

Jan 04, 2019

Will the changes implemented in the FIFA Code of Ethics in 2018 improve the global governance of football?

Governance | Opinion Article | International



by José Juan PINTÓ SALA, Luis TORRES MONTENERO, Roberto NÁJERA REYES

**José Juan Pintó Sala,
Roberto Nájera Reyes
& Luis Torres Montenero**

Lawyers, Pinto Ruiz & Del Valle

Barcelona - Spain

Brief introduction

It is undeniable that the *Fédération Internationale de Football Association* (FIFA) has been in constant battles against corruption since Mr *João Havelange*'s era in the late 90's. As the most popular sport in the world - and particularly in view of the current figures involved in sponsorships and media rights - it is of foremost importance that FIFA's objective to protect the integrity of football worldwide is taken seriously.

Although match manipulation was the focus of attention in the beginning, FIFA decided to take a broader approach in 2012 with the creation of the FIFA Integrity Initiative[1], which would cover the areas of prevention, detection, intelligence-gathering, investigation and sanctions, of potential incidents of match-fixing and corruption.

One significant landmark was the approval of the 2012 version of the FIFA Code of Ethics (2012 FCE), which would remain – jointly with the FIFA Code of Conduct – the main legal framework addressing the principles and the core values of integrity within FIFA (including, of course, member associations, confederations and other stakeholders) and with third parties. One of the most significant aspects of the reform carried out in the 2012 FCE was the restructuring of the Ethics Committee with two chambers; an investigatory one and an adjudicatory one.[2]

Despite the fact that a great number of cases were brought to the attention of the Ethics Committee between 2012 and 2018[3], the 2012 FCE was thoroughly reviewed “with the intention of guaranteeing greater opportunities for transparency and understanding of the respective proceedings”, as well as “to be more specific with respect to the conduct that is expected from persons bound by the code”. [4] The result of such revision led to the approval by the FIFA Council, on 10 June 2018, of the 2018 version of the FIFA Code of Ethics (2018 FCE or the Code), which entered into force on 12 August 2018.

The present article addresses the most relevant amendments introduced by the new 2018 FCE and focuses the attention on the specific links between the aforesaid changes and the considerations of the CAS Panel in the well-known Valcke case[5] that may lead FIFA to consider the modification of some specific provisions of the FIFA former Code of Ethics.

Main changes to the FIFA Code of Ethics

Below is a summary of the most relevant amendments made to the FIFA Code of Ethics that are also identified in the FIFA Circular no. 1645.

Limitation periods and competence of the Ethics Committee

Article 12 of the 2018 FCE, now provides a shorter limitation period for the prosecution of ethics-related cases. In comparison with the 2012 FCE, the limitation period was reduced from 10 to 5 years for general breaches of the provisions of the Code. On the other hand, matters related to bribery, misappropriation of funds and manipulation of football matches or competitions were set to 10 years (conversely, there was no statute of limitation previously provided in 2012 FCE for bribery and corruption cases).

This is obviously a change that will require FIFA to be extremely diligent in its monitoring mechanisms in order to enable a swift identification, investigation and prosecution of potential violations of the Code. As a matter of fact, FIFA has already addressed this issue in the new 2018 FCE by reducing its workload, delegating the competence of investigating and adjudicating certain conducts to the member associations or confederations. In addition, FIFA has also reserved the jurisdiction of the Ethics Committee in the event that such member association or confederation does not initiate proceedings within three months from the matter becoming known to the Ethics Committee. As provided below, the instrument of the plea bargain will also assist FIFA in expediting the completion of ethics cases.[6]

Rules of Conduct

These rules are the foundation of the FIFA Code of Ethics and all the conducts to which the persons bound by the Code shall abide are currently defined within Articles 13 to 29 of 2018 FCE. It is worth noting that the aforesaid provisions share some of the amendments made in the 2018 FCE. In this sense, the most relevant modifications made to Part II – Section 5 (Rules of Conduct) of the Code may be summarized as follows:

- The member associations and confederations are required to include Articles 13 to 29 of 2018 FCE within their respective applicable regulations;
- Each of the material articles now specify either a minimum and/or a maximum sanction, with the purpose of (i) promoting transparency and legal certainty in ethics proceedings, and (ii) establishing a constant jurisprudence of the Ethics Committee;
- Most of the Articles of the 2012 FCE were either maintained or modified to provide for additional clarification;
- New articles were included, specifically addressing defamation (new Article 22), misappropriation of funds (new Article 28) and match manipulation (new Article 29).

A more detailed review of certain rules of conduct are analyzed further below, *vis-à-vis* the CAS’ Valcke case.

Plea Bargain

In the 2018 FCE, FIFA has introduced an expedited procedure of application of sanctions by mutual consent (the so-called, plea bargain). Pursuant to Article 67 of 2018 FCE, the parties may enter into an agreement with the chairperson of the investigatory chamber for the application of a sanction by mutual consent. The aforesaid agreement will also be subject to ratification by the chairperson of the adjudicatory chamber (nonetheless, an exception is made to sanctions related to infringements of bribery, misappropriation of funds and manipulation of matches or competitions where no agreement on the sanction can be reached).

This is certainly another tool for FIFA to expedite the investigation procedure and reduce the workload of the investigatory chamber.

Decisions of the Ethics Committee now appealable directly to CAS

An important inclusion aimed at reducing the time involved in the conclusion of an ethics case is that the decisions of the Ethics Committee will be appealed directly to the Court of Arbitration for Sport (CAS). This amendment in the procedure for most ethics-related cases will mainly help the persons concerned to have their cases settled in an even timelier manner. Nevertheless, this will not apply to cases related to match manipulation (new Article 29), as their second instance of review will be the FIFA Appeal Committee.

Other amendments

Last but not least, some of the amendments that were implemented in the 2018 FCE were subject to severe criticism by the general media, e.g. in relation to the deletion of the word “corruption” from the Code, which seems more like a semantical change than a material one, and it was certainly not intended to establish that corruption will now be allowed or welcomed by FIFA, as already explained by the football international governing body in a press release.[7] The aforementioned deletion has no material impact on the actual infringements that are pursued (as can be seen by comparing Article 21 of the 2012 edition with Article 27 in the 2018 edition). Indeed, the same conduct that was punishable under the previous code is still punishable today under the new one.

Analysis of the CAS considerations in the Valcke case and their relation with the changes to the FIFA Code of Ethics

As the reader may be aware, high FIFA officials have recently been implicated in major ethics cases before the FIFA Ethics and Appeal Committees, which were ultimately brought to CAS. It was indeed imperative to FIFA to show to the world of football - as mentioned in the introduction above - that it would take corruption seriously and that no wrongdoing would go unpunished, regardless of the position held by the individual within FIFA's organization.

For the purposes of exemplifying FIFA's new approach above, as well as for the purposes of comparing the wording of certain articles of the 2012 FCE *vis-à-vis* their new wording in the 2018 FCE, below is a brief practical analysis focusing on the main CAS findings in the Valcke case[8] that may have influenced the amendments to the Code.

Article 13 (general rules of conduct)

Article 13 could be considered as a catch-all rule, *i.e.* if the conduct does not clearly fit the description contained in other articles, Article 13 would apply.

The main changes implemented by FIFA in Article 13 of the 2018 FCE are (i) the deletion of the abuse of position (par. 4), and the creation of a specific article addressing this behavior (new Article 25)[9]; and (ii) the creation of a new paragraph 4 stating that the persons bound by the Code must refrain from acting or behaving (or attempting to act or behave) in a way that could give rise to the appearance or suspicion of improper conduct.

As far as the Valcke case is concerned, the considerations of the Panel regarding Article 13 of 2012 FCE (and also Article 15) are particularly relevant since it was of the opinion that the conduct foreseen in Articles 13 and 15 of 2012 FCE is merely the same conduct that was already sanctioned under Article 19 of 2012 FCE (conflict of interest).

Bearing in mind the above, the Panel highlighted[10] that Article 13 - and 15 of 2012 FCE - were (i) written in general terms, and also that (ii) the obligations set forth in such articles were by definition violated if a conduct directly falls foul of Article 19 of 2012 FCE, as was also concluded in TAS 2016/A/4474.[11]

Taking into consideration the above-mentioned conclusions, among others, the Panel held that Mr Valcke did not violate Article 13 (nor Article 15 of 2012 FCE) as the conduct under investigation was already sanctioned according to Article 19 of 2012 FCE.

In this context, if the Panel were to apply the 2018 FCE, a possibility that additional sanctions imposed to Mr Valcke would exist, since the 2018 version of the Code now includes a specific sanction in the case that a person bound by the Code violates the general duties as foreseen in Article 13.

Article 15 (loyalty)

The wording of the duty of loyalty provided in the 2018 FCE remained the same as the one in the 2012 FCE. However, it is worth noting that, in the new version of the Code, Article 15 also provides for an explicit sanction in case of breach of such article.

The same *rationale* related to Article 13 above was applied by the Panel for the analysis of a potential breach of Article 15.[12]

Article 16 (confidentiality)

The wording of the duty of confidentiality provided in the 2018 FCE remained almost the same as the one in the 2012 FCE. With a clear view of widening the interpretation of certain duties, FIFA made a slight change by stating that information should be treated as confidential or secret, regardless of whether or not there is “an expression of loyalty”. In other words, the sentence “as an expression of loyalty” has been removed from the 2018 FCE by FIFA, in our opinion, with the aim of broadening the conducts that may be subject to the conduct forbidden in this provision.

In *Valcke* case, the fact that he forwarded an internal e-mail from FIFA to his son was considered by the Panel a breach of the duty of confidentiality as it was considered “*quintessentially a trade secret*”, irrespective of such e-mail having any explicit warning about confidentiality.[13]

Articles 18 (duty of disclosure, cooperation and reporting) and 41 (obligations of the parties to collaborate)

For the sake of clarity and transparency, Articles 18 (duty of disclosure, cooperation and reporting) and 41 (obligation of the parties to collaborate) of the 2012 FCE have been replaced by Articles 17 (duty to report) and 18 (duty to cooperate) of the 2018 FCE. With this amendment FIFA wanted to harmonize the aforesaid concepts and avoided any possible overlap between the former Articles 18 and 41 of 2012 FCE.

In the case at hand, the Panel was of the opinion that Mr Valcke failed to comply with his duty to cooperate as he deleted several files from his work laptop, and, *inter alia*, did not attend an interview requested by the investigatory chamber of FIFA Ethics Committee. It was evident to the Panel that Mr Valcke was in breach of his duty to cooperate.[14]

With regards to the new version of the Code, three interesting points can be observed to the duty to cooperate now provided for in Article 18 of the new 2018 FCE. First, the Ethics Committee is expressly authorized, if it deems necessary, to request details regarding income and finances (e.g. bank statements, balance sheets, audit reports). Secondly, it applies to anyone called or required to cooperate with the Ethics Committee, as far as confidentiality is concerned, even outside FIFA or football world (par. 2). In addition, paragraphs 3 and 5 of the new wording of the Article 18 sets forth that sanctions may apply to those attempting to obstruct, prevent, evade or interfere in the Ethics Committee proceedings, including by harassing, intimidating, threatening or retaliating against persons that are required to cooperate.

Article 19 (conflicts of interest)

This article has suffered a few amendments in its new wording at the 2018 FCE, the most relevant being the following: (i) the replacement of the concept “*private or personal interests*” by “*secondary interests*”; as well as (ii) the definition of “*secondary interests*”. [15] Again, FIFA sends a strong message to the world of football that the definitions contained in

the Code are to be broadly interpreted. In this sense, the 2018 FCE explicitly establishes that even a potential conflict of interest must be disclosed and failure to do so may constitute a sanction, according to the new Article 19 of 2018 FCE.

Although it seems unlikely that the Panel would reach a different decision if the 2018 FCE would have applied in the *Valcke* case, the discussion carried out by the Panel of the amendments made to Article 19 is particularly interesting.

On the one hand, by including the definition of “secondary interests”, FIFA intends to also capture situations where the person that is bound by the Code does not necessarily - personally, directly or immediately - benefit himself/herself, but may be benefiting solely a third party. In *Valcke*’s case, the Panel found that he had private and personal interests in the resale of tickets as he would be receiving a kickback.[16] Arguably, based on the new wording of Article 19(1) of 2018 FCE, Mr *Valcke* would be sanctioned even if he had not personally or privately received an advantage, but a third party related to him.[17]

Another remark that the Panel in *Valcke*’s case addressed was whether or not Mr *Valcke*’s relationships with other persons were considered “friends” or “acquaintances” taking into consideration the definition of “acquaintance” under the *Oxford and Merriam-Webster Dictionaries*. [18] Nevertheless, it seems that FIFA has reacted with the new wording of Article 19 because such terms have been deleted in the definition of “secondary interests” in the 2018 FCE. Even though such removal may seem to narrow the list of individuals that could gain an advantage in a conflict of interest situation, the new wording of Article 19(1) has also included the commonly used expression “but not limited to”, which indicates that the list would not be exhaustive and could provide additional room to the Ethics Committee to decide at its sole discretion. It shall be remarked that with the aforementioned amendment, it seems that FIFA is willing to give more weight to the conduct and the sanction themselves rather than to the relation the offender may have with any third party.

Article 20 (offering and accepting gifts and other benefits)

Article 20 has also been amended and such modifications are aimed at broadening the conduct that may be subject to sanctions if any person bound by the Code “offers and accepts gifts”, however the amendments do not involve a substantial change of the provision. The expression “offering” has been maintained, which means that the other party does not necessarily need to accept or receive the improper gift or benefit. It is worth mentioning that the change to this particular expression was already implemented in the 2012 FCE, following a review of the 2009 FIFA Code of Ethics (2009 FCE).

Interestingly, the Panel in *Valcke*’s case, first recognized that the wording of the relevant Article in the 2009 FCE (Article 10) was applicable to the case and not Article 20 of the 2012 FCE since the e-mail at the basis of the alleged ethical infringement was sent on 7 March 2011 (i.e. before the FCE 2012 came into force). Nevertheless, despite the wording of Article 10 of 2009 FCE [19], which does not expressly specify that “offering” gifts constitutes an infringement of this relevant clause (contrary to Article 20 of the 2012 FCE), the Panel, after analyzing the aforesaid articles, came to the conclusion that “both rules do in fact prohibit not only the actual delivery of a gift but also the mere “offering” of gifts” and therefore, according to the Panel, there was a legal basis under both versions of the FCE to condemn Mr *Valcke* for offering gifts.[20]

Conclusion

First and foremost, one should consider the importance of the matter at stake, bearing in mind that corruption in football has become one of the biggest subjects addressed by FIFA in recent years. FIFA has further strengthened the system in order to protect the integrity, independence and neutrality of any FIFA institution and/or FIFA officers.

One of the fundamental changes introduced by FIFA is the delegation of competence to confederations and member associations, which now bear a special and tangible responsibility to ensure that the core principles of FIFA are rightfully implemented within their respective spheres of competence. However, considering that FIFA is composed of 211 member associations, it remains to be seen how every member association will ensure the compliance with the new Code of Ethics. In any case, as above-mentioned, FIFA has reserved the competence, in the event that the respective member association and/or confederation does not act within three months as from when the Ethics Committee becomes aware of the matter.

Furthermore, it is worth noting that the clarifications made to the FIFA Rules of Conduct will bring more certainty to the deciding bodies when implementing the new 2018 FCE. Unquestionably, the amendments are aimed at broadening conducts that may be subject to sanctions for breaching the FIFA ethics rules. In this sense, the CAS findings on the Valcke case are an essential tool to understand the core of the new 2018 FCE as the decision examines in-depth several Rules of Conduct that were (or not) infringed by Valcke according to the 2012 version. Indeed, one can perceive these modifications to the Code as a FIFA reaction to improve an (already) proper system to fight corruption and to provide the deciding bodies with more efficient instruments to tackle any violation of the Code.

Likewise, particularly in connection with the amended Rules of Conduct provided for in the 2018 FCE, it is yet to be seen how the Ethics Committee and even CAS will apply them in their decisions. Will there be significant deviations from what has been decided so far? How will the plea bargain work out? It is clear, however, that FIFA will have more flexibility to apply sanctions, especially to capture situations that were not previously envisaged as or considered misconducts.

The FIFA Code of Ethics has substantially improved since 2009 and undoubtedly it seems that the bar has been set high after the 2018 amendments.

[1] www.fifa.com/governance/independent-ethics-committee/integrity/index.html

[2] FIFA Circular no. 1314.

[3] “Ethics Committee milestones (2012-2018)”

<https://resources.fifa.com/image/upload/ethics-committee-milestones-2012-2016-2741972.pdf?cloudid=yqvbb8ilqcdqj7vhba8r>

[4] FIFA Circular no. 1645.

[5] CAS 2017/A/5003 Jérôme Valcke v. FIFA.

[6] Article 30, par. 2 FIFA Code of Ethics (version 2018).

[7] “Clarification concerning the revised FIFA Code of Ethics”

www.fifa.com/about-fifa/news/y=2018/m=8/news=clarification-concerning-the-revised-fifa-code-of-ethics.html

[8] CAS 2017/A/5003 Jérôme Valcke v. FIFA.

[9] It is worth mentioning that the new Article 25 of the 2018 FCE addressing the abuse of position has replaced the expression “may not abuse their position” by “shall not abuse their position”. It seems that the change of wording here was to clarify that such action is strictly forbidden.

[10] CAS 2017/A/5003 Jérôme Valcke v. FIFA, par. 202.

[11] TAS 2016/A/4474 Michel Platini c. FIFA, par. 322 and 334.

[12] CAS 2017/A/5003 Jérôme Valcke v. FIFA, par. 202.

[13] *Ibid*, par. 229 to 234.

[14] *Ibid*, par. 259 and 272.

[15] The definition of secondary interest in the 2018 FCE “include[s], but are not limited to, gaining any possible advantage for the persons bound by this Code themselves or related parties as defined in this Code.”

[16] CAS 2017/A/5003 Jérôme Valcke v. FIFA, par. 188.

[17] It is worth mentioning that the Panel found that Mr Valcke could have even received a higher sanction as “FIFA could have even pursued, with solid factual and legal grounds, an Article 20 [offering and accepting gifts and other benefits] or 21 [bribery and corruption] FCE violation for that grave misconduct” and because “receiving a kickback - is on its own severe enough to warrant a ten-year ban from football” (par. 284 of the award).

[18] CAS 2017/A/5003 Jérôme Valcke v. FIFA, par. 181 and 182.

[19] Article 10(1) of 2009 FCE: “1. *Officials are not permitted to accept gifts and other benefits that exceed the average relative value of local cultural customs from any third parties. If in doubt, gifts shall be declined. Accepting gifts of cash in any amount or form is prohibited (...).*”

[20] *Ibid*, par. 142 and 245.