective Answers with CAS.

24. On 15 September 2020, after consultation of the Parties, the Panel decided to hold a hearing on 21 October 2020 by video-conference.

25. On 28 September 2020, the CAS Court Office issued the Order of Procedure, which was duly signed by the Parties.

26. On 2 October 2020, the Panel ordered FIFA to produce an electronic copy of the complete disciplinary case file of this appeal ("FIFA File").

27. On 5 October 2020, FIFA sent the link with the access to download the FIFA File.

28. On 21 October 2020, a hearing was held by video-conference via Cisco Webex. The following persons attended the hearing in addition to the Panel and Mr António de Quesada, as CAS Counsel/CAS Head of Arbitration:

1. For the Appellant

- Mr Cristian Javier Nasuti – Appellant
- Mr Ricardo Frega Navia - Counsel
- Mr Sebastian Borras - Counsel
- Ms Marina Tracey – Interpreter
- Mr Alberto Larrea – Interpreter

2. For the First Respondent

- Mr Konstantinos Zamberis – Counsel

3. For the Second Respondent

- Mr Jaime Cambreleng Contreras - Head of Litigation
- Mr Roberto Nájera Reyes – Senior Legal Counsel

29. As a preliminary remark, the Parties were requested to confirm not having any objection to the composition of the Panel and to confirm that all relevant documents of the appeal were in the file.

30. The Parties were given the opportunity to present their case and make their submissions and arguments. After the Parties' closing submissions, the hearing was closed, and the Panel reserved its detailed decision to this Award.

31. Before the hearing has been concluded, both Parties expressly stated that they had no objection to the way that these proceedings have been conducted and that the equal treatment of the Parties and their right to be heard had been respected.

IV. THE PARTIES' SUBMISSIONS

32. The following summary of the Parties' positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Panel, however, has carefully

considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows:

a. The Appellant's submissions

33. The Appellant prayed the below reliefs in its Appeal Brief:

"(…) issuing an award that revokes [the FIFA DECISION], *and thereby imposing the existence of the figure of the sports successor against the AEK, and therefore the pertinent sanction is fixed, which this part requests is that the aforementioned club be prohibited from hiring soccer players internally or internationally for the period of 3 transfer windows; or, as the case may be, it is resolved that once the figure of the sports successor has been established by this Court, in the aforementioned award, FIFA is obliged to stablish said specific sanction.*

In the alternative, (…) it is requested that the aforementioned decision be annulled, and that the FIFA Disciplinary Commission should also be imposed to resolve, on the one hand, the issue of the sports successor, and also in the case if admitted, the appropriate sanction is imposed. On the other hand, it is requested that the appealed parties be ordered to pay the costs and costs of this procedure. (…)

This appeal DOES NOT PURSUE ANY ECONOMINC ISSUE. IT ONLY PRETENDS THAT A DISCIPLINARY DECISION BE REVOKED, AND A SANCTION IS PROCESSED, OR IN ITS CASE ORDER FIFA TO RESOLVE THE ISSUE OF SPORTS SUCESSOR, ATTENTIVE TO THE SATE OF DENIAL OF EXISTING JUSTICE IN ITS NOW APPEALED DECISION. (…)

REQUEST:

1) The grounds for this appeal are considered timely and presented.

2) The aforementioned documentary evidence is considered as presented.

3) The transfer to the two appealed parties are ordered.

4) Resolve that the total costs of this procedure are one thousand Swiss francs.

5) Appropriately, an award is issued in which the request is admitted in the terms of what is stated in [above]*".*

34. The Appellant advanced the following grounds in support of his appeal:

- The Appellant had a favourable FIFA decision (i.e the FIFA DRC Decision) against the Old AEK that should be complied by the New AEK.

- The New AEK has not complied with the FIFA DRC Decision.

- The New AEK is the sporting successor of the Old AEK.

- The FDC "communication" dated 16 March 2016 is not a formal decision.

- FDC has never issued a formal decision to resolve the "sporting successor" of the New AEK.

- The FDC "communication" of 17 March 2016 does not have *"the content and the formalities of* [a] *decision (…)"*.

- The Player has been insisting with FDC to decide on the sporting succession between the New AEK and the Old AEK and, so far, no decision has been taken. This represents also a denial of justice, because the Player has never received a proper response / decision from FDC on this matter.

- The FIFA Disciplinary Committee has never resolved the issue of "sports successor" regarding the New AEK. FDC has always maintained the issue of "sporting successor" open, without expressing its position on the matter. FDC was based on its previous "communication" of 16 March 2016 which in turn was only based on the HFF information that the Old AEK was dissolved and lost its affiliation to the HFF.

- The Appellant's request is based on the issue of sporting successor. During the past four years, the FDC has never, in previous procedures, issued any decision and has always kept the case open for decision.

- There is *"(…) an absolute identity of the club's history; the same sporting achievements; the same stadium; the same city; same club name; same coat of arms; same colours and the same sporting conditions. All this is practically proven with the information that comes from the official website of that club, and that is accompanied as evidence"*. For this reason, New AEK should be the sporting successor of the Old AEK and the FIFA DRC Decision must be enforced against it.

B. The First Respondent

35. The First Respondent filed its Answer to the Appeal Brief and made the following prayers for relief:

"1) Rejects the Appellant's appeal in its entirety.

2) Confirms that the principle of res judicata applies in the present matter and that the FIFA Disciplinary Committee could not deal again with the merits of the present matter.

3) Establish that the costs of the present arbitration procedure shall be borne by the Appellant.

4) Rule that the Appellant must pay the First Respondent a contribution towards its legal fees and expenses.

Or alternatively.

5) To rule that the appeal is vague and lacks legal merit or, alternatively, that the First Respondent is not the successor of the Old Entity and it is not liable to pay any amount to the Appellant.

4) To establish that the costs of the present arbitration procedure shall be borne by the Appellant.

5) To rule that the Appellant must pay the First Respondent a contribution towards its legal fees and expenses.

Or alternatively

6) To rule that the Appellant is not entitled to receive any amount from the First Respondent and to request that sanctions be imposed on the First Respondent due to his lack of diligence in recovering his credit.

7) To establish that the costs of the present arbitration procedure shall be borne by the Appellant.

8)To rule that the Appellant must pay the First Respondent a contribution towards its legal fees and expenses".

36. The submissions of the First Respondent, in essence, may be summarise as follows:

a. Preliminary remarks

37. The First Respondent clarified that it has no knowledge of the facts of the case before 2014, since it has no connection with the Old AEK. For this reason, their comments on the referred facts until 2014 are only based on the documents produced by the Appellant, from limited information retrieved by the HFF and from the public registries.

38. The First Respondent is a Greek football club that has been incorporated in the summer of 2014 and is, since then, an affiliated member of the HFF.

39. The Old AEK was disaffiliated from the HFF and the First Respondent is a new legal entity.

40. Following the incorporation of the First Respondent, the Appellant started to send requests to the FDC for the "enforcement" of the FIFA DRC Decision, as alleged sporting successor of the Old Entity. However, the Appellant's claim against the New AEK has already been decided and the New AEK is not the sporting successor of the Old AEK.

41. A similar case involving the New AEK was already decided and dismissed by the CAS (CAS 2019/A/6436). In this case, another player tried – as the Appellant is trying – to enforce a DRC decision against it on the alleged sporting successor between Old AEK and New AEK.

b. The matter is covered by res judicata

42. The Appellant is wrong in saying that the letter of the Chairman of the FDC dated 16 March 2016 is not a formal decision but a simple "communication".

43. The "communication" of 16 March 2016 made by the Chairman of the FDC was clearly a motivated decision, since the Chairman of the FIFA Disciplinary Committee proceeded with a careful analysis of all the facts, evidence and circumstances of the case.

44. The form of communication of the decision of the FDC is irrelevant and does not affect its validity. This understanding is supported by the long-standing jurisprudence of CAS (CAS 2015/A/4162; and CAS 2015/A/4266).

45. As the First Respondent states in para. 23 of its Response *"(…) it is generally accepted that a letter containing a ruling that affects and intends to affect the legal situation of a party, is actually a decision (that can be appealed) even if it is dressed in the form of a letter"*.

46. The Appellant did not appeal of the FDC Decision of 16 March 2016 and, of 21 January 2020 requested FDC (once more) to open disciplinary proceedings against the New AEK for alleged failure to comply with the FIFA DRC Decision, on the basis of an alleged sporting succession between the Old AEK and the New AEK. The Appellant invokes the same arguments and sustain his request on the same evidence assessed by the Chairman of the FDC Decision of 16 March 2016.

47. In light of the above, the New AEK agrees with FDC that the *res judicata* principle applies to the present matter and, as a result, FIFA was not in position to deal with the same matter again. It also agrees that the Appellant had not brought forward any new evidence that could justify the re-opening of the disciplinary proceedings or to overturn the decision that the New AEK is not the sporting successor of the Old AEK.

c. The Appeal is vague and lacks necessary elements and evidence and substantiation

48. The appeal should be dismissed as groundless. The appeal is vague and lacks evidence. The Appellant did not produce any evidence regarding the Club's failure to respect a FIFA decision.

49. CAS is not in a position to assess the validity of the Appellant's arguments, because has not produced any evidence regarding: (i) the existence of an outstanding debt of the New AEK towards the Appellant; (ii) a FIFA decision confirming that the New AEK has not respected a relevant FIFA decision; and (iii) the existence of the alleged sporting succession between the Old AEK and the New AEK.

d. The lack of standing to be sued

50. There is a clear lack of connection between the Appellant and the First Respondent.

51. The First Respondent has no standing to be sued in the present matter, neither before FIFA nor before the CAS, since it is a completely different entity from the Old AEK and not a successor of any obligations and/or rights of the Old AEK.

52. The Appellant is trying to mislead the FDC and the CAS by insisting that the First Respondent is the sporting successor of the Old AEK and, for this reason, is obliged to assume the debts of the dissolved Old AEK.

53. However, the New AEK cannot be sanctioned and forced to pay an alleged outstanding debt of a different and unrelated legal entity without any direct or indirect link between them and without any judicial decision determining that the New AEK was liable towards the Player.

e. No existence of sporting succession

54. This case does not fall under Article 15.4 of the FIFA Disciplinary Code (ed. 2019). This provision only sets an indicative criteria that should be taken into consideration by the FDC – on a case by case basis – in order to decide whether a club shall be deemed as a sporting successor of another club or not.

55. The FIFA and CAS jurisprudence case regarding this issue are significantly different of those in present case, because the New AEK did neither acquire the license of the Old AEK (in order to continue participating in the top division of the Greek football) while avoiding at the same time the payment of its obligations, nor had acquired in an auction or otherwise the assets (players, federative rights, etc) of the Old AEK.

56. There is no uninterrupted participation in the first division where the Old AEK was participating. The New AEK is not owned and/or controlled by the same owner or the same management to circumvent its obligations and continue its operation without any interruption and without liabilities, as if nothing happened.

57. The sporting continuity of the Old AEK was ceased, as this entity entered into liquidation due to its severe financial problems.

58. The starting point of the New AEK was as an amateur association AEK Athens, started in the lowest division of Greek football. Then, the New AEK, as from its incorporation, participated in the second division following promotion of the Amateur Association AEK Athens from the third division and, only then it was promoted to the Superleague.

59. If there was any succession between clubs, such succession would primarily occurred between the Old AEK and the Amateur Association AEK Athens that started playing in the amateur third division, following the Old AEK's entering into liquidation and disaffiliation from the HFF.

60. In the landmark FDC decision number 200216 it was noted:

"(…) CAS already considered that a "new" club had to be considered as the "sporting successor" of another one in a situation where a) the "new" club created the impression that it wanted to be legally bound by the obligations of its predecessor, i.e. the "old" club, b) the "new" club took over the licence or federative rights from the "old" club and c) the competent federation treated the two cubs as successor of one another. By the same token, a "sporting succession" is the result of the fact that 1) a new entity was set up with the specific purpose of continuing the exact same activities as the old entity, 2) the "new" club accepted certain liabilities of the "old" club, 3) after the acquisition of the assets of the "old" club, the "new" club remained in the same city and 4) the "new" club took over the license or federative rights from the "old" club".

61. The above criteria are not met in the present case.

62. It is true that the New AEK uses the same name and a similar logo of the Old AEK. This is due to the history of the club and to the fact that the amateur association AEK Athens holds the 10% of the shares of the New AEK and allows the New AEK to do so, on the basis of a pertinent concession by the said amateur association against a considerable remuneration.

63. It is true that the New AEK is using the Olympic Stadium of Athens for its home matches, but for such use pays an annual fee. This stadium is also used by Panathinaikos FC which is also paying a rent fee.

64. Several FIFA jurisprudences confirm the position of the New AEK, such as FIFA DRC decision of 18 February 2016; and FIFA Disciplinary Committee decision 150155 of October 2019.

65. Finally, the First Respondent points out that UEFA has always accepted the New AEK in its competitions without raising any objections.

f. The Appellant's lack of diligence in satisfying his claim

66. Even if the New AEK was the "sporting successor" of the Old AEK, the Player would be deprived of its claim against the New AEK, because he has not been diligent to satisfy his credit by claiming his rights within the bankruptcy procedure. As explained by the Panel in para. 31 of the CAS 2011/A/2646:

"(…) if the player would have received the sum of his credit in case he had duly claimed for it in the bankruptcy proceedings, but it was at least a feasible theoretical possibility that could have happened (especially taking into account the privileged nature of his credit) and which would have provoked that the order of payment issued by the FIFA DRC was complied and thus, that the sanction imposed in the Decision become groundless. (…)".

67. The above understanding is also supported by the FIFA decisions 171380 (passed by the Deputy Chairman of the FDC on 15 October 2019) and FIFA decision 170528 PST (passed by the Deputy Chairman of the FIFA Disciplinary Committee on 20 November 2019).

68. Under Article 118A (para. 4) of the Law 2725/1900 (Law on Professional Sports), *"[t]he Presidents of the Board of Directors, the general managers, the directors, the CEOs and the Liquidators of the Sports S.A.s and of the Departments of Remunerated Athletes or clubs, which participate in the professional championships, are liable jointly and severally with the respective legal entity for the debts of the said legal entity that are created during the period of their administration / term of office"*. This law was implemented to assist employees and other creditors of a sport legal entity to satisfy their claims. The Player could use this mechanism to satisfy his credit, as other players in the same conditions did.

C. The Second Respondent | FIFA

69. FIFA filed its Answer to the Appeal Brief and made the following prayers for relief:

"1) rejecting the requests for relief sought by the Appellant.

2) confirm the appealed decision.

3) alternatively, referring the case back to the Disciplinary Committee for a new assessment of the case concerning the legal and/or sporting succession between the New Club and the Debtor Club.

4) in any case, ordering the Appellant to bear the full costs of these arbitration proceedings".

70. The submissions of the Second Respondent, in essence, may be summarise as follows:

a. Preliminary remarks

71. The background of this appeal is related to the enforcement of the FIFA DRC Decision, as per Article 64 of the FIFA Disciplinary Code (ed. 2011) and, the main issue to be decided, is whether the FDC can review the Appellant's claim that it is related on same facts and evidence that have already been considered on previous occasions.

72. FIFA starts by clarifying that the FDC is an enforcement authority that is not in position to review or modify the substance of a previous decision taken by another FIFA body, nor a CAS decision or a decision passed by a national ordinary court based on national public law as is the case of bankruptcy law.

b. The decision of the Chairman of the FDC Decision of 17 March 2020 is a FIFA decision subject to appeal before CAS

73. The Appealed Decision is an unliteral act from the FDC and affects the legal position of the Appellant by deciding not to enforce the FIFA DRC Decision and to maintain the disciplinary procedure closed.

74. CAS jurisprudence has established in several awards that the form of the decision is irrelevant. The fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal.

75. The Panel shall dismiss the Appellant's allegations in regard to the lack of form of the decisions.

c. The Old AEK's bankruptcy

76. The HFF informed them that the Old AEK was dissolved due to a liquidation process and was no longer affiliated to the HFF. As evidence of the Old AEK's bankruptcy, the HFF enclosed two documents from the Greek Ministry of Development & Competitiveness.

77. The decision to close the disciplinary proceedings against the Old AEK was taken under Article 107(b) FDC 2011 and this decision was fully in line with the FIFA Regulations and the CAS jurisdiction.

78. Even if the Old AEK had remained affiliated after the bankruptcy proceedings, it would not have been possible for it to comply with the FIFA DRC Decision, as this would be a circumvention of the Greek Court's decisions which, as in most legal systems, could have led to potential civil or criminal judicial proceedings in Greece.

79. CAS has already confirmed that the purpose of the disciplinary sanction becomes moot if the debtor is under some impossibility to comply with the obligation from the outset. In such case the disciplinary measure according to Article 64 of the FDC is deprived of any meaning.

d. The principle of res judicata and the previous FIFA Disciplinary Decisions

80. The *res judicata* is *"(…) the general legal principle which prevents a judgment involving the same parties and the same object from being discussed over again by a court or tribunal. The application of the res judicata principle avoids the occurrence of two contradicting decision, which would be contrary to public policy. (…) there is a res judicata situation when there is (i) a claim identical (from a substantive point of view) to another that has already been decided, (ii) the same parties were involved in such outcome, and (iii) the matter was solved based on the same facts existing at the time of the first judgment".*

81. The FIFA Disciplinary Committee concluded that it was not in conditions to re-open the case, because previous decisions have already dealt with the same matter in a final and binding way, i.e. the matter was already *res judicata*.

82. The above-mentioned elements are met in the previous FDC decisions:

(i) The FDC Decision of 9 October 2013:

> *"(…) We refer to the above-mentioned matter and would like to inform you about the correspondence dated 2 August 2013 from the Hellenic Football Federation, a copy of which we herewith enclose for the perusal of the Mr. Cristian Javier Nasuti, for his information and any action he may deem appropriate.*

In this respect, we have noted from the above-mentioned correspondence that – amongst others – the Greek club A.E.K Athens FC is no longer affiliated to the Hellenic Football Federation by stating that it is "no longer affiliated with the HFF, due to dissolution / entering in liquidation process and consequent and consequent relegation to amateur divisions.

On account of the above, we must inform you that, as a general rule, our services and competent decision-making bodies (i.e. the Player´s Status Committee) cannot deal with cases involving clubs which are not affiliated to their Association any longer.

As a consequence, on behalf of the chairman of the Disciplinary Committee, we regret having to inform you that we do not appear to be in a position to further proceed with the case of the reference in which the club A.E.K. Athens FC is involved.

Finally, we would like to add that our statements made above are based on the information we received from Hellenic Football Federation only and hence are of a general nature and without prejudice whatsoever. (…)".

(ii) The FDC Decision of 26 February 2015:

"(…) We refer to the above-mentioned matter and acknowledge receipt of the correspondence from the legal representative of Mr. Cristian Javier Nasuti dated 10 January 2015 and received on 10 February 2015, the contents of which have received our full attention and copies of which are enclosed for the other party´s attention.

In this regard, we take in particular due note that Mr. Cristian Javier Nasuti claims that the Club A.E.K Athens FC is actively participating in the second division, namely in the Greek Football League and is therefore requesting to proceed with the disciplinary proceedings opened against the club in question.

In response to Mr. Cristian Javier Nasuti's query, we wish to refer to the correspondence dated 3 December 2013 from the Hellenic Football Federation, herewith enclosed.

In this respect, it can be in particular noted from said correspondence that the Greek club A.E.K. Athens FC "is already non-existent" and that "the club currently competing in the Amateur National Division is the amateur founding association AEK, which is a completely different and distinctive legal entity, having a different fiscal registration number from the dissolved FSA".

Bearing in mind the foregoing information from the Hellenic Football Federation, the club A.E.K. Athens FC – party to the present matter – does no longer exist and the affiliated club called AEK Athens currently competing in the Greek Football League is a different legal entity.

In view of the foregoing, the affiliated club AEK Athens currently competing in the Greek Football League is not a party to the above-mentioned matter.

On account of the above, we regret having to inform you once again that we do not appear to be in a position to further proceed with the case of the reference in which the club A.E.K. Athens FC is involved.

Finally, we would like to add that our statements made above are based on the information we received from Hellenic Football Federation only and hence are of a general nature and without prejudice whatsoever. (…)".

(iii) The FDC Decision of 16 March 2016:

"(…) We refer to the above-mentioned matter and acknowledge receipt of Mr. Cristian Javier Nasuti´s documentation provided on 9 November 2015 copy of which is hereto enclosed for your information.

In this regard, we hereby inform the parties that the chairman of the Disciplinary Committee, after considering all the facts and documents related to the present case, observed that, according to the letter of the Hellenic Football Federation dated 26 October 2015 (hereto enclosed), the club AEK Athens FC involved in the matter at stake had to be dissolved and lost its affiliation to the Hellenic Football Federation. Therefore, it remains that the club called AEK Athens that is currently competing in the Greek first division is a new entity.

As a consequence of the foregoing, we must inform you that, as a general rule, our services and decision making-bodies (i.e. the Player´s Status Committee and Dispute Resolution Chamber as well as the Disciplinary Committee), cannot deal with cases involving clubs which are not affiliated to their association any longer.

In this context, we regret having to inform you once again that we do not appear to be in a position to further proceed with the investigation in the present case.

Finally, we would like to add that our statements made above are based on the information we received from Hellenic Football Federation only and hence are of a general nature and without prejudice whatsoever. (…)".

e. The Appellant's claim is res judicata

83. The Appellant's claim is sustained on the facts that the Old AEK and the New AEK (i) have the same history; (ii) have the same achievements; (iii) have the same name and logo; (iv) use the same stadium; and (v) have the same identity.

84. The Player did not provide any new element that could lead FDC to take a different decision. For FIFA Disciplinary Committee it was already clear that:

"a) The New AEK was "currently participating in the Superleague Greece Championship" as the HFF established in its letter of 26 October 2015;

b) As was stated in AEK's letter of 4 December 2015, the New AEK and the [Old AEK] *shared the same name because the New AEK was paying a concession for that purpose;*

c) The same AEK letter of 4 December 2015, contained the logo of the [New AEK] *which did not have any obvious differences from the one of the* [Old AEK]*;*

d) The address of the AEK stadium – i.e the Olympic Athletic Centre of Athens (OAKA) – was already established in the footnote of AEK's letter of 4 December 2015".

85. The Player did not even attempt to appeal the previous decision and for this reason they become final and binding. The Player lost his right to challenge the outcome of the previous FDC decisions.

86. If we compare the elements of the FDC Decision of 16 March 2016 and 17 March 2020, we conclude that both claims involved/are related to: (i) the same parties, i.e. the New AEK and the Player; (ii) the same claim/request, i.e. the enforcement of the FIFA DRC Decision; (iii) the same facts, i. e the Old AEK is in bankruptcy and disaffiliated; and (iv) the same decision, i.e. not to re-open the disciplinary proceedings against the New AEK.

f. The Appellant's arguments related to the succession of New AEK

87. In the claim decided on 16 March 2016, the Player insisted that New AEK was affiliated with the HFF and had been participating in the Greek Super League since 2015 and, for this reason, the New AEK is the sporting successor and the FIFA DRC Decision should be enforced against it.

88. However, the Appellant has not provided any new evidence – only copies of the club's website and league's standings and FIFA has taken into consideration that HFF clarifications that *"(…) clarified the differences between the* [Old AEK] *and the New AEK that was participating in the Greek League, inter alia, that:*

a) Both were totally different legal entities;

b) Both were legally recognized by the Greek authorities;

c) Both had different TAX Registry numbers;

d) Both had different Commercial Registry numbers;

e) There were operating independently of each other;

f) They had different administrations, assets and liabilities. (…)".

89. The Appellant's arguments related to the successor of New AEK are the essentially the same as those taken in account by the FIFA Disciplinary Committee on 16 March 2016, which become final and binding.

90. On 5 December 2015, the New AEK had confirmed to FIFA that:

"a) Did not have any links with the [Old AEK] with the exception of the brand and name, which were licenced by the AEK amateur club which, in turn, was receiving some amounts from the New AEK for such concession;

b) The [New AEK] was first incorporated in 2014;

c) That it did not assume any rights or obligations of the [Old AEK];

d) That the creditors of the [Old AEK] could resort to the Greek courts which have recognized the lack of any relationship between both clubs; and

e) Therefore, the New AEK could not be responsible for any of the actions performed by the [Old AEK]".

g. Conclusion

91. In conclusion, FIFA maintains the following understanding:

(i) The impossibility to enforce a monetary decision against a bankrupt, disaffiliated and non-existent club – FDC Decision of 9 October 2013;

(ii) The Old AEK was still disaffiliated and that the competing club in 2015 was a different and an amateur club – FDC Decision of 26 February 2015;

(iii) The lack of elements and evidence to conclude that the New AEK is the sporting successor of the Old AEK – FDC Decision of 16 March 2016;

(iv) The lack of new elements to reopen the case – the Appealed Decision.

92. The Chairman of the FDC arrived to the correct conclusion when considering that the Player had not provided any evidence at this point to prove his allegations.

93. FIFA restate its position in the Appealed Decision and states that the Appealed Decision was correct and in line with the *res judicata* principle.

V. JURISDICTION OF THE CAS

94. Article R47 of the 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.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

95. The jurisdiction of CAS is based on Article 58.1 of the FIFA Statutes and is not disputed by the Parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the parties.

96. It follows that the CAS has jurisdiction to hear this dispute.

VI. APPLICABLE LAW

97. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

"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".

98. In addition, Article 57(2) of the FIFA Statutes stipulates 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".

99. As such, the Panel is satisfied to primarily apply the various regulations of FIFA, in particular the FIFA Disciplinary Code and, subsidiarily, Swiss law shall be applied should the need arise to fill a possible gap or *lacuna* in the various regulations of FIFA.

VII. ADMISSIBILITY

100. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

101. Article 58 of the FIFA Statutes read as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".

102. The Panel notes that the admissibility of the Appeal is not contested by the Parties. The letter of the FIFA Disciplinary Committee was notified to the Appellant on 17 March 2020 and that the Statement of Appeal was filed on 5 April 2020, *i.e.* within the 21-day deadline fixed under Article 58 of the FIFA Statutes.

103. It follows that the Appeal is admissible.

VIII. MERITS OF THE APPEAL

104. This Appeal has been filed against the Appealed Decision by which the FDC decided to close the Appellant's requested disciplinary proceedings against the New AEK, based on the fact that the same issue had already been assessed on the previous occasions.

105. The Parties have raised a few legal issues for the Panel's determination, but the main procedural issue that requires the preliminary attention of the Panel is the question whether FDC can review or reopen disciplinary proceedings against the New AEK, i.e whether the matter under the scope of this Appeal is covered by *res judicata*.

106. In case the *res judicata* argument is dismissed, then the Panel will address the other legal issues raised by the Parties, namely (i) whether the appeal is vague, lacks necessary elements, evidence and substantiation; (ii) whether the New AEK has or not standing to be sued; (iii) whether the New AEK is the sporting successor of Old AEK; (iv) whether CAS has authority and powers to enforce the FIFA DRC Decision; and (v) whether sporting sanctions can be imposed on New AEK.

107. The Panel will start by analysing the issue of whether the subject of this appeal is covered by *res judicata*. In doing so, the Panel will take into consideration the following matters: (i) the relevance of the *res judicata* principle in the appeal; (ii) the concept of *res judicata*; (iii) are the previous FDC decisions – in particular the FDC Decision of 16 March 2016 – considered as valid and enforceable decisions; (iv) what is the matter under the scope of the previous FDC decisions; (v) what is the impact of the previous FDC decisions in this appeal – in particular the FDC Decision of 16 March 2016 – and the effects of the *res judicata* principle; and (vi) the relevance of previous CAS jurisprudence – CAS 2019/A/6435.

A. Is the matter under the scope of this Appeal covered by *res judicat*a?

A.1. The relevance of the res judicata principle in the Appeal

108. The Respondents had raised the defence that the Appellant's request had already been adjudicated with *res judicata* effect by previous FDC decisions (in particular the FDC Decision of 16 March 2016) and that the Parties are bounded by such decisions.

109. The Appellant's position is that FDC had never decided the matter before, since the FDC Decision of 16 March 2016 is not a formal decision, but a mere "communication". In the Appellant's views, there is no previous FDC decision on the matter and the *res judicata* principle is not applicable. FDC has always kept open the Player's claim in relation to the "sporting successor" of the New AEK.

A.2. The concept of res judicata

110. *Res judicata* is the legal principle that precludes a subsequent legal action involving the same claim, demand, or cause of action to be redecided once it has been judged / decided on the merits.

111. The *res judicata* principle avoids the occurrence of two contradicting decisions, which would be contrary to public policy (MAVROMATI D., *Res judicata* in sports disputes and decisions rendered by sports federations in Switzerland, CAS Bulletin 2015/1).

112. The *res judicata* effects have also been assessed by the CAS jurisprudence in several awards. The Panel highlights the following CAS decisions in which it is well explained the concept and legal effects of the *res judicata* principle:

CAS 2013/A/3256:

"138. The Panel observes that the procedural concept of res judicata is defined in Swiss law. (OBERHAMMER/NAEGELI, in OBERHAMMER/DOMEJ/HASS (Ed), Commentary on Swiss Civil Procedure, 2nd ed. 2014, Art. 236, no. 39 et seq.). Accordingly thereto res judicata has two elements:

1) The so-called "Sperrwirkung" (prohibition to deal with the matter = ne bis in idem). The consequence of this effect is that if a matter (with res judicata) is brought again before the judge, the latter is not even allowed to look at it, but must dismiss the matter (insofar) as inadmissible. It is for this reason – e.g. – that article 59(2) of the swiss Federal Code of Civil Procedure (hereinafter: the "CCP") provides that a claim must be rejected as inadmissible, if the matter falls under res judicata.

2) The so-called "Bindungswirkung" (binding effect of the decision). According thereto, the judge in a second procedure is bound to the outcome of the matter decided in res judicata. The binding effect is only of interest, if the judge asked second has to deal with a preliminary question that has been decided finally by the first judge. (…)".

CAS 2016/A/4408:

"81. There is res judicata when the claim in dispute is identical to that which was already the subject of an enforceable judgments (identity of the subject matter of the dispute). This is the case when in both litigations the same parties submitted the same claim to the court on the basis of the same facts. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated (ATF 140 III 278 at 3.3; ATF 139 III 126 at 3.2.3).

82. The res judicata effect extends to all the facts existing at the time of the first judgment, whether or not they were known to the parties, stated by them, or considered as proof by the first court (ATF 139 III 126 at 3.1, p. 129). However, it does bit stand in the way of a claim based on a charge in circumstance since the first judgment (ATF 139 III 126 at 3.2.1 p. 130 and the cases quoted). The res judicata effect does not extend to the facts after the time until which the object of the dispute could be modified, namely to those which took place beyond the last time when the parties could supplement

their statements of facts and evidentiary submissions. Such circumstances are new facts (real nova) as opposed to the fact already in existence at the decisive time, which could not have been invoked in the previous proceedings (false nova), which opened the way to revision (AF 140 III 278 at 3.3 judgment 4A_603/2011 of November 22, 2011, at 3.1 and the references). (…)".

113. The Panel shares the same views of the above CAS decisions and highlights that *res judicata* exists when there is (i) an identical claim from a substantive point of view; (ii) the same parties were involved in the proceedings; and (iii) the matter was solved based on the same facts and evidence at the time of the first judgment. This is the so-called triple identity test.

A.3. Are the previous FDC decisions – in particular the FDC Decision of 16 March 2016 – considered as valid and enforceable decisions?

114. The Appellant has alleged that the previous FDC decisions may not be qualified as valid and enforceable "decisions", because they are not "formal decisions", i.e. they lack the legal form to be considered as such.

115. The Appealed Decision – which was also issued in a form of communication signed by the Chairman of the FDC is considered a valid and enforceable decision, because – contrary to the others FDC decision, namely the FDC Decision of 16 March 2020 – it clear states and the end of the "communication" that *"(…) please note that the present decision is final and subject to the legal remedies foreseen by article 49 of the FIFA Disciplinary Code (2019 ed.)".* None of the other FDC decisions includes such statement.

116. The Panel shares the opinion that the previous FDC decisions – in particular the FDC Decision of 16 March 2016 –, should be considered as valid and enforceable "decision(s)", because: (i) it is irrelevant if they were issued in a letter format; (ii) they affected the legal situation of the Appellant by deciding not to enforce the FIFA DRC Decision and/or maintain the disciplinary procedure against the First Respondent closed; (iii) they were unilateral acts from the FDC sent to the Appellant intended to produce legal effects (i.e. closing or keeping closed the disciplinary proceedings and not enforcing the FIFA DRC Decision); (iv) they had an obvious intention to decide on the matter that was requested by the Appellant (*animus decidendi*); and that (v) the Appellant is a new legal entity.

117. The non-inclusion of the FIFA's standard statement in the FDC Decision of 16 March 2016 (and in the other FDC decisions) – saying that *"(…) the present decision is final and subject to the legal remedies foreseen by article 49 of the FIFA Disciplinary Code (….)"* – does not change the nature and effects of this "communication" as a decision.

118. The Panel is sympathetic to the argument put forward by the Player that the FDC Decision of 16 March 2016 should not be regarded as a formal decision, since it is not expressly assumed as such. The Appellant should have the legitimate expectation that a formal legal decision regarding the "sporting succession" of the New AEK would be passed.

119. Most likely, in a normal situation and in a different context, this Panel could conclude in favor of the Player. To better explain, it is common and expected that FIFA's decisions contain an

express indication that it is a formal decision which may be challenged/revised by the CAS. This is the standard practice, and it is what the parties involved expect from FIFA. Moreover, it could also be added that the *rational* of CAS jurisprudence has been in a way to allow a party to defend its interests by appealing to CAS and avoid denial of justice. This *rational* has been supported by the principle of good-faith, which is also expressed in Article 9 of the Swiss Federal Constitution: *"[e]very person has the right to be treated by state authorities in good faith and in a non-arbitrary manner"*. As highlighted by the CAS award 2018/A/5746 *"[a]ccording to this principle, citizens are protected in the legitimate trust they have in the declarations or the behaviour of authorities. These latter must not act in a contradictory or abusive manner*[1]*. This principle, although stemming from public law, can in the Panel's view be applied by analogy"*.

120. If the Panel looks in detail at CAS decisions, the disregard for the "form" is to avoid "denial of justice" and to allow the parties to appeal to CAS and see their issues resolved when a decision has a legal effect on such parties. CAS jurisprudence has not been construed to limit the right to appeal on the basis that a "communication" should be assumed as a decision that meets the requirements for defending the application of the *res judicata* principle.

121. In practice, the system established should allow a party to appeal from a FIFA "communication" that meets the material requirements of a decision, but should not preclude that same party from appealing a decision which FIFA has not expressly regarded as final and, for this reason, such party missed the appeal's deadline because did not understand that was dealing with a formal decision from FIFA.

122. In another context, FIFA's position could be defended as unfair or discriminatory, since the communication in question is not classified or expressly assumed as a formal decision as FIFA uses to do and the parties involved in their decisions so expect. However, despite the above comments, the Panel considers that in the context of the facts in question, the Player could not ignore the *animus decidendi* of the FDC Decision of 16 March 2016. We make this statement, based on the existence of the various prior communications of the FDC since 2013 and the very content of the FDC Decision of 16 March 2016.

123. In light of the above, we believe that the facts and circumstances of the present appeal do not fit the argument of "denial of justice" and that there are no justifiable reasons for the Player not knowing the nature and the *animus decidendi* of the FDC Decision of 16 March 2016.

124. The Panel's understanding is supported by the long-standing CAS jurisprudence confirming that the form is irrelevant for determining if a communication should be considered as a decision. The Panel adheres and highlights the following CAS jurisprudence:

i. *"[T]he form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal"* (CAS 2005/A/899 para. 63; CAS 2008/A/1633 para. 31; CAS 2015/A/4213 para. 49; and CAS 2017/A/5200 para. 94);

[1] Decisions of the Swiss Federal Tribunal ATF 141 V 530, § 6.2, and ATF 136 I 254, §5.2.

ii. *"In principle for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addresses of the decision or other parties"* (CAS 2004/A/748 para. 89; CAS 2005/A/899 para. 61; CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2015/A/4213 para. 49; and CAS 2017/A/5200 para. 94);

iii. *"A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects"* (CAS 2004/A/659 para. 36; CAS 2004/A/748 para. 89; CAS 2008/A/1633 para. 31; CAS 2015/A/4213 para. 49; and CAS 2017/A/5200 para. 94);

iv. *"[A]n appealable decision of a sport association or federation "is normally a communication of the association directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide on a matter (…). A simple information, which does not contain any "ruling", cannot be considered a decision"* (BERNASCONI M., "When is a "decision" an appealable decision?", in: RIGOZZI/BERNASCONI (ed.), The Proceedings before the CAS, Bern 2007, p. 273; and CAS 2008/A/1633 para. 32; CAS/A/4213 para. 49; CAS 2015/A/5200 para. 94);

v. *"(…) the Appealed decision clearly ruled on the admissibility of the Appellant's request for relief, denying such admissibility and thus, objectively affecting the Appellant's legal position with regard to the right of the latter to pursue the enforcement of its claim against (…). It must be concluded, therefore, that notwithstanding the fact that the Appealed Decision was dressed in the form of a letter it is in substance an appealable decision within the meaning of Article R47 of the CAS Code"* (CAS 2015/A/4162 para. 53); and

vi. *"(…) even a letter from the secretariat of the FIFA Disciplinary Committee can be a decision if it actually contains and/or notifies a decision/ruling that affects the legal situation of a party"* (CAS 2015/A/4266).

A.4. What is the matter under the scope of the previous FDC decisions?

125. The relevant previous FDC decisions – in which the *res judicata* argument raised by the Respondents is sustained – are the following:

a. The FDC Decision of 9 October 2013, in which FIFA states the impossibility to enforce a monetary decision against a bankrupt disaffiliated and non-existent club. Within these disciplinary proceedings the Appellant claimed against the Old AEK the enforcement of the FIFA DRC Decision. The FIFA Disciplinary Committee decided not continuing with the disciplinary case on the grounds that the Old AEK was in bankruptcy and disaffiliated.

b. The FDC Decision of 26 February 2015, in which FIFA states that the Old AEK was still disaffiliated and that the competing club in 2015 was an amateur club different from the Old Club. Within these disciplinary proceedings the Appellant claimed against the Amateur AEK to comply with the FIFA DRC Decision. The FDC decided not re-opening the disciplinary case on the grounds that the Amateur AEK was in bankruptcy

and disaffiliated and the non-existence of succession between the Amateur AEK and the Old AEK.

c. The FDC Decision of 16 March 2016, in which FIFA states that the lack of elements and evidence to conclude that the New Club was the legal successor of the Debtor AEK. Within these disciplinary proceedings the Appellant claimed against the New AEK the enforcement of the FIFA DRC Decision supported on the legal/or sporting succession of the New AEK. The FIFA Disciplinary Committee decided not reopening the disciplinary case on the grounds that the Old AEK was in bankruptcy and disaffiliated and because the New AEK was a "new entity". i.e. the New AEK was not the legal successor of the Old AEK.

A.5. What it is the impact of the FDC Decision of 16 March 2016 — and the effects of the res judicata principle?

126. On 21 January 2020, the Appellant requested FDC to open disciplinary proceedings against the New AEK and to enforce the FIFA DRC Decision by imposing sanctions on the New AEK for alleged (i) failure to respect a FIFA DRC Decision; and (ii) to be the sporting succession of the Old AEK. The Appellant grounds his claim and sustain the argument of "sporting successor" on the same facts.

127. In the FDC Decision of 16 March 2016, the FDC has already decided on the same request (This decision was based on the same facts, i.e. that the Old AEK was still disaffiliated from the HFF and the New AEK was a new legal entity). Taking into consideration the position received by the HFF, the evidence produced by the Appellant was not adequate to prove that sporting succession exists between the Old AEK and the New AEK.

128. The Appellant decided by not challenging the FDC Decision of 16 March 2016 and, it is also a fact that, in the current CAS proceedings, the Appellant has not raised new facts, evidence and arguments, which were not considered by FDC in its previous decisions.

129. When analysing the Appealed Decision and the FDC Decision of 16 March 2016, the Panel concludes that both FDC decisions involve (i) the same parties, i.e. the Player and the New AEK; (ii) the same subject matter/claim, i.e. the Player's request that the New AEK be ordered to comply with the FIFA DRC Decision in view of the legal and/or sporting succession of the Old AEK; and (iii) the same grounds / motivations, i.e. the closing of the disciplinary proceedings is based on the bankruptcy and disaffiliation of the Old AEK; and (iv) the same decision, i.e the FDC is not in position to re-opening the disciplinary case in absence of any new elements brought by the Appellant that may have allowed to re-open the disciplinary proceedings.

130. It is clear that the case has been previously decided and for this reason FIFA had a legitimate reason to conclude that they could not entertain (again) the Appellant's claim. The FDC Decision of 16 March 2016 has already dealt with the same issue in a final and binding way and, as already concluded by the Panel above, the non-reference to the fact that the "decision was final and subject to appeal" is irrelevant and does not change its nature.

131. As FIFA stated in its Response (para. 58 and 59):

"(…) the Appellant's letter of 21 January 2020 was not accompanied by any new documentation and the information provided therein was not new for the Disciplinary Committee.

(…) the Appellant alleged in his letter of 21 January 2020 that (i) the Debtor AEK and the New AEK had the same history, (ii) the same achievements, (iii) the name and the logo of the club did not change, (iv) both clubs held their matches in the same stadium and (v) they had the same identity. Nevertheless, these elements did not constitute any new information for the Disciplinary Committee, once it was already clear that:

a. The New AEK was "currently participating in the Superleague Greece Championship" as the HFF established in its letter of 26 October 2015;

b. As was stated in AEK's letter of 4 December 2015, the New AEK and the Debtor AEK shared the same name because the New AEK was paying a concession for that purpose;

c. That same AEK letter of 4 December 2015, contained the logo of the New Club which did not have any obvious differences from the one of the Debtor Club;

d. The address of the AEK stadium – i.e the Olympic Athletic Centre of Athens (OAKA) – was already established in the footnote f AEK's letter of 4 December 2015. (…)".

132. Before concluding on this matter, the Panel would like to comment the Appellant's following arguments raised during the hearing:

a. FDC Decision of 16 March 2016 states in the 4th paragraph that *"(..) we regret having to inform you <u>once again</u> that we <u>do not appear</u> to be in position to further proceed with the investigation in the present case"* (emphasis added by the Panel). Basically, the Appellant states that the expressions *"once again"* and *"do not appear to be in position"* implies that the FDC has not closed the analysis of the matter and that it is possible to continue the investigation.

b. FDC Decision of 16 March 2016 states in the 5th paragraph that *"(…) our statements made above are based on the documentation in our possession only and hence are of a general nature and thus without prejudice whatsoever".*

133. The Panel clarifies that the above-mentioned paragraphs of the FDC Decision of 16 March 2016 need to be interpreted in the context of the full "communication", namely having in consideration the following paragraphs/statements:

Paragraph 1: *"… documentation provided on 9 November 2015 …"*

Paragraph 2: *"… after considering all the facts and documents related to the present case …" (…) "… the club called AEK Athens (…) is a new entity".*

Paragraph 3: *"As a consequence (…) cannot deal with cases involving clubs which are not affiliated to their association any longer".*

134. Therefore, since the matter referred to the same dispute and the same allegation regarding the sporting succession (on the basis of the same evidence and involving the same parties), it is evident that the principle of *res judicata* was applicable on the matter and the FDC was right to keep the disciplinary proceedings closed, since the FIFA Disciplinary Committee was not allowed to deal again with the same matter. The only possible way to challenge the understanding / findings of the FDC was to appeal from the FDC Decision of 16 March 2016, but such appeal has not occurred.

135. In view of the above and considering the cumulative requisites of *res judicata* are met, the legal effects of such principle applies. Therefore, the case related to this Appeal cannot be re-assessed.

A.6. The relevance of previous CAS jurisprudence – CAS 2019/A/6436

136. The abovementioned arguments and conclusions have already been confirmed by the recent CAS decision of 13 July 2020 (CAS 2019/A/6436). This CAS case is quite similar to the facts related to the present appeal, since it involves another player who tried to enforce a FIFA DRC decision against the New AEK, based on the argument that it was the sporting successor of the Old AEK. In that case – with the same type of FDC "communications" and decisions – CAS has confirmed that (i) the similar FDC communication to the one of 16 March 2016 was an appealable decision; and (ii) the fact that *res judicata* applied since the matter had already been decided by the Chairman of the FDC. In this decision the sole arbitrator states, *inter alia*, that:

"68. The Sole Arbitrator (…) notes that FIFA stresses that the observation of the Chairman of the FIFA DC is based on all the facts and documents related to the present case, which include the Club's submission regarding not being the successor or in any other way related to the "old" AEK FC.

69. Even if the provision of the material in question by the FIFA DC may not per se be regarded as passing a formal and motivated decision, it nevertheless gives the recipients an insight into the deliberations underlying the content of the letter.

70. (…) the Sole Arbitrator agrees with the Appellant that the fact that it is a new entity does not automatically preclude this new entity from being the successor of the "old" AEK FC, the Sole Arbitrator (…) finds that the FIFA DC, in its letter, not only addresses the question of whether it is a new entity, but also addresses the question of whether, based on the information received, it is assumed that there are valid grounds for enforcing the FIFA DRC decision against the Cub, which is rejected by the FIFA DC.

Based on that, the Sole Arbitrator finds that the FIFA DC actually dealt with the same matter from a substantive point of view (…).

77. (…) the term "decision" must be construed in a broad sense, that the form of the communication in question is irrelevant for its qualification, that a decision is a unilateral act issued to one or more determined recipients that is intended to produce or produces legal effects and that an (appealable) decision of a sport association or federation is normally a communication directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide the matter.

78. The Sole Arbitrator further notes that a large degree of legal certainty must be required in order to ensure that the recipients of, for example, a letter from FIFA are not, unnecessarily, in any doubt as to whether the communication received is an actual decision or has been provided as general information only.

79. However, this requirement of legal certainty also applies to any other receipts of such a communication so as to ensure that such recipients, if necessary basis is found to be present, will have a legitimate expectation that a decision has been passed even in situations where not all formal conditions may have been met. (…)

81. In light of these circumstances and since the letter of 24 October 2016 from the FIFA DC has the character of a unilateral act intended to produce legal effects, combined with the fact that the letter is considered to be based on an animus decided, the Sole Arbitrator finds that it is a formal and legal decision meeting the requirements for a decision in relation to the principle of res judicata.

82. The Sole Arbitrator also finds that this should reasonably have been clear to the Appellant at the time of receiving the latter in 2016, in which connection the Appellant had the opportunity to appeal against the decision in accordance with the applicable rules.

83. (…) the Sole Arbitrator finds that no evidence has been produced to prove that the Appellant, after this decision, has brought forward any additional and new information to sustain his claim for a reopening of proceedings, in which connection to the Sole Arbitrator points out that the FIFA DC, prior to its decision in 2016, has received information about the Appellant's allegations from the Club and from the HFF.

84. In light of the foregoing, the Sole Arbitrator thus finds that a formal decision was already made in 2006, addressing the question of whether the Club is the successor of the "old" AEK FC and, therefore, liable for the debt of the former cub to the Appellant.

85. With reference to this decision of 24 October 2016 and in accordance with the principle of res judicata, the Sole Arbitrator finds that the decision in the Appealed Decision not to reopen the disciplinary proceedings on the ground that the FIFA DC was not in a position to deal again with the merits of the request, does not constitute a denial of justice since the matter has already been dealt with once by the competent legal body of FIFA. (…)".

B. Conclusion

137. The form of communication of a decision is irrelevant and does not affect its validity. This understanding is in line with the long-standing CAS jurisprudence that a decision can be communicated in many forms. A decision exists when the required elements that constitute a ruling exist irrespectively of the form of communication.

138. The Appellant has not appealed the FDC Decision of 16 March 2016 – and such decision became final and binding. The Appellant has not provided any new evidence that could lead FDC to re-open the disciplinary proceedings against the New AEK, in particular because the alleged "new" elements brought by the Appellant were already evident and explicit in the documents which served FDC to arrive to the FDC Decision of 16 March 2016, i.e. (i) the HFF's letter of 26 October 2015; (ii) the letter to the New AEK of 5 December 2015; and (iii) the Appellant's letter dated 9 November 2015.

139. In light of the foregoing, the Panel considers that the outcome and conclusion of the Appealed Decision was correct, considering that the FDC (i) was prevented from re-assessing the case that had been decided before; and (ii) it was bound by the outcome of the previous FDC decisions, in particular the FDC Decision of 16 March 2016.

140. Therefore, there is no legal basis for disciplinary sanctions against the Appellant, essentially because the matter is covered by *res judicata*.

141. In conclusion, the appeal is dismissed and all other prayers for relief are also dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Cristian Javier Nasuti on 5 April 2020 against the decision issued by the FIFA Disciplinary Department on 17 March 2020 is dismissed.

2. The decision issued by the FIFA Disciplinary Department on 17 March 2020 is confirmed.

3. (…).

4. (…).

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