

The International Football Justice



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Sanctions and Proportionality

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The latest controversy on disciplinary issues is a one that has been changing with times and the previous strict liability on everything and for everybody, linked to a plain application of sanctions without taking into consideration certain aspects of the cases has changed. Nowadays, it seems that there are some cases that are following the Bob DYLAN song "The Times They Are A-Changin'" and despite the case of FC Barcelona on the minors that was not seen neither by FIFA nor by CAS as having such a possibility, other paths are being followed and we clearly appreciate some novelties on that issue.

Sanctions in the legal sphere are usually defined as measures that can be taken to a person violating laws or other regulations, or in other words are means of enforcement used to provide incentives for obedience to the law.

One should also divide the sanctions by the nature of their origin - it could be either sanctions established by a governing body for violation of its internal rules (regulations), or sanctions established by parties of a contract for non-compliance with their respective obligations deriving from that contract. In the first meaning the sanctions have a completely disciplinary nature while in the second sense these sanctions are usually named as contractual penalties.

However, regarding the definition of sanctions in the disciplinary proceedings in front of FIFA and UEFA is a little different. Although the FIFA Disciplinary Code (FIFA DC) does not characterise sanctions, Article 1 of FIFA DC states:

"This code describes infringements of the rules in FIFA regulations, determines the sanctions incurred". Thus, the sanction is considered

through a prism of infringement of FIFA Regulations and being the direct consequence of such violation. The FIFA DC also names the full and exhaustive list of sanctions applied both to natural and legal persons; this list includes such sanctions from warning or reprimand to a ban on taking part in any football-related activity for natural persons and relegation to lower divisions for legal persons.

As for UEFA, its Disciplinary Regulations (UEFA DR) do not contain the word "sanction" in regards to measures applied by the competent UEFA disciplinary authorities. Instead, it uses the words "penalties" or "disciplinary measures". Thus, Article 1 of UEFA DR reads: *"These regulations contain the substantive and formal provisions governing the punishment of disciplinary offences falling within their scope of application. They describe the infringements, regulate the application of penalties [...]"* The list of penalties in UEFA DR is similar to that of the FIFA DC.

Considering the principle of proportionality while applying any sanction, either through FIFA or UEFA, some important notices

should be made. The principle of proportionality of an applied sanction to an infringement at stake is not *per se* nominated in the regulatory documents. However, some provisions of the FIFA and UEFA Regulations help to determine such a principle as definitely existing, applying and generic in terms of application of sanctions. Here, Article 39 of the FIFA DC should be stated entirely:

"Article 39. General rule

- 1. The body pronouncing the sanction decides the scope and duration of it.*
- 2. Sanctions may be limited to a geographical area or to one or more specific categories of match or competition.*
- 3. Unless otherwise specified, the duration of a sanction is always defined.*
- 4. The body shall take account of all relevant factors in the case and the degree of the offender's guilt when imposing the sanction."*

Every paragraph of the said article is relevant to a principle of proportionality. Defining the type and duration of the sanction is a privilege of deciding authority; however, relevant articles of the DC

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establish the limits for sanctions in every particular case.

The competent authority should always be clear when determining the duration (limits) of sanctions. And as the most important part of this article of the FIFA DC - the deciding body should take into account all relevant factors on a case-by-case basis evaluating the degree of fault and other objective and subjective circumstances.

The UEFA DR states in Article 17:

"Article 17 - General principles

1. The competent disciplinary body determines the type and extent of the disciplinary measures to be imposed in accordance with the objective and subjective elements of the offence, taking account of both aggravating and mitigating circumstances.

2. If the competent disciplinary body is of the opinion that information provided by the party charged has been decisive in uncovering or establishing a breach of UEFA's rules and regulations, it may exercise its discretionary powers and scale down its disciplinary measures or even dispense with them entirely.

3. The disciplinary measures enumerated in Article 14 of these regulations are standard measures and can be reduced or increased by the competent disciplinary body only under exceptional circumstances.

4. The disciplinary measures enumerated in Article 15 of these regulations are standard measures. Unless stipulated otherwise in these regulations, disciplinary measures can be reduced or increased by the competent disciplinary body on the basis of the circumstances of the specific case."

Like it was said before, the principle of proportionality of the sanction is based on the particular circumstances of every case in question. This article of the UEFA DR gives direct instructions to the

deciding bodies to look carefully at all the facts of the case to measure the appropriate type and weight of the sanction. Additionally, very interestingly in this relation is paragraph 2 of the said article, which provides UEFA's competent bodies with full discretionary powers and gives them the possibility to dispense solely based on the information provided by the party charged. No currently existing list or criterion describes the circumstances that could be treated to lower the margin of sanction so that the competent authorities would respect the principle of proportionality.

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As for the second major type of cases (cases where contractual penalties, or sanctions, are being examined by the jurisdictional bodies), they are usually cases of contractual disputes where the particular penalty is presumed by the contract for non-compliance with its conditions. However, in this type of cases, the deciding body can use the help of the national legislation governing the essence of the dispute, or, in particular, the provisions of the Swiss Code of Obligations (SCO). Thus, the Article 163 of the SCO states:

"Art. 163

1 The parties are free to determine the amount of the contractual penalty.

[...]

3 At its discretion, the court may reduce penalties that it considers excessive."

As it can be clearly seen, the scope of application of the present article is very broad. In general, paragraph 1 operates with the principle of *pacta sunt servanda*, allowing parties in the contract to freely design the amount and types of appropriate sanctions at their mutual decision. However, paragraph 3 indicates that the court (or other competent authority dealing with the case) could reconsider the freedom of establishment of such a sanction (or penalty) at its own discretion. It is a very important input, as the discretion of the judge would depend on his own senses of fairness and proportionality. But that has also the other side - the judge is not limited in the process of evaluation of the sanction nothing than by excessiveness of the penalty established by the contract and his discretion could be very wide.

In further paragraphs several FIFA and UEFA decisions as well as CAS awards would be rendered as examples helping to understand what the principle of proportionality is according to the competent bodies, what are the criteria allowing its application and to which extent it could be applied.

UEFA Appeal Body, 18 June 2015, Istanbul Basaksehir Spor v. UEFA

In this case, Turkish club Istanbul Basaksehir Spor was refused the issue of the UEFA license for competing in Euro competitions by the UEFA competent authorities. The main assertion of the UEFA bodies was that this sanction (refusal to issue the UEFA license for participation in the Europa League) was because two players of the club were convicted of participation in match-fixing throughout the course of the national championship in Turkey. The club had nevertheless provided this information in the application form for UEFA

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competitions and had obviously no intentions of hiding it. However, UEFA considered this as the indirect involvement of the club in the participation in match-fixing and refused to issue the license.

The club appealed this decision to the UEFA Appeal Body, which considered some of the case's significant facts. Accordingly it was taken into account that the club itself had never been accused of match-fixing throughout the course of the procedure held in Turkey.

Furthermore, none of the club's officials had been convicted or made responsible for match-fixing. It was only a matter of two players who received the incentive bonus directly from their agent and without even disclosing this information to any of the club's administration or to their teammates. The UEFA Appeal Body considered that such facts could not be the evidence of the club's direct or indirect involvement in the organization of the match-fixing, thus the sanction applied was clearly disproportional to the merits of the case. The UEFA Appeal Body dismissed the refusal to issue the license and granted it to the club.

UEFA Appeal Body, 2 February 2015, Bulgarian Football Union v. UEFA

The Bulgarian Football Union (BFU) was sanctioned by the UEFA Control, Ethics and Disciplinary Body with a fine of EUR 95,000 for the setting of pyrotechnics and crowd disturbances (and apparently resulted in a fight of supporters), which was appealed by both the BFU and the Ethics and Disciplinary Inspector. The latter considered the sanction applied to be very lenient in terms of the infringements occurred during the match.

As a result of the appeal proceedings, the UEFA Appeals Body issued a rather interesting decision. It considered the following facts as mitigating circumstances - the financial situation of the Bulgarian Football Union was evaluated - and the amount of fine imposed was reduced to EUR 35,000.

However, the UEFA Appeals Body evaluated a lot of other circumstances. In particular, it concluded:

"The sanction in such a case should fulfil the twin objectives of educating the supporters and the association and prompting the latter to implement safety and security rules according to UEFA standards.

A sanction that is limited to a fine appears, in these circumstances, insufficient to fulfil the objective of eradicating hooliganism and to reach the people actually responsible for the offences committed. Closing the sectors of the stadium where the disorder took place, combined with an appropriate fine, appears to be a more suitable punishment."

Despite the fact that the fine imposed on the Federation was limited, the UEFA Appeals Body agreed with most of the arguments of the Disciplinary Inspector. The seriousness of the violations incurred was not reflected in the type and amount of sanctions imposed by the Control, Ethics and Disciplinary Body. Besides, the fine did not have the goal of eliminating hooliganism from the stadium. In that sense the UEFA Appeals Body considered the sanction of partial closure of stadium sectors as proportional and appropriate. Both appeals were partially upheld and even though the amount of the fine was reduced, the totality of sanctions imposed satisfied the deciding body in its aim to better serve the goal of sanctions application.

CAS 2015/A/3975, 31 August 2015 (operative part of 20 April 2015), Nassir Al Shamrani v. Asian Football Confederation

In the case at stake the Asian Football Confederation (AFC) sanctioned a player for two acts, which violated the Disciplinary Regulations - spitting at a player of the opposite team and for head butting a player during play. The sanction imposed on the player was 8 (eight) matches of suspension in total conformity with the AFC Disciplinary Code provisions, which was applied by combination of two relevant articles of the AFC Disciplinary Code.

However, the player did not agree with the decision of the AFC and appealed it to the CAS. The CAS Arbitrator in its considerations rendered that the provisions of the AFC Disciplinary Code were applied correctly and thus the sanction was also applied correctly. However CAS considered the suspension of 8 matches as excessive. The following circumstances of that particular case were to be considered as well:

"[...] taken into consideration the degree of the Appellant's (i.e. the Player) fault as well as the fact that he had a clean slate as he has not committed any other disciplinary offences prior to the events of this case, the Panel finds that the sanctions imposed on the Appellant are excessive [...]"

The degree of the player's fault was reduced by the immediate excuses that he expressed after the events at stake. Moreover, the absence of previous infringements committed by the player was considered as a mitigating circumstance.

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As a result, two matches out of eight were partially suspended for a probationary period of two years. This was the evaluation of the proportionality principle made by the CAS Arbitrator due to the circumstances of the case.

FA Regulatory Commission, 8 September 2015, Jake Livermore⁴⁵¹

There is a case of a particular interest regarding the applicability of the principle of proportionality, which was rendered by the independent Regulatory Commission of the English Football Association (FA) in the case of Jake Livermore against the FA for the violation of anti-doping rules and regulations. Despite the fact that the competent authorities that rendered this decision are not FIFA, UEFA or CAS, the principle of proportionality is a milestone of the present decision.

According to the facts of the case the 25-year old football player from Hull City was found in breach of anti-doping regulations. Traces of cocaine were found in his urine. The following facts occurred in April and May 2015, when the player had admitted the Anti-Doping Rule violation. However, the Commission recalled the tragic events that happened in the player's family almost one year before that - his new-born son died soon after he was given birth.

The Commission established that the death of the child had a "devastating effect" on him. Besides, the Commission duly evaluated the following facts:

"14.1. there was no intention on the part of Mr Livermore to enhance his performance as an Athlete;

14.2. Mr Livermore had been tested on ten previous occasions and all tests had returned negative;

14.3. this was a one-off incident in respect to the use of the cocaine. He had never used recreational drugs previously;

14.4. the incident ADRV [i.e. Anti-Doping Rule violation] only occurred as a result of the severe impairment of Mr LIVERMORE's cognitive functions and judgement caused by the Circumstances for which he was in no way in fault."

Regarding the principle of the proportionality - the Commission examined two main possibilities, which could be applied to the case: either no fault or negligence or no significant fault or negligence in the actions of the player. However, the respective article on "no fault or negligence" could only be applied in case when the player did not know or suspect, or could reasonably know that he used a prohibited substance - in the case at stake the player understood what he consumed.

As for the respective article on "no significant fault or negligence", the Commission concluded that in principle, the player could benefit from the provisions of said article, however, "the extreme" circumstances of the case at stake move it to other category of anti-doping cases as the impairment was much greater than simple decrease or depression.⁴⁵²

"The proportionality between the breach of the rules and the sanction which is imposed is a fundamental aspect of disciplinary proceedings in general and in respect of Anti-Doping in particular. [...] It must be accepted that there will always be cases where the sanction appears to operate harshly in one case or another. The benefits of consistency in the battle against Doping outweigh those

*detriments incurred in certain cases where the sanction appears to operate somewhat harshly. However there is no general discretion to depart from the sanctions set out in the WADC (WADA Code) in those cases where it is felt to operate somewhat harshly even if it leaves the Tribunal feeling uneasy."*⁴⁵³

As in the CAS case, CAS 2006/A/1025 M. Puerta v. ITF, the Commission was of the opinion that:

*"1) There [was] a gap or lacuna in the WADC in relation to the circumstances of the present case;
2) Such circumstances may never rise again;
3) The WADC provides a just and proportionate sanction in all but the very rare case;
4) Its decision does not weaken either the WADC or WADA."*

With regards to the imposition of the article on "no significant fault or negligence" the Commission was of the opinion that the circumstances of the case make any sanction applied to the player "wholly unfair and as well as evidently and grossly disproportionate. [...]"

[...] taking into account all the evidence relating to the circumstances and the degree of impairment in this case concludes that Mr LIVERMORE was not negligent or at fault in any real sense.

The unanimous view of the Commission is that the proportionality principle is engaged [...] and the imposition of any period of suspension would be wholly unjust and disproportionate."

Thus, the Commission decided not to impose any period of suspension on the player for the infringement incurred.

⁴⁵¹ www.thefa.com/news/governance/2015/sep/fa-statement-jake-livermore

⁴⁵² Reference is made in particular to awards CAS 2005/A/873 Vlasov v. ATP Tour Inc and CAS 2008/A/1490 WADA v. USADA & Thompson

⁴⁵³ CAS 2004/A/690 Hipperdinger v. ATP Tour Inc; CAS/2005/A/830 Squizzato v. FINA and CAS 2006/A/1032 Edwards v. IAAF

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Conclusion

As it can be seen, the proportionality principle in terms of the application of sanctions is one of the basic milestones and lies at the base of the process of the adequate sanction choice.

The use of the principle of proportionality has a particular importance in terms of cases directly connected with the parallel criminal proceedings in front of a particular jurisdiction. These could be cases of match-fixing, which in many countries is considered a criminal offense. In such cases the principle of proportionality should comply with two main objectives:

1) The facts related to a criminal proceeding within the case should not been separated by the procedure conducted in front of football authorities and taken into consideration as the regulatory framework of the governing bodies. Indeed, all the relevant facts need to be examined by the procedure. It also goes with the principle of *res judicata* when facts determined by state courts are considered to have legal force and a presumption of these facts is created.

2) Somewhat contrary to that, the deciding bodies of football federations handling the case should distance themselves from possible sanctions, which could be imposed on the parties by state courts or other bodies of prosecution order, and objectively evaluate the relevant facts. As the UEFA Appeal Body did in the case of Istanbul *Basaksehir Spor*, where two players who participated in match-fixing were sanctioned in terms of criminal procedure handled in front of the Turkish court. However, the UEFA Appeal Body has evaluated the facts that neither any official person from the club, nor the club itself was accused or condemned as a result of match-fixing activities in the frame of the criminal procedure.

In the opinion of the UEFA Appeal Body, sanctioning the club by not giving them a license for UEFA competition participation would be clearly disproportionate to the facts at hand and to the matter that the club itself had not previously been sanctioned by the state courts. Any sanction that was imposed on the club would be unfair and grossly disproportionate.

Thus, it could be said as a final conclusion, that the correct implementation of said principle permits deciding bodies to apply a fair and proper sanction for any infringement incurred. However, it should be said that the sense of proportionality is *per se* different in mind of any person, and especially a judge/arbitrator. To surpass the possible inadequate application of sanction, other measures could be taken, such as a collegial decision-making process. In any case the principle of proportionality will be one of the governing and basic principles that will help to achieve the proper sanction, which would be the result of a fair and just process. •