

AIMS OF DISCIPLINARY SANCTIONS FOR THE SPECTATORS' BEHAVIOR: CONTROVERSIAL UEFA PRACTICE CONCERNING FOOTBALL CLUBS

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Article info

Received –

2022 May 28

Accepted –

2023 January 10

Available online –

2023 March 20

Keywords

Sports liability, strict liability, spectators' behavior, sports sanctions, sanction purposes, general prevention, private prevention, preventive purpose, deterrent purpose, educational purpose

The subject. The objectives of strict club liability for spectators' behavior are not mentioned in the provisions of the UEFA Disciplinary Regulations. Strict liability implies the responsibility of clubs, regardless of the presence of fault for the actions of third parties – their spectators. Therefore, the question of the purpose of sanctions acquires additional actuality: a sanction cannot only have a punitive effect in the absence of the subject's fault.

The purpose of the study. The variety of sporting sanctions and the wide range of their application creates risks of excessive coercion against football clubs. It is necessary to consider the preventive and deterrent purposes of sports sanctions, without which sports liability is deprived of the sign of certainty for the subjects of sport and turns into the arbitrariness of the soccer authorities.

Methodology. In an attempt to find references to sanctions targets under strict liability we analyzed the available practice of the UEFA bodies from 2013 to 2021 (a massive of several hundred decisions of the UEFA Control, Disciplinary and Ethics Commission, the UEFA Appeals Commission). Due to the dispute resolution system existing in European football our research could not be carried out without referring to the decisions of the Court of Arbitration for Sport (CAS) for the period 2002-2020.

The main results of research and the field of their application. A serious obstacle to the consistent practice of disputes about the responsibility of clubs for the behavior of spectators is the ambiguity of the terminology used and the doctrinal approaches of law enforcement officers. In decisions we can come across a mention of a preventive effect; preventive and deterrent effect; preventive and educational effect of sanctions. The study found that the current sports justice's practice of applying strict liability to football clubs has two main problems. Firstly, the UEFA bodies have not established an understanding of who is the subject of the focus of the sanctions. In the disputes examined, two target audiences for sanctions under strict liability are named: clubs and spectators. Secondly, different disputes have emphasized different goals of sports sanctions. The combined approach has not yet been formulated. We have tried to fix these problems.

Conclusions. The goals of strict liability and applied sports sanctions in the UEFA perimeter should not differ: preventive and deterrent, and only in the last – punitive. The need for an unambiguous choice of the football entity targeted by sports sanctions will be the first step to take into account the set of aims of the sports sanctions applied to clubs: preventive, deterrent and punitive. Despite decades of UEFA practice in the application of strict liability, there is still uncertainty as to how a sanction will have the expected effect on the spectators. Limiting UEFA to private prevention in determining the sanction and its size in club competitions does not fully fulfill the mission of sports justice. Even if the sanctions imposed on clubs under strict liability have not been verified by a UEFA jurisdictional body to take into account a set of objectives, CAS is entitled to carry out such verification. An additional difficulty arises due to the ambiguity of terminology (and ideology) regarding the objectives of sanctions in sports justice's practice.

1. Introduction.

Strict liability of sports clubs for the behavior of their fans in football, although it leaves enough legal questions today, it still remains one of the key legal institutions in the regulation of FIFA, territorial football confederations (in our case, UEFA), national associations.¹ The key characteristic of this type of legal liability is the lack of research by the law enforcer of the key subjective element – guilt. Football clubs are liable, whether at fault, for the conduct of their supporters that is unlawful under specific regulations.²

The sporting sanctions that accompany strict liability in football vary depending on the specific composition of unacceptable behavior by fans. A rather voluminous list of sanctions, for example, is presented in the UEFA Disciplinary Regulations. Some of them have been specifically selected by UEFA for discriminatory behavior,³ while other unacceptable behavior may be subject to any proportionate sanction against clubs.⁴ The principle of proportionality, at a first approximation, obliges the body resolving the dispute to choose a negative measure of coercion corresponding to the deed: not being clearly and obviously disproportionate to the misconduct. Proportionality, as a fundamental principle of law, is inherently imperative for the purposes of sports sanctions. But let's think about it: are such goals formulated by UEFA as a standard-setter, and are sanctions solely an expression of the punitive function of strict liability? Compliance of sanctions with the goals in each specific case remains an important point for self-control of the law enforcer. The difference in impact between a fine and

suspension from a UEFA competition is as big as the non-obvious choice of playing a match without spectators versus closing a sector of the stadium. Let us recall from the science of criminal law that any punishment is associated with coercion in the sense of causing suffering to the person held accountable, why it is necessary to abandon the methods of legal influence preceding the act [1, p. 150]. Therefore, when a sports sanction also has a preventive purpose, it should not be supplemented by other coercive measures. To date, this requirement leaves doubts in connection with the provisions of Art. 7 of the UEFA Disciplinary Regulations, which establishes the institution of an administrative directive.

2. Law enforcement discourse of the goals of sports sanctions.

In the practice of strict liability disputes, it is quite rare to find a discussion or even an indication of the goals of sporting sanctions imposed on clubs: we can name only 12 cases out of an array of several hundred considered by the UEFA jurisdictional bodies.⁵ This fact makes us think about the effectiveness of the risk of using sanctions that do not pursue all the necessary goals. One can agree with the opinion that sanctions built on soft law (such is the *lex sportiva*, including law enforcement practice in cases of strict liability) should not be deprived, at least, of the purpose of deterrence [2, p. 154–156]. At the same time, in the decisions we analyzed, the law enforcer sometimes calls the preventive goal (preventive) of sanctions as separate from the deterrent (deterrent) and vice versa, and also generally emphasizes the “effect” of sanctions, probably thereby speaking about their goals. We, like some other sports legal practitioners, may find it strange to such an extent the uncertainty of the jurisdictional bodies of UEFA. However, the disputes considered in the CAS appellate procedure do not qualitatively change the situation: the postulation of the goals of strict liability sanctions is presented as a standard wording that has been transferred from decision to decision since 2002: Art. 8 of the UEFA Disciplinary Regulations establishes the responsibility of clubs for the behavior of their supporters and

¹ In this article, we use the terms “federation” and “association” interchangeably, which is consistent with their identical meaning in the sports law literature.

² See, for example, art. 8 UEFA Disciplinary Regulations. URL: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2Ql_y8~qQ (date of access: 26.05.2022).

³ Art. 14 UEFA Disciplinary Regulations. URL: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2Ql_y8~qQ (date of access: 26.05.2022).

⁴ Art. 16 (2) UEFA Disciplinary Regulations. URL: https://documents.uefa.com/v/u/ZNsWJsRSmOuSS2Ql_y8~qQ (date of access: 26.05.2022).

⁵ Archive of decisions on the UEFA website. URL: <https://disciplinary.uefa.com/cases/archive/> (date of access: 26.05.2022).

therefore has a preventive and deterrent effect.⁶ However, the question remains: why is any default sanction for fan behavior at least preventive and deterrent? Somewhat expands the dogma we cited by one of the decisions of the UEFA jurisdictional bodies,⁷ according to which the purpose of Art. 8 of the Disciplinary Regulations is to create a rule that has a preventive and deterrent effect, that is, “guaranteeing the responsibility of clubs in competitions for the behavior of their fans”.

The message presented by the law enforcer is rather controversial: prevention and deterrence serve as a justification for strict liability, when the club is forced to work with fans, being at each match a conditional hostage of risk, poorly controllable. One gets the impression that UEFA itself is an (un)conscious supporter of the concept of adjustment measures, when clubs are considered as subjects that are permanently in a “dangerous state” [3, p. 53] as the basis of strict liability. There is a doubt: whether the severity of the applied sanction always reflects only the socially significant nature of the negative act [4, p. 97], without including behind the scenes UEFA’s reaction to the dangerous state of clubs whose supporters systematically behave in unacceptable ways? The inconsistency or silence of the UEFA jurisdictional bodies in relation to the goals of the sanctions raises doubts about their effectiveness, their ability to be an effective way of influencing the violating subject in a particular situation. Since sanctions are only one of the types of coercive measures in sports, it is necessary to plan the long-term result of their application. We are not supporters of a limited understanding of coercive measures as purely punitive, “putting an end” to a specific violation and entailing serious restrictive

consequences for an entity that has crossed the line of regulation in football. As shown by criminological studies in relation to crime, severe sanctions, at best, have an insignificant impact on its statistics and have the same mild preventive effect [5, p. 253]. It seems to us that the lack of a clear goal-setting for a strict liability sanction pushes clubs towards an indifferent attitude towards any behavior of fans and a stoic perception of their punishment in the style of “will be punished anyway”. And with such a development of practice, the method of preventive deterrence of potential violators-clubs disappears in law enforcement [6, p. 151-152].

To what extent is the preventive goal of sanctions consistent with prevention in sports? Some researchers propose to understand prevention as an activity aimed at preventing misconduct, which means a narrower category in comparison with prevention [7, p. 39]. In a situation of strict club liability, this distinction is of particular importance. It can be stated that in European club competitions, the main responsibilities for the prevention of the behavior of fans (how to work with them, and not just the implementation of security measures and maintaining order before, during and after a sporting event) have been transferred to participating clubs (which, in general, corresponds to individual national concepts of ensuring safety at sports competitions [8, pp. 759-770]).

Transferring the obligation to prevent the behavior of fans to the clubs raises the issue of the methodological basis of sanctions as the only way, for a negative reaction from UEFA, to influence violators. In the scientific literature, one can find a proposal to use a risk-based approach, when through punishment it is necessary to plan an impact on a risk factor instead of the classical social danger of an act as a characteristic of its harmfulness [9, p. 64]. This point of view seems to us appropriate for the strict liability of clubs. The goals of any sports sanction applied to clubs are seen as complex, not limited to negative, punitive impact on the principle of “the greater the danger, the more severe the reaction”.

In sports jurisprudence, it seems logical to predict not only private, but also general prevention. True, even the CAS tends to focus only on a particular dimension: “... the purpose of disciplinary

⁶ The said formula in law enforcement practice is cited by Arbitrage TAS 2002/A/423 PSV Eindhoven / Union des Associations Européennes de Football (UEFA), sentence du 3 juin 2003, para. 13-16: “L’art. 6 al. 1er RD, faisant endosser une responsabilité objective par les clubs pour les faits de leurs supporters, remplit donc une fonction préventive et dissuasive”. URL: <https://jurisprudence.tas-cas.org/Shared%20Documents/423.pdf> (date of access: 26.05.2022).

⁷ UEFA Decision of 4 September 2014 Ferencvárosi TC. URL: <https://disciplinary.uefa.com/cases/archive/> (date of access: 26.05.2022).

sanctions is, in particular, to eliminate the harm caused and prevent the repetition of certain violations, that is, to encourage the club to fulfill its obligations and influence the behavior of its fans".⁸ At the same time, the preventive impact in the theory of law is called as two-element, including private and general dimensions [10, p. 56]. The combination of private and general preventions in any sporting sanction imposed for the behavior of fans will allow ambivalent influence both on the subject brought to strict liability and on other clubs in this competition and even on a larger scale – to be a warning, at least for all clubs under jurisdiction of UEFA and participants in club competitions within the FIFA perimeter. The latter is fully justified by the fact that strict liability in football is a universal legal institution of the FIFA Disciplinary Regulations⁹, territorial analogue confederations of UEFA¹⁰ and their national member associations.¹¹ Despite the subordinate nature of relations in the management pyramid in football [11, p. 100–108], they do not oblige national football federations to implement in their regulation the rule of strict club liability – *the strict*

liability rules. But in the absence of the named doctrine, bringing fans, who, although they are called, for example, in the Disciplinary Regulations of the RFU, subjects of football,¹² to liability on the basis of the norms of the football regulations will meet objective obstacles – the prosecution of persons in different national jurisdictions with the specifics of legal systems. For federations, there is only the option of recovering the damage caused in a civil law order with all the difficulties of proving a causal relationship [12, p. 198–210].

Let us recall in one of the publications of sports lawyers the undisputed idea that the punishment of clubs will be felt by all fans, guilty or innocent, which should ultimately lead to order in the stands, preventing the repetition of misconduct [13, p. 231]. However, by doing so, the researcher directly named the fans, and not the club, as the real addressee of the sanctions, and, as a result, declared the value of a combination of private (in his concept, these are violating spectators) and general (the rest of the spectators) prevention.

The analyzed practice allows us to state the difference in the approaches of law enforcers to determining the content of the preventive and deterrent goals of sports sanctions. In separate decisions, their justified, as we believe, distinction is made. In the main array, prevention and deterrence are considered in the status of synonyms – as a private prevention only in relation to the violating club. At the same time, "the deprivation of criminogenic tendencies of freedom of development" [14, p. 144] fans as the goal of "strict liability" of preventive activities can be traced in many decisions.

3. Conclusion.

The objectives of strict liability and applied sports sanctions within the UEFA perimeter should not be distinguished: preventive and deterrent, and only last but not least – punitive. According to some researchers, the punitive function is woven into the complex mechanism of private law relations and is necessarily present in it [15, p. 35]. However, UEFA's

⁸ Arbitration CAS 2017/A/5299 Olympique Lyonnais v. Union des Associations Européennes de Football (UEFA), award of 10 August 2018, para. 142. URL: <https://jurisprudence.tas-cas.org/Shared%20Documents/5299.pdf> (date of access: 26.05.2022).

⁹ FIFA Disciplinary Code, art. 8(1): "In particular, associations and clubs may be responsible for the behaviour of their members, players, officials or supporters or any other person carrying out a function on their behalf even if the association or club concerned can prove the absence of any fault or negligence". URL: <https://digitalhub.fifa.com/m/2b6a6b73ba614d53/original/twc8yxh6fn0kjkgxhe9e-pdf.pdf> (date of access: 26.05.2022).

¹⁰ For example, Asian confederation football. AFC Disciplinary and Ethics Code, art. 65.1.2: "The home Member Association or home Club is liable for improper conduct among spectators, regardless of the question of culpable conduct or culpable oversight". URL: https://assets.the-afc.com/migration/a/f/AFC%20Disciplinary%20and%20Ethics%20Code%202019_v8.pdf (date of access: 26.05.2022).

¹¹ RFU Disciplinary Regulations, art. 32(1, 2). URL: <https://static.rfs.ru/documents/1/5d97451d197af.pdf> (date of access: 26.05.2022).

¹² RFU Disciplinary Regulations, List of terms and definitions. 14. Subject of football – spectators (fans) and their associations. URL: <https://static.rfs.ru/documents/1/5d97451d197af.pdf> (date of access: 26.05.2022).

current regulatory approach does not yet create the prerequisites for the flexibility of the law enforcement officer in the event of discriminatory fan behavior covered by Art. 14 of the Disciplinary Regulations. The predetermined nature of the types and range of sanctions for the named offense allows us to recall that the economy of repression in criminal law is considered as the choice of the optimal sanction from the list of possible ones [16, p. 32]. The lack of flexibility in the choice of sanctions means a limited search for the most appropriate of them in specific actual circumstances, taking into account the whole range of appropriate goals of strict liability: preventive, deterrent, punitive (ideally, sports liability should also perform regulatory, restorative and educational functions-goals [17, p. 521]). Since the sanctions against clubs pursue the fulfillment of a combination of goals, it is necessary to provide the law enforcer with their entire range and, if applied to clubs, Part 2 of Art. 14 of the Disciplinary Regulations.

In parallel, it would be appropriate to recall an example from the field of administrative activity given in one of the studies: the deterrent effect of revoking a license for the right to drive a vehicle was more significant than the effect of suspending such a license [18, p. 284]. From our point of view, resorting to higher sanctions even in case of relapse without an array of aggravating circumstances eliminates the complex goal-setting of strict liability and sanctions, which is enhanced by the use of the “middle” of the three standards of proof in sports justice [19, p. 22-23; 20, p. 178], but not specifically created for this category of disputes with “exceptional force” [21, p. 385]. In such a situation, private prevention is seen as the deprivation of the club of the right to participate in the competition and the exclusion of its fans from the football family for a certain period, containment and general prevention – an unambiguous message to other participating clubs about possible negative consequences.

To limit ourselves to private prevention when determining the sanction and its size in UEFA club competitions means not to fully fulfill the mission of sports justice. And the prevalence of the institution of strict liability in world football

obviously needs to use the best practices of influencing violating clubs (the best does not mean punitive) [22, p. 273], which is still far from reality. In this regard, the systematization of information acquires additional importance [23, p. 90; 24, p. 346], obtained through the practice of applying strict liability to clubs, and by making the practice publicly available as a way of ensuring the preventive goal of liability. The disclosure on the website of the decisions of the UEFA jurisdictional bodies on the category of disputes we are interested in has become a good example of sports justice.

In the interests of the study, it seems appropriate to us to draw an analogy with the conclusion of arbitration in one of the decisions related to bringing the club to strict liability¹³: regardless of whether the jurisdictional body refers to the principle of proportionality, the sanctions must comply with such a principle. Therefore, even if sanctions applied to clubs under strict liability have not been verified by the UEFA body to take into account a set of goals, CAS is entitled to carry out such verification. Maybe, but should it, given that we are talking about goals, and not about the principles of applying the sanction? Today, it seems premature to give an affirmative answer to this question until the CAS practice and the UEFA jurisdictional bodies are consolidated. We can agree with researchers who believe that the effectiveness of educational impact stems from the fairness of regulation [25, p. 264; 26, p. 616], in our case – the construction of strict liability, its components, the procedural rules of the UEFA Disciplinary Regulations. However, the discussion of the fairness of strict club liability for the behavior of fans is guaranteed to meet with polar opinions, as we have noted in this paper. An additional difficulty in waiting for an answer to the question arises due to the uncertainty of terminology (and ideology) regarding the goals of sanctions in law enforcement practice. There was an impression that in order to protect the sports

¹³Arbitration CAS 2020/A/6920 Al Hilal Club v. Confédération Africaine de Football (CAF), award of 15 December 2020, para. 82. URL: <https://jurisprudence.tas-cas.org/Shared%20Documents/6920.pdf> (date of access: 26.05.2022).

community from carriers of a “dangerous state” as a preventive measure of social protection [27, p. 13] and “strict liability” was developed. It would seem that sports arbitration should bring orderliness by speaking out about the correct goal-setting of sports sanctions in the legal perimeter of UEFA [28, p. 179; 29, p. 21] and sports in general [30, p. 142]. But so far, this is only a perspective, akin to determining the true subject of goal-setting sanctions in disputes about the strict responsibility of clubs for the behavior of fans.

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BIBLIOGRAPHIC DESCRIPTION

Vasilyev I.A. Aims of disciplinary sanctions for the spectators' behavior: controversial UEFA practice concerning football clubs. *Pravoprimerenie = Law Enforcement Review*, 2023, vol. 7, no. 1, pp. 93–102. DOI: 10.52468/2542-1514.2023.7(1).93–102. (In Russ.).

