

THE PRINCIPLE OF PROPORTIONALITY AND STRICT LIABILITY OF FOOTBALL CLUBS FOR THE BEHAVIOR OF SPECTATORS AT UEFA COMPETITIONS

Ilia A. Vasilyev

St. Petersburg University, St. Petersburg, Russia

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The subject. This article is devoted to the content of the principle of proportionality in disputes about the strict liability of football clubs for the behavior of spectators. The proportionality means that the sanction corresponds to the offense and it has two dimensions. Firstly, the more serious the offense is the higher the sanction should be. Secondly, proportionality protects sport from unreasonably low sanctions while the violation is serious.

The purpose of the study is the content of the principle of proportionality: the use of related principles of sports jurisprudence, exceptional circumstances (mitigating and aggravating) in the practice of applying clubs' strict liability for spectators' behavior in UEFA competitions over the period 2007-2021. Liability without fault increases the value of investigating the factual circumstances of a dispute. The broad discretion of the bodies raises the question of the validity of the choice of aggravating circumstances or the refusal of mitigating circumstances. Therefore, the jurisdictional authority in each specific dispute must search for exceptional circumstances thereby fulfilling the principle of proportionality. The second important nuance of strict liability in the UEFA regulations is the difference in the interconnection between violations and sanctions. In some articles, the sanction is predetermined. It is possible to reduce such a sanction only in the presence of an exceptional circumstance and to increase it in the presence of an aggravating circumstance. Separately considered, in conjunction with the principle of proportionality, other principles: principles of predictability of sanctions, equal treatment, the precedent value of decisions on similar disputes (*stare decisis*).

Methodology. The methodological basis of the stated research involves the generalization and analysis of the practice of two institutions of sports jurisprudence. Firstly, the jurisdictional bodies of UEFA are publicly available, as well as available to the author, but currently

not available for free download on the UEFA website. Secondly, the relevant decisions of the Court of Arbitration for Sport are in the public domain. Turning to the approaches of law enforcement officers regarding the content of the principle of proportionality meant comparing positions that did not differ in inconsistency. As a result of the analysis of the practice were systematized and identified typical exceptional circumstances, unique exceptional circumstances, and specific enforcement of the principle of proportionality.

The main results of research and the field of their application. The article examined the normative limits of sanctions in the UEFA Disciplinary Regulations; exceptional circumstances affecting the choice of sanction; search by the law enforcement officer of the content of exceptional circumstances; principles of predictability of sanctions, equal treatment, the precedent value of decisions on similar disputes (*stare decisis*) in connection with the verification of sanctions for proportionality. Compliance with the principle of proportionality, in this case, should protect the club from an unreasonably harsh and grossly disproportional sanction. Therefore, it is important to analyze the factual circumstances: which of them are mitigating and which are aggravating. In other categories of offenses, the sanction remains at the discretion of the jurisdictional authority. In such violations, the principle of proportionality takes on a special value. The more flexibility in the choice of sanction is, the higher is the risk of abuse by the jurisdictional bodies. UEFA's enforcement practice is seeking exceptional circumstances that are not consistent enough to be predictable. Some consistency exists only concerning aggravating circumstances. There is an unreasonably strict approach to mitigating circumstances. The practice of CAS does not differ from the practice of UEFA in terms of strict liability compositions. The principle of proportionality in sports jurisprudence can be interconnected with other legal concepts. Such concepts are equal treatment, predictability, and so-called *stare decisis*.

Conclusions. For the slightly undisputed observance of the principle of proportionality, several requirements must be fulfilled. First, analyze the factual circumstances to find exceptional circumstances among them. Secondly, always choose the minimum sanction in the absence of aggravating circumstances, since strict liability is a forced legal institution. Thirdly, indicate in the decisions what circumstances are mitigating, what aggravating circumstances have been established, and how they both affect the choice of a sanction. Fourth, use the previous decisions of the UEFA's jurisdictional bodies and CAS of the strict liability offenses when the actual circumstances are close.

1. Introduction.

Sports liability (or “disciplinary liability” in UEFA Disciplinary Regulations) from the nineties of the previous century had two possible types. The first one is a liability, which can be called classical, as an obliging disciplinary body to establish the fault of the offender. The second type – so-called “strict liability” is used when some violations of anti-doping regulation (involves the transfer of the burden of proof of the absence of fault or negligence¹ either of significant fault or negligence²), certain misconduct on motor racing³ (when the subject of sports was not given the right to prove the absence of guilt by the rules of the international federation), match-fixing by officials of the results of matches in football (the club is liable for the illegal influence of its official on the result⁴), as well as in determining the subject of liability for the behavior of fans in football and water polo (clubs and national federations are

always liable for the behavior of their spectators – even in the absence of fault⁵). The latter variant of strict liability differs from the others and is based on the actions of third parties who are not officials of the club. In the last seven years we are consistently tracking the practices of the Union of European Football Associations (UEFA) on the composition of strict liability (discriminatory behavior – Article 14 of the UEFA Disciplinary Regulations; inappropriate behavior of spectators – Article 16 (2) of the said regulations). We may state the existing ambiguity justified jurisdictional and UEFA bodies (Control and Disciplinary and Ethics Committee of UEFA, Appeals Committee) and the Court of Arbitration for Sport (CAS, sports arbitration, arbitration) choosing sports sanctions.

One of the main criteria of proper sports justice is the principle of proportionality, meaning that authorization cannot *evidently and grossly disproportionate*⁶. Active principle a sports justice reasonably numbered amongst the general theoretical principles, along with predictability and equal treatment [1, p. 30]. The principle of proportionality is also called the manifestation of justice: the search for a balance between competing interests, not forgetting about the level of impact that will be exerted on the offender [2, p. 487]. The proportionality also determines the necessary level of negative sanctions policy, when the violation is accompanied by a low sanction that does not correspond to it. The content of “*evidently and grossly disproportionate*” should be formulated when resolving the dispute in each specific case

¹ See the All-Russian Anti-Doping Rules: 12.5. Elimination of the period of ineligibility in cases of no fault or negligence. If the athlete or other person can prove in each specific case that there is no fault or negligence in their actions, then the otherwise applicable period of ineligibility should not be applied. Available at: <http://www.consultant.ru> (date of access: 30.03.2021).

² See the All-Russian Anti-Doping Rules: 12.6.1.1. Specified Substances or Special Methods. In cases where a violation of the Rules involves a Specified Substance (other than an Addictive Substance) or a Specific Method and the Athlete or other Person is able to prove negligent fault or negligence, the maximum period of ineligibility is two years, and the minimum is a warning without assigning a period of ineligibility, depending on degree of guilt of an athlete or another person. Available at: <http://www.consultant.ru> (date of access: 30.03.2021).

³ Arbitration CAS 2006/A/1164 Luca Scassa & MV Augusta Motor Spa v. Fédération Internationale de Motocyclisme (FIM), award of March 15, 2007. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1164.pdf> (date of access: 30.03.2021).

⁴ Arbitration CAS 2014/A/3625 Sivasspor Kulübü v. Union of European Football Association (UEFA), award of 3 November 2014. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3625.pdf#search=3625> (date of access: 30.03.2021).

⁵ Starting from a dispute Arbitrage TAS 2002/A/423 PSV Eindhoven / Union des Associations Européennes de Football (UEFA), sentence du 3 juin 2003. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/423.pdf> (date of access: 30.03.2021).

⁶ The first decision on the application of strict liability in football with a check on the compliance to the principle of proportionality was the following: Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, para. 36. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf> (date of access: 30.03.2021).

based on the established subjective and objective circumstances in the violation committed, including those of the latter that could be qualified as mitigating or aggravating. Referring to the UEFA Disciplinary Regulations, we find such a formula in the provisions of Art. 23⁷. Along with this, the question arises of the obligation of the jurisdictional body and the sports arbitration to comply with its practice to comply with the principle of *equal treatment*. Following the procedural rules, neither the jurisdictional authorities nor the arbitration is bound by their practice to make decisions. It is not possible to answer this question in the affirmative and based on the practice of UEFA [3, p. 62] or CAS [4; p. 45]. At the same time, these bodies do not dare to directly ignore the principle of equal treatment to the subjects of the sport attracted to strict liability. The legality of drawing an analogy between specific situations of spectators' violations remains at the discretion of the aforementioned dispute resolution bodies, which legalizes the formal application of *equal treatment* – depending on the factual circumstances of the case (*case-by-case basis*⁸) which rarely coincide. At first glance, the requirement to apply the principle of equal treatment is not limited to the precedent value of decisions in sports (*stare decisis*⁹). But we will

return to the discussion of the listed doctrinal concepts later in this research. In the meantime let us note that some legal positions are used in the actual precedent status – such is the arbitration decision TAS 2002/A/423 starting from which in the practice of strict liability of clubs for the behavior of spectators in football, the following opinion of arbitration is given: “The principle of strict liability clubs for the behavior of their fans is preventive and cautionary. But this principle does not pursue the goal of punishing the club, whose guilt may be absent, but making it liable for the misconduct of fans”¹⁰. In this quote, attention is drawn to the recognition of the fact of the normative shifting of liability from the person committing the act (by the way, formally called the subject of football, for example, in the Russian Football Union Disciplinary Regulations¹¹), on the subject of sports – a club. The significance of such a “transfer” of the area of liability by football regulators as “legislators” is seen in encouraging clubs to work with their spectators, the result of which should be the ousting of any manifestations of hooliganism and propaganda of non-football information out of the sport. Such

⁷ UEFA Disciplinary Regulations. Article 23 (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”. Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2Ql_y8~qQ (date of access: 30.03.2021).

⁸ Arbitration CAS 2012/A/2750 Shakhtar Donetsk v. Fédération Internationale de Football Association (FIFA) & Real Zaragoza SAD, award of 15 October 2012, para. 133: “... the particular circumstances of a case have to be taken into account in deciding whether or not to close the proceedings in a particular case. Similar cases have to be treated similar, but dissimilar cases could be treated differently”. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/2750.pdf> (date of access: 30.03.2021).

⁹ Arbitration CAS 2018/A/6072 Kwesi Nyantakyi v. Fédération Internationale de Football Association (FIFA), award of 9 April 2020, para. 60: “It is well-established (and uncontested by the Parties) that there is

no principle of binding precedent (*stare decisis*) at CAS. To the extent that it finds it useful, however, the Panel is free to take note of the decisions in previous cases which involved broadly similar circumstances, in order to aid it in determining whether the sanction in the Appealed Decision is proportionate in all the circumstances”. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6072.pdf> (date of access: 30.03.2021).

¹⁰ See. Arbitration CAS 2013/A/3047 FC Zenit St. Petersburg v. Russian Football Union (RFU), award of 7 October 2013, para. 58: “These provisions contain a very important principle in football, which is the principle of liability of a club for the behavior of its supporters. This principle fulfils a preventive and deterrent function. Its purpose is not to punish the club itself, which may have nothing to feel guilty about, but to pass the responsibility on the club for its supporters' faulty behavior (in this sense: CAS 2002/A/423)”. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3047.pdf> (date of access: 30.03.2021).

¹¹ Disciplinary Regulations of the Russian Football Union. List of terms and definitions, clause 14.: The subject of football is spectators (fans) and their associations. Available at: https://rfs.ru/subject/documents/index?id=1&cat_id=2 (date of access: 30.03.2021).

flawless modeling relations between the club and the fans should as seen UEFA further substantiate held in football approach.

That also is the main reason for the use of strict liability in football. But why is the individual pursuit of the behavior at matches left at the mercy of national legal systems (for example, in Russia, Article 20.31 of the Administrative Code¹²)? Answering the question, we come across a thesis cited in the practice of sports arbitration in connection with a broad approach to the admissibility of evidence¹³ and corresponding to the actual situation – about the limited powers and resources of football federations in comparison with public authorities. In addition, let's not forget that spectators cannot be brought under the disciplinary jurisdiction of the federations, even through contractual relations, by the fact of acquiring or obtaining a ticket. There remains the civil liability of such persons for the harm caused¹⁴ by their behavior to the match organizer, which according to the UEFA Safety and Security Regulations is a specific club and not a federation¹⁵.

¹² The Code of Administrative Offenses of the Russian Federation. Available at: <http://www.consultant.ru> (date of access: 30.03.2021).

¹³ Arbitration CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 85: "Taking into account the nature of the conflict in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigating authorities of the governing bodies of sport as compared to national formal interrogation authorities, the Panel is of the opinion that cases of match-fixing should be dealt with in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made". Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1920.pdf> (date of access: 30.03.2021).

¹⁴ Harm is a sporting sanction imposed on a club by the national football federation or UEFA, depending on the level of competition. The most common such sanction is a fine, but other types such as closing a sector or sectors of the stadium, playing a match without spectators can be mathematically calculated to establish the possible amount of harm.

¹⁵ UEFA Safety and Security Regulations. Article 3 Definition of terms. d. Match organizer: an association or

The latter can only claim damage to its business reputation and the reputation of the competition as a whole. However, this kind of liability is not the subject of our current research. Summing up, we can state the absence of disciplinary mechanisms for the influence of football federations on fans, which forces us to look for a subject of liability for their behavior. Another possible argument is the use of strict liability in football is seen as a subsidiary underpinning reason. For unacceptable behavior of someone (a spectator) must in charge of someone answer, but because the powers of the Federation shall not apply to it then choose the entity subject under our disciplinary authority.

2. UEFA Disciplinary Regulations and Sanction Limits.

Is it possible to expect football authorities aware of the imperative of the institution of strict liability to use minimum sanctions for disputes in which there are no aggravating circumstances? The UEFA example shows an ambiguous answer. On the one hand, Art. 16 (2) of the Disciplinary Regulations does not contain predetermined sanctions, allowing the selection of any or any of the list presented to clubs and federations in the provisions of Art. 6 of the named act. The presence in the Annex to the regulations of the recommended sanctions for some violations¹⁶ can only partially be used as a starting point for motivation while taking into account the principle of proportionality. In addition to a recommendatory nature, these sanctions may be relevant only for violations without exceptional (mitigating, aggravating) circumstances. In the presence of the latter, it will be difficult to choose a proportionate sanction starting only from the recommendation proposed in the regulations. At the

club responsible for organizing a match to be played at home, or an association, club or other entity responsible for organizing a match at a neutral venue, whether or not one of its teams is involved. Available at: <https://documents.uefa.com/r/CWhJ~bY3mi97N9RltR4txw/root> (date of access: 30.03.2021).

¹⁶ Sanctions are recommended only for the following violations within the area of strict club responsibility: Annex A. List of disciplinary measures. Invasion of the field of play, Lighting of fireworks, Use of laser pointer or similar, Message not fit for a sports event, Act of damage.

same time, another part of the strict liability of clubs – the discriminatory behavior of fans (Article 14 (2) of the Disciplinary Regulations) – includes a minimum sanction in the form of closing the stadium sector. Article 14 (3) of the regulations implies even greater regulatory certainty in case of recidivism – a match without spectators and a fine of 50,000 Euro, and a choice of several sanctions in the event of a third and subsequent violation (more than one match without spectators, playing a match in another stadium, forfeit, deduction of points and/or disqualification from the competition)¹⁷. The lack of space for choosing the severity level for discriminatory behavior does not prevent CAS from drawing the attention of disciplinary bodies to the need for the actual purpose of such misconduct. According to the position of the arbitration in one of the disputes, the gradation of the severity of the discriminatory behavior of spectators should be applied, since the practice of applying Art. 14 confirms – while all racist acts are unacceptable, some are less tolerant than others¹⁸. Therefore, CAS sends an unambiguous message to the UEFA disciplinary bodies that the principle of proportionality should be followed: disputes under Art. 14 should be resolved each time individually in the particular context.

The UEFA Disciplinary Regulations did not directly accept the concept of imposing a sanction

less than an amount which leaves the decision to reduce the amount based on mitigating circumstances at the discretion of the disciplinary bodies¹⁹. However, in a situation of a predetermined lack of alternative sanctions which prevents the choice even when another sanction will be sufficient to achieve the goals of liability remains doubts about the proportionality as an expression of justice [5, p. 132]. When a disciplinary body choosing a sanction it is necessary to remember about achieving the goal or most of the goals of the corresponding liability [6, p. 63], in our case – strict liability. Sanctions under strict club liability cannot be purely punitive as the actual perpetrator is not the factual aim. In sports justice, we should remember the combination of two goals of this institution: preventive (informational and psychological impact [7, p. 49]) and negative, punitive effect for the offender. We could highlight an example when the disciplinary body raised the issue of going beyond the lower limit of the sanction (however, to no avail for the club – the existence of exceptional circumstances was not proved): “... the only reason for deviating from the standard sanction under Art. 14 (2) of the Disciplinary Regulations, there may be “exceptional circumstances”²⁰. The application of the principle of proportionality is reduced only to checking the grounds – aggravating circumstances – to increase the sanction. Going beyond the minimum limit of sanctions today is assessed as compliance with the principle of proportionality [8, p. 143].

Proportionality is an ambivalent requirement when the disciplinary body uses a balanced and objective search of all exceptional circumstances that could affect the more accurate choice of sanctions. At the same time, the creation of a uniformly flexible approach to the strict liability of clubs today is not seen in UEFA practice as a value. The regulator proposed a maximum discretion for choosing the sanction for all violations Art. 14 and Art. 16 (2) of the Disciplinary Regulations. The

¹⁷ UEFA Disciplinary Regulations. Article 14 Racism and other discriminatory conduct. 2. If one or more of a member association or club's supporters engage in the behavior described in paragraph 1, the member association or club responsible is punished with a minimum of a partial stadium closure. 3. The following disciplinary measures apply in the event of recidivism: a. a second offence is punished with one match played behind closed doors and a fine of € 50,000; b. any subsequent offence is punished with more than one match behind closed doors, a stadium closure, the forfeiting of a match, the deduction of points and / or disqualification from the competition. Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2QI_y8~qQ (date of access: 30.03.2021).

¹⁸ Arbitration CAS 2013/A/3324&3369 GNK Dinamo v. Union des Associations Européennes de Football (UEFA), award of 13 June 2014, para. 9.31. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3324,%203369.pdf> (date of access: 30.03.2021).

¹⁹ Arbitration CAS 2013/A/3324&3369 GNK Dinamo v. Union des Associations Européennes de Football (UEFA), award of 13 June 2014, para. 9.30. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3324,%203369.pdf> (date of access: 30.03.2021).

²⁰ Decision UEFA AB of 11 September 2015. FC Midtjylland (not publicly available at the moment).
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presence of an extremely broad discretion on mitigating and aggravating circumstances, as we will demonstrate further, is not the best way today.

2.1. Exceptional Circumstances Affecting the Choice of Sanction.

The concept of exceptional circumstances in the UEFA Disciplinary Regulations is specific in comparison with the classics of national legal systems. So, the only one aggravating and one mitigating circumstance are presented. The latter is the immediate reaction of the host club to the behavior of the fans²¹, provided for in paragraphs “a”, “e” Art. 16 (2)²², evaluation of which as a mitigating circumstance is left to the discretion. Based on practice we can assert that the meaning of the circumstance has expanded in comparison with the normatively fixed one. Not only an immediate reaction of the organizing club is required, but also the result – the complete elimination of the spectators’ behavior²³, while the partial effectiveness of actions is not recognized as the fulfillment of the terms of the Regulations²⁴. In comparison, an aggravating circumstance is always recidivism as an offense of a *similar nature*, considered for violations of Art. 14 (2) (3)²⁵ and Art.

16 (2)²⁶ at different times. The problem with recidivism lies in the dualism of the strict liability distributed between the violations cited: will it have a “similar nature”, for example, the use of pyrotechnics, when a club was previously sanctioned for racist behavior? We could find the expected position on the margin of appreciation in each case about identical nature within the limitation period²⁷. Disciplinary practice is moving along the path of cross-recognition of the grounds for recidivism between the two violations we have mentioned, which, however, may seem logical – the behavior of the fans is an identical basis for the clubs’ liability. Although, it still remains two doubts. The first is the titles of the articles of the regulations (Art. 14 “Racism and other discriminatory behavior”, Art. 16 “Order and security at UEFA competition matches”), at first, indicate the different nature of the misconduct included. The second is the distinction of limitation periods: for Art. 16 (2) it is two years, while for Art. 14 – three years. Therefore, the club will be checked within three years for previous violations of Art. 16 (2) of the Regulations, while another club in the opposite situation is limited in negative disciplinary statistics to two years. Paradoxically, it turns out that the discriminatory acts for the first time become more “convenient” for a club than the offenses Art. 16 (2). Note that the problem of the terminology of the offenses committed in sports is not limited to football [9, p. 85]. Any other circumstances may be determined by the disciplinary bodies at its discretion as aggravating, depending on the circumstances of the particular dispute.

²¹ UEFA Disciplinary Regulations. Article 23 Determination of disciplinary measures. In the case of offenses related to Article 16 (2) (a) and (e), the competent disciplinary body may take into consideration the immediate reaction of the host club or national association as a mitigating circumstance. Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2QI_y8~qQ (date of access: 30.03.2021).

²² UEFA Disciplinary Regulations. Article 16 Order and security at UEFA competition matches. a. the invasion of the field of play; e. the use of gestures, words, objects or any other means to transmit a provocative message that is not fit for a sports event, particularly provocative messages that are of a political, ideological, religious or offensive nature. Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2QI_y8~qQ (date of access: 30.03.2021).

²³ Decision UEFA CEDB of 13 October 2016. FC Zürich (not publicly available at the moment).

²⁴ Decision UEFA CEDB of 23 February 2017. Borussia Dortmund (not publicly available at the moment).

²⁵ UEFA Disciplinary Regulations. Article 25 Recidivism. 1. Recidivism occurs if another offence of a similar nature is committed within: d. three years of the

previous offence in all other cases. Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2QI_y8~qQ (date of access: 30.03.2021).

²⁶ UEFA Disciplinary Regulations. Article 25 Recidivism. 1. Recidivism occurs if another offence of a similar nature is committed within: c. two years of the previous offence if that offence was related to order and security at UEFA competition matches. Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2QI_y8~qQ (date of access: 30.03.2021).

²⁷ Decision UEFA CEDB of 15 October 2019. FC Lazio // URL: <https://www.uefa.com/insideuefa/disciplinary/cases> (date of access: 30.03.2021).

The degree to which recidivism affects the choice of sanction should not be underestimated. For example, in one dispute the club possessed incredible negative disciplinary statistics: fourteen disciplinary disputes twelve of which were associated with the behavior of the fans²⁸. The CAS stressed out that clubs, systematically demonstrate unacceptable spectators' behavior, deserve serious sanctions, and one of the sanctions was disqualification from UEFA competitions. In comparison, a match without spectators was assessed by the arbitration more as a sanction for the opposing team than for the offending club, due to the different scale of support from the fans. Thus, CAS followed one of the goals of strict liability (punitive), which cannot be extended to the subject of football who did not commit an offense. Since in this case about discriminatory actions, CAS has chosen the "proportionate sanction" and it was precisely disqualification. Such a measure, according to the arbitration, was capable of eliminating the behavior of the club's spectators for a certain period – in the sporting season, unacceptable behavior will no longer be present²⁹. Here we could see how CAS emphasizes the second goal of strict liability – preventive.

Another example, which allows us to identify the practical value of sanction in form of a football match held without spectators, is launching fireworks by the spectators, located around the stadium. Arbitrage called such behavior "zero tolerance", confirming that the previous methodology for applying sanctions against the club for the use of pyrotechnics, did not achieve the goal and did not become a deterrent for fans. As we noted earlier, sports sanctions applied in the order of strict liability are considered by CAS as

inherently pursuing a preventive goal [10, p. 360] concerning any persons affiliated with the club acting on its behalf, as well as fans. Therefore, although the match was interrupted for a short time (about a minute), and not caused serious damages, this fact was not interpreted as a mitigating circumstance in the light of numerous violations of similar nature, which took place earlier³⁰. On the example of this dispute, we can see the blocking nature of the recidivism, which prevents the recognition of an insignificant negative effect from the behavior of spectators as a mitigating circumstance.

2.2. In searching for the Exceptional Circumstances.

UEFA disciplinary practice has been choosing only two systematically applied aggravating circumstances: the seriousness of violations (the scale and duration of the behavior of the fans³¹ or extremely provocative nature of behavior³²) and damage to the reputation of UEFA as well as the organized competition (due to content offensive to UEFA³³; media coverage of fan behavior³⁴). We have specially cited the content of the circumstances to focus on the horizon of discretion in specific disputes. For example, the "severity of the violation" could be detailed in the particular case or not³⁵. The briefness could be enhanced by the use of factual circumstances to determine the sanction without

²⁸ Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, para. 37. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf> (date of access: 30.03.2021).

²⁹ Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, paras. 41, 42. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf> (date of access: 30.03.2021).

³⁰ Arbitration CAS 2013/A/3139 Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA), award of 5 December 2013, para 125. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3139.pdf> (date of access: 30.03.2021).

³¹ Decision UEFA CEDB of 23 February 2017. Borussia Dortmund (not publicly available at the moment).

³² Decision UEFA CEDB of 23 March 2017. FC Schalke 04 (not publicly available at the moment).

³³ Decision UEFA AB of 19 May 2015. VfL Borussia Mönchengladbach (not publicly available at the moment).

³⁴ Decision UEFA CEDB of 19 May 2016. Manchester United FC (not publicly available at the moment).

³⁵ Decision UEFA AB of 8 October 2019. Slovan Bratislava. <https://www.uefa.com/insideuefa/disciplinary/cases> (date of access: 30.03.2021).

clarification of what is mitigating or aggravating circumstance [11, p. 559–560].

The UEFA practice regarding exceptional circumstances in strict liability disputes appears to be little more definite than for aggravating ones. In this case, we are dealing rather with refusals to qualify certain circumstances as mitigating, and only some of them are positively verified. Here we should make an important mark: in disciplinary practice, it cannot be traced to something systematically recognized as a mitigating or aggravating circumstance. And there may be isolated cases, an extension of which to other situations of strict liability remains at the discretion of the body. Thus, the status of the guest club could be considered a mitigating circumstance only if there is evidence of the adoption of this club the necessary measures to prevent the access of certain spectators that create problems in the competition (due to the moderation process of distribution of tickets quota for the guest sector)³⁶. Another example is the club's efforts to work with fans before matches of historical competitors, which was recognized as a mitigating circumstance once³⁷. These two circumstances are directly related to the prospective influence on the possible behavior of the spectators, or, to be more precise, as preventive actions to prevent such behavior. But in the disciplinary practice on strict liability, we can find, for example, a decision that recognized a mitigating status for the limited finances of the club, confirmed by the average statistics of attendance at a home match, "... what must be taken into account especially when using a fine as a type of sanction"³⁸. It is impossible to see a preventive nature in such a circumstance, but it was used to reduce the sanction. For comparison, followed the case of the disqualification of a club from the UEFA competition, which also featured an argument about serious economic losses associated with payments for broadcasts and tickets that will

not be sold for upcoming matches³⁹. The club considered that such a circumstance was exceptional and should be taken into account to replace the sanction with a lenient one. However, CAS upheld the disciplinary bodies' point of view, considering the consequence of disqualification only temporary economic impact: did not entail full of a rushing business, and did not affect the implementation of sports activities at the national level and on the right to participate in UEFA competitions next season⁴⁰. Without addressing the issue of proof (which is undoubtedly important – it is necessary to confirm the expected negative effect of the sanctions by financial calculations), we note that the body in both cases commented on the negative economic consequences of the sanctions with a different approach. In connection with the two cases considered, it is appropriate to recall the criticism of the lack of correlation between the scale of sanctions having a monetary equivalent (fines) with the calculations of the consequences for the club [12, p. 232].

3. The Principles of Predictability of Sanctions, Equal Treatment, Stare Decisis in Connection with the Proportionality.

The requirement for clubs to understand the impact of certain circumstances on UEFA's sanctions policy includes the principles of *predictability* and *equal treatment*. Both of these principles are used in disciplinary practice to protect subjects from inconsistent and weakly substantiated decisions. Therefore, it seems likely to spread on not only the selected sanction but also on uniform use of the institute of exceptional circumstances.

CAS recognized that the discretion of a disciplinary authority does not itself contradict the

³⁶ Decision CEDB of 23 February 2017. FK Austria Wien (not publicly available at the moment).

³⁷ Decision CEDB of 19 May 2016. Manchester United FC (not publicly available at the moment).

³⁸ Decision CEDB of 10 October 2014. Dundalk FC (not publicly available at the moment).

³⁹ Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, paras. 35, 39 // URL: <http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf> (date of access: 30.03.2021).

⁴⁰ Arbitration CAS 2007/A/1217 Feyenoord Rotterdam v. Union of European Football Associations (UEFA), award of 20 April 2007, para. 40. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf> (date of access: 30.03.2021).

principle of predictability⁴¹. At the same time, it is important to establish whether the body is properly used (then the principle of predictability is observed) or abused (the principle of predictability is violated) by its discretion. The discretionary right is, of course, not unlimited. The position of CAS is that if certain Disciplinary Regulations lists the types of sanctions that could be applied to clubs, and constitute the choice depending on the circumstances of the offense (the behavior of the offender), the predictability of sanctions is corroborated⁴². Implementing this matrix into the UEFA Disciplinary Regulations, we can see the full match only if assume that the relatively predictable for the club's choice of sanctions from a wide list of Art. 6 for misconducts of clubs covered by Art. 16 (2). Our position is that the unpredictability of assessing the factual circumstances as exceptional entails turbulence of the sanction. As a result, the uncertainty is there for the clubs on the choice of the UEFA sanctions, and appropriate goals of the "strict liability" for a particular violation. There is a risk that the choice of an excessive sanction when applying Art. 16 (2), will mean an increase in the level of public danger for sport-specific actions that disrupt the influence on sports liability attributes included in other parts of the misconduct [13, p. 69].

The application of the requirement of predictability in CAS decisions is connected with the review of the principle of proportionality. Disproportional sanctions are always contrary to the requirement of predictability. The arbitration reasonably considers that if sanctions applied were proportionate since proportionality must be respected at all times it will also be *ipso*

facto predictable⁴³. As an example, we can remember the threshold value of the probationary period for conditional sanctions. According to Art. 26 (2) Disciplinary Regulations, the possible range of probation is from one to five years⁴⁴. An arbitration dispute raised the question of understanding the threshold of such serious sanctions as disqualification from the competition UEFA. During the probationary period, the club is in a situation of uncertainty: which of the violations of the provisions of the regulations, which has a "similar nature" following Art. 26 (3) will be regarded as a basis for transforming a conditional sanction into a real one? In the absence of legal certainty concerning the threshold value compliance with the principle of proportionality is updated. Therefore, disciplinary bodies should in every situation with a conditionally sanctioned club investigate based on the specific circumstances, whether the violation should lead to the real transformation of the sanction⁴⁵. It is welcome that the shortening of the probationary period limited the level of uncertainty and ensured that the principle of proportionality was respected⁴⁶.

Checking for compliance principles equal treatment and proportionality simultaneously observed as a comprehensive approach in CAS practice. Thus, it is postulated duty of UEFA disciplinary bodies to decide on the imposition of appropriate sanctions, taking into account the

⁴¹ Arbitration CAS 2014/A/3665, 3666&3667 Luis Suárez, FC Barcelona & Asociación Uruguaya de Fútbol (AUF) v. Fédération Internationale de Football Association (FIFA), award of 2 December 2014, para. 73 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3665,%203666,%203667.pdf> (date of access: 30.03.2021).

⁴² Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA), award of 16 December 2019, para. 62 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf> (date of access: 30.03.2021).

⁴³ Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA), award of 16 December 2019, para. 64 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf> (date of access: 30.03.2021).

⁴⁴ UEFA Disciplinary Regulations. Article 26 Suspension of disciplinary measures. The probationary period must be a minimum of one year and a maximum of five Available at: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2Q1_y8~qQ (date of access: 30.03.2021).

⁴⁵ Arbitration CAS 2013/A/3139 Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA), award of 5 December 2013, para. 130 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3139.pdf> (date of access: 30.03.2021).

⁴⁶ Arbitration CAS 2015/A/4256 Feyenoord Rotterdam NV v. Union des Associations Européennes de Football (UEFA), award of 24 June 2016, para. 146 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/4256.pdf> (date of access: 30.03.2021).

circumstances of the dispute with the principle of proportionality and the right to equal treatment⁴⁷. As a general rule, equal treatment obliges to resolve two similar situations identically while resolving sports cases⁴⁸. Although, we could find another idea of the principle, according to which equal treatment does not require comparing sanctions between specific decisions, but involves comparing the sanctions with the trend of practice in this category of disciplinary disputes⁴⁹. This principle is almost observed due to the *case-by-case basis*: two violations are rarely completely similar to each other and therefore it is very difficult to compare a sanction in one case with a sanction applied for another offense without taking into account the factual circumstances. The recognition of the sanction as proportionate means that “significant interest in the issue of equal treatment is lost”⁵⁰ (but not eliminated!), whereas even when broken the principle of equal treatment the sanction still may be considered proportionate given the “comprehensive test”⁵¹. As we could see,

in the CAS practice there is the view of higher-value for the proportionality test in comparison with the principle of equal treatment. Equal treatment cannot be found in a particular decision (that we could see from time to time in the UEFA disciplinary practice), but it does not prevent recognizing the lawful punishment if proportionality is not the question. So if the sanction is proportionate, the body do not think about the correct approach to the formation of practice on disputes on the strict liability. How could we talk about proportionality, when the practice of the disciplinary authority on the offense has not been investigated? The subjective opinions about the choice of a sanction as appropriate for the offense in the presence or absence of exceptional circumstances outside the principle of equal treatment will endlessly formulate new vectors of practice on strict liability’s cases (just look at Article 16 (2), in which there are at least eight offenses). We have no doubt that equal treatment should not be reduced to formal consideration of the circumstances and one’s conviction that it is more than less suitable for the violation of the club.

Arbitration does not recognize the precedent value for its decisions (*stare decisis*), which does not prevent “to the extent that it considers it useful, to take into account the decisions in previous cases, which concerned generally similar circumstances, to determine whether the sanction in the appealed decision is proportionate in all the circumstances”⁵². A more categorical opinion could be found in the practice of CAS: arbitration decisions form a valuable body of case law and can contribute to the strengthening of predictability in sports justice – therefore its previous positions could and should be taken into account for legal expectations of sports organizations and athletes⁵³. In this view, although

⁴⁷ Arbitration CAS 2016/A/4692 Kardemir Karabükspor Kulübü Derneği v. Union des Associations Européennes de Football (UEFA), award of 26 January 2017, para. 7.34 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/4692.pdf> (date of access: 30.03.2021).

⁴⁸ Arbitration CAS 2013/A/3297 Public Joint-Stock Company “Football Club Metalist” v. Union des Associations Européennes de Football (UEFA) & PAOK FC, award of 29 November 2013, para. 8.39 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3297.pdf> (date of access: 30.03.2021).

⁴⁹ Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA), award of 16 December 2019, para. 94 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf> (date of access: 30.03.2021).

⁵⁰ Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA), award of 16 December 2019, para. 85 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf> (date of access: 30.03.2021).

⁵¹ Arbitration CAS 2019/A/6345 Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA), award of 16 December 2019, para. 96 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf> (date of access: 30.03.2021).

[cas.org/Shared%20Documents/6345.pdf](http://jurisprudence.tas-cas.org/Shared%20Documents/6345.pdf) (date of access: 30.03.2021).

⁵² Arbitration CAS 2018/A/6072 Kwesi Nyantakyi v. Fédération Internationale de Football Association (FIFA), award of 9 April 2020, para. 60 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/6072.pdf> (date of access: 30.03.2021).

⁵³ Arbitration CAS 2008/A/1545 Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC),

the CAS could in principle decide without considering similar disputes, it should maintain the value of its decisions, and the party motivating a change in this practice should provide sufficient evidence for this shift. Regardless of our opinion in this discussion, the decisions made by the disciplinary bodies and the arbitration on disputes close to the facts contribute to a more accurate verification of the sports sanction for compliance with the principle of proportionality. As an example of an exception to the existing practice of strict liability, let us turn to the dispute about the unintentional discriminatory behavior of fans [14, p. 231-232]. As noted by CAS, based on the evidence presented about the club's fans' tradition of using banana symbols, the possibility that an inflatable banana was thrown onto the field because of disappointment with sporting performance and without the purpose of discrimination cannot be completely neglected⁵⁴. And since the incident could be unintentional the sanctions confirmed by the appeal authority are disproportionate, if not will be accompanied by an incentive for the club to demonstrate effective measures against such ambiguous behavior in the future. Therefore, the arbitration gave a conditional character to one of the sanctions, which ordered the next match in the UEFA competition to be played without spectators⁵⁵.

4. Conclusion.

The position of the UEFA regarding the establishment of exceptional circumstances gives us grounds to highlight several interesting aspects.

award of 16 July 2010, para. 53 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1545.pdf> (date of access: 30.03.2021).

⁵⁴ Arbitration CAS 2017/A/5299 *Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA)*, award of 10 August 2018, para. 50 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf> (date of access: 30.03.2021).

⁵⁵ Arbitration CAS 2017/A/5299 *Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA)*, award of 10 August 2018, paras. 77, 78 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf> (date of access: 30.03.2021).

Firstly, the regulator refused to rigidly impose its vision of mitigating and aggravating circumstances. Even in the case of a direct indication of a mitigating circumstance in the provisions of the Disciplinary Regulations, its content is broader and aimed at achieving the suppressive goal of the football "legislator" – the prompt termination of unacceptable behavior of fans. The only exceptional circumstance is recidivism, adjusted for some of the problematic points we identified. Here one should think about the legitimacy of the possible second meaning of recidivism – the negative disciplinary history of the club beyond the limits of prescription as an aggravating circumstance. It seems that this approach is not acceptable, since it makes it possible to level the limitation period of the main meaning of recidivism. Support should be given to the restrained expansion of typical aggravating circumstances in disciplinary practice, limited today by the two options discussed earlier.

Secondly, disciplinary authorities are restrained in establishing circumstances as exceptional ones. The severity of the practice is dominant at the moment and it is difficult to guess whether its vector will change. In part, this can be considered justified for specific examples: the absence of aggravating circumstances is not a mitigating circumstance⁵⁶ and previous negative disciplinary history⁵⁷.

Thirdly, it seems to us that the refusal to recognize mitigating status for certain preventive actions of clubs is unjustified since the concept of mitigating circumstances in disciplinary practice is formulated with preventive priority, which is one of the goals of strict liability. Let us recall the identification of a spectator, the preventive role of which is obvious, but not assessed either by the disciplinary bodies⁵⁸ or CAS⁵⁹. The same doubt arises

⁵⁶ Decision UEFA AB of 11 September 2015. *FC Midtjylland* (not publicly available at the moment).

⁵⁷ Decision UEFA CEDB of 22 March 2018. *Atalanta BC* (not publicly available at the moment).

⁵⁸ Decision UEFA AB of 3 February 2015. *Ferencvárosi T.C.* (not publicly available at the moment).

⁵⁹ Arbitration CAS 2013/A/3139 *Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA)*, award of 5 December 2013, para. 126 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3139.pdf>

in connection with the non-recognition for the club's spectators program, which had been demonstrated its effectiveness over a relatively long period (in a particular dispute – one year)⁶⁰.

Fourthly, despite the earlier words of support for the restraint in determining aggravating circumstances the content of those needs special commentary. "The severity of the violation", in contrast to the damage to the reputation of UEFA and the competition, has weak boundaries of understanding. The current situation of filling with the meaning of this concept allows the jurisdictional authorities to use the category of "seriousness" for almost any circumstance as a justification for a stricter approach in the sanctions policy in a particular case. In one dispute, despite the confirmed CAS violations and harm the reputation of UEFA and the competition "severe sanctions" meant only a conditional suspension of the club⁶¹. At the same time, this measure as noted by the arbitration was supposed to give a clear signal to the club about its inability to work with fans and help to achieve the preventive goal of keeping them from unacceptable behavior⁶². The logical connection between the listed aggravating circumstances and the achievement of the goal of a preventive "clear signal to the club" through a conditional rather than real disqualification in the given case is more than discussible.

The examples can be continued from which there is only one conclusion – the disciplinary bodies are in a difficult situation of balancing between two values. On the one hand, it is the UEFA statutory goal of the "for sports

without hooliganism" format. On the other hand, it is an obvious risk of violating the interests of clubs by a choice that is far from always verified by the proportionality test. A convincing equilibrium point has not yet been found and passed. And not the least ground for such a status quo is due to the provisions of the Disciplinary Regulations, which do not prevent the disciplinary bodies from using the circumstances of the violation committed to determining the sanction and its amount without classifying them as mitigating or aggravating. It seems to us that detailed regulation is impossible and the regulator's approach is justified. But a continuation of this conclusion is the need for a predictable proportionality of practice, demonstrating equal treatment for real subjects of strict liability – clubs.

Is it possible to find a "hand-made" methodology in the sports jurisprudence on strict club liability to test a sanction for proportionality? Especially keeping in mind the philosophical understanding of the concept of proportionality of punishment [15, p. 370-373]. Proportionality inevitably includes, among other things, an assessment of the degree of guilt of the sports subject⁶³ which is conceptually irrelevant for strict liability [16, p. 808]. But even with considering such an amendment, you could select only one solution to the arbitration of the clubs' strict liability, demonstrated the technique for defining proportionate sanctions. The proportionality test assumes that the sanction must be (1) appropriate and (2) necessary, and (3) demonstrate a balance between the goal pursued by the sports federation and the sanction used in a particular dispute to achieve it⁶⁴. By mentioning appropriate and necessary sanctions CAS considered combining the

cas.org/Shared%20Documents/3139.pdf (date of access: 30.03.2021).

⁶⁰ Decision UEFA AB of 3 February 2015. Legia Warszawa S.A. (not publicly available at the moment).

⁶¹ Arbitration CAS 2017/A/5299 Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA), award of 10 August 2018, paras. 138, 139. // Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf> (date of access: 30.03.2021).

⁶² Arbitration CAS 2013/A/3139 Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA), award of 5 December 2013, para. 25 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3139.pdf> (date of access: 30.03.2021).

⁶³ Arbitration CAS 2005/A/1001 Fulham FC (1987) Ltd v. Fédération Internationale de Football Association (FIFA), award of 9 May 2006, para. 45 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/1001.pdf> (date of access: 30.03.2021).

⁶⁴ Arbitration CAS 2017/A/5299 Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA), award of 10 August 2018, para. 137 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf> (date of access: 30.03.2021).

two functions: to help compensate for the harm caused to the breach, and, what is more important, to prevent the recidivism of the offense according to the club (note that we are talking exclusively about the private prevention, not the common). The arbitration considers the balance of sanctions through an analysis of existing practice, the use of which, however, “is difficult due to differences in circumstances and the need to balance them on an individual basis to obtain a proportionate sanction”⁶⁵. At the same time, one could come across the point of view that despite the prerogative to formulate its opinion on the proportionality of sports sanctions, arbitration should not ignore the experience of disciplinary bodies involved in specific sports when determining which sanctions are appropriate concerning a particular violation⁶⁶. This conclusion of CAS is far from indisputable, but it limited the abuse of sports arbitration as an appellate instance by its right to check the proportionality of the decisions on sports liability. Undoubtedly, the arbitration does not have the right to exclude itself from checking sanctions for proportionality, either at the request of the party to the processor in the absence of such. At the same time, this principle should not be applied in the absence of grounds. At least, an analysis of the exceptional circumstances applied and hypothetically related to the dispute is needed. It should be agreed that lowering the sanction for a club in the absence of exceptional circumstances will mislead all law-abiding fans and will motivate clubs to take a frivolous attitude towards

spectators` behavior⁶⁷. But the decision of the disciplinary authority, which did not formally establish aggravating circumstances (or ignored exceptional circumstances at all), but at the same time chose a sanction that deviates from the trend of practice, does not mirror-match sports justice.

Combination in the provisions of Art. 14 (2) (3), and Art. 16 (2) Disciplinary Regulations of several approaches to the available list of sanctions for clubs is not much distinction between the mission of disciplinary bodies as a multidimensional idea of the principle of proportionality. It seems that it is necessary to emphasize the unity of the value of the object of the Disciplinary Regulations – the holding of UEFA competitions on a sporting principle and outside the influence of abstract interests. This will ensure the uniform approach of strict liability and support the principle of proportionality [17, p. 844].

The choice of a mechanism for ensuring UEFA`s understanding of proportionality is also not peremptory – through the desire to uniformly prosecute violators by limiting the discretion. The principle of proportionality logically assumes that the most severe sporting sanctions are not applied until the lighter sanctions have been exhausted⁶⁸. The use of unjustified sanctions not only overrides the goals of the UEFA but also raises the question of the fundamental fairness of the process⁶⁹. The chosen sanction also depends on the goals of such a policy, which cannot be exclusively punitive but must be combined with the prevention of unacceptable behavior in the future.

Using a specific example, we draw attention to the understanding of private prevention and only concerning the offending club. At the same time, in the disciplinary disputes considered by the CAS, we can meet another point of view that seems

⁶⁵ Arbitration CAS 2017/A/5299 *Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA)*, award of 10 August 2018, para. 143 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf> (date of access: 30.03.2021).

⁶⁶ Arbitration CAS 2010/A/2090 *Aino-Kaisa Saarinen & Finnish Ski Association v. Fédération Internationale de Ski (FIS)*, award of 7 February 2011, para 48 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/2090.pdf> (date of access: 30.03.2021); Arbitration CAS 2013/A/3324&3369 *GNK Dinamo v. Union des Associations Européennes de Football (UEFA)*, award of 13 June 2014, para. 9. Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3324%203369.pdf> (date of access: 30.03.2021).

⁶⁷ Decision UEFA AB of 3 February 2015. *Legia Warszawa S.A.* (not publicly available at the moment).

⁶⁸ Arbitration CAS 2011/A/2670 *Masar Omeragik v. Macedonian Football Federation (FFM)*, award of 25 January 2013, para. 8.15 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/2670.pdf> (date of access: 30.03.2021).

⁶⁹ Arbitration CAS 2005/A/830 *S. v. FINA*, award of 15 July 2005, para. 50 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/830.pdf> (date of access: 30.03.2021).

to us to be more consistent with the principle of proportionality. Thus, compliance with proportionality is characterized by containment of the club and other clubs from potential future violations⁷⁰. Expansion to common prevention is undoubtedly conditioned by the protected value of the Disciplinary Regulations, but there remains the risk of using this thesis as a formal cover for serious sanctions. Other than common prevention, one cannot justify a proportional reduction of sanctions in difficult situations of introducing new prohibitions and the corresponding strict liability [18].

In the conclusion, we will offer some simple tips that can be used to improve the methodology (consequently, to update the previous methodology) of verification by disciplinary authorities and arbitration of sanctions within the framework of strict liability of clubs. Firstly, to summarize and analyze the factual circumstances accompanying the violation (these may also be related to the professional activities of the violating club: financial situation; results of involvement in working with fans; ticket policy, and others), in terms of exceptional value. Secondly, it should be indicated in the decision what circumstances are mitigating or aggravating, and how they collectively affect the choice of sanction. Here, the disciplinary body has to demonstrate why the sanction is predictable and consistent with the principle of equal treatment. Thirdly, the authorities should always choose the minimum sanction in the absence of aggravating circumstances, since strict liability is a forced legal institution. It is also possible to use the right to go beyond the lower limit of the established sanction, although it is not provided Art. 14. And at last, it is necessary to use the disciplinary decisions in precedent status when the actual circumstances are close, but not necessarily in the same circumstances. In such a situation there is a risk

of dissonance with the requirement of equal treatment as an established practice. The choice between the precedent and the trend of practice is recommended to be made based on the needs of the disciplinary body: if the circumstances of the violation require a different, more lenient, or strict approach. At the same time, there is a risk of using a decision, which does not meet the principle of proportionality. To eliminate such risks means need to be sufficiently convinced that a representative case law meets the requirement of proportionality.

⁷⁰ Arbitration CAS 2014/A/3793 Fútbol Club Barcelona v. Fédération Internationale de Football Association (FIFA), award of 24 April 2015, para. 9.14 Available at: <http://jurisprudence.tas-cas.org/Shared%20Documents/3793.pdf> (date of access: 30.03.2021).

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INFORMATION ABOUT AUTHOR

Iliia A. Vasilyev – PhD, Associate Professor; Associate Professor, Department of Theory and History of Law *St. Petersburg University*
7/9, Universitetskaya nab., St. Petersburg, 199034, Russia
E-mail: i.vasilev@spbu.ru
Scopus AuthorID: 57196348447
ResearcherID: I-7480-2013
RSCI SPIN-code: 7524-7480; AuthorID: 508695

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