Overdue payables in action: FIFA jurisprudence on the 12bis procedure

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→ ***Overdue payables – FIFA Regulations – FIFA Proceedings – FIFA Dispute Resolution Chamber (DRC) – FIFA Players' status Committee – Training compensation – Player contract – Player transfer – Sporting sanctions – Financial sanctions***

In this article[3] *we will discuss the Article 12bis procedure on overdue payables based on the jurisprudence of the DRC and the PSC during the last three years and five months: as from 1 April 2015 until 1 September 2018.*[4] *The awards of the Court of Arbitration for Sport (CAS) in relation to Article 12bis that are published on CAS' website will also be brought to the reader's attention. In this article, we will also focus on the sanctions applied by FIFA committees under Article 12bis.*

Introduction

In 2015, FIFA announced a very significant addition to the Regulations on the Status and Transfer of Players (RSTP): the inclusion of a new provision on overdue payables by defaulting clubs towards players and other clubs.

On 1 April 2015, the 2015 edition of the RSTP gave birth to a fast-track procedure to deal with overdue payables enshrined in Article 12bis (hereinafter: "*the 12bis procedure*"). In its Circular letter no. 1468, FIFA also strongly urged all of its member associations to make sure that their affiliated clubs were informed of this new provision immediately.

From Article 12bis, which is also laid down in the 2018 edition of the RSTP, it follows that clubs are required to comply with their financial obligations towards players and other clubs as per the terms stipulated in the contracts signed with their professional players and in the transfer agreements signed with other clubs. In accordance with Article 12bis, as from 1 April 2015 FIFA is entitled to sanction clubs that have delayed a due payment for more than 30 days without a *prima facie* contractual basis.

It was a real thorn in the side of FIFA that too many clubs, on a worldwide level, did not comply with their financial contractual obligations without legitimate reasons.[5] With the introduction of this provision, it was not only FIFA's aim to continue its process to further speed up its proceedings, but also to establish a stronger system regarding overdue payables towards players and clubs. FIFA stressed that it wanted to further improve efficiency and provide for clear regulatory steps to deal with overdue payables from clubs to players as well as from clubs to other clubs.

As from 1 April 2015, the Dispute Resolution Chamber (DRC) and the Players' Status Committee (PSC) are FIFA's competent authorities to deal with claims on overdue payables in relation to Article 12bis.

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3 This publication is the sequel an earlier article written with Mr. *Frank John VROLIJK*, attorney-at-law at *Loyens Loeff*, as published on the Asser International Sports Law Blog. The first part was published on 5 July 2017 and the second one on 7 July 2017. Reference will be made to that contribution in which the first two years (between 1 April 2015 and 1 April 2017) of jurisprudence of FIFA DRC and PSC related to 12bis was examined. In this contribution the same structure and key concepts are used.

4 Decisions published after the date of 1 September 2018 (even if issued before this date) will fall outside the scope of this contribution. The awards of the CAS in relation to Article 12bis will also be discussed in this contribution. However, only the awards as published on the website of CAS before 1 September 2018 will be discussed in this contribution.

5 As was also introduced in FIFA Circular no.1468, dated 23 January 2015, the new Article 12bis is added to the list of provisions that are binding at national level and must be included in the association's regulations (*cf.* Article 1(3)(a) of the RSTP).

Both FIFA committees were given a wide scope of discretion to impose sanctions on defaulting clubs, such as fines and transfer bans. In fact, the possibility to impose sanctions is critical to support a stronger and more efficient dispute resolution system regarding overdue payables, as we will see in the second part of this contribution.

As we saw in the previous contribution, the introduction of FIFA's 12bis procedure gave rise to many questions. For example, were only clubs and players entitled to lodge a claim before respectively the PSC and the DRC? Or were other parties, such as coaches and national associations, also entitled to raise claims under 12bis? Did claims for training compensation and solidarity contribution fall under 12bis? Could the 12bis procedures be considered as a real fast-track procedure? When can an offence be considered as a repeated offence? And also, since the imposition of sanctions is key to the efficacy of the 12bis procedure, under what conditions will these sanctions apply? These are only a small sample of the questions that arose after the introduction of the 12bis procedure. We will analyse whether the answers to these questions still stand, based on the developments in the leading jurisprudence.

General preliminary observations

As a starting point, it must be noted that exactly 260 decisions by the DRC and the PSC regarding Article 12bis have been published by FIFA on its website between 1 April 2015 and 1 September 2018.[6] Of these 260 decisions, 186 decisions have been dealt with by the DRC, including 112 decisions issued by the DRC Single Judge. Additionally, 46 decisions were passed by a Chamber of three judges, whereas 31 of these decisions were passed by circulars and 15 were passed by a decision of a sitting Chamber in Zürich, Switzerland. Exactly 26 FIFA decisions were passed by a Chamber of five judges and only two were passed by a Chamber of seven judges.

> ***260 decisions by the DRC and the PSC regarding Article 12bis have been published by FIFA***

From the 74 decisions of the PSC, 55 were issued by its Single Judge and 19 were issued by a Chamber of three judges *via* a circular. It can be noticed that in most "*renouncement of right cases*" (in which defaulting clubs have not replied to the claim), a Single Judge has dealt with the case, however, on the understanding that in case of a repeated offence these cases were issued by a chamber of three judges.[7]

Analysing the decisions that were issued between 1 April 2015 and 1 September 2018, it must be noted that all claimants in the 260 decisions won their cases. In other words, in none of the decisions of the DRC and the PSC it was found that a "*prima facie contractual basis*" existed for the respondent party, which would justify non-compliance with the original contract. A sanction was imposed in all decisions.

It can further be observed that in the great majority of the decisions, the respondent party did not reply to the claim. As we will see in this contribution, the absence of a reply will generally result in more severe 12bis sanctions for the defaulting club.

The jurisprudence of FIFA also illustrates that the 12bis procedure is a step towards swifter proceedings. In the last years we have already noted a positive development with regard to the length of '*regular*' proceedings before FIFA (not including the 12bis procedures). With regard to the 12bis procedure, FIFA stressed that it has shortened the timeframe for decisions taken on overdue payables, with decisions now being taken within eight weeks and claimants being notified of a decision within nine weeks of lodging their complete claim. After analysing the 12bis decisions of the DRC and the PSC, it is clear that during the first two years of jurisprudence (between 1 April 2015 and 1 April 2017), FIFA actually lived up to these expectations. During these first two years of jurisprudence, the average duration of a 12bis procedure was two months.[8] In the former contribution, it was concluded that approximately 67% of the PSC and the DRC procedures was concluded within a period of eight weeks. Approximately 80% of the PSC and the DRC procedures were dealt with within a period of 10 weeks. It was only exceptionally that a 12bis decision lasted longer (four or ultimately five months) or even took less time (one or one and a half months).[9] However, in more recent jurisprudence of the DRC and PSC (in the period between 1 April 2017 and 1 September 2018), only 27%

6 Dispute Resolution Chamber: www.fifa.com. Accessed 30 October 2018. Players' Status Committee: www.fifa.com; Accessed 30 October 2018.

7 DRC 9 November no. op11171186 and DRC 9 November no. Op11171372.

8 For the shorter procedures: *inter alia* DRC 18 May 2016, no. op0516646, DRC 29 February 2016, no. op0216229, DRC 15 July 2016, no. op0916308 and DRC 30 November 2015, no. 11151578. See for the longer procedures: *inter alia* DRC 3 June 2016, no. op0616046, DRC 7 April 2016, no. op04161633, DRC 15 October 2015, no. op1015914 and DRC 1 October 2015, no. 1015648.

9 For the shorter procedures: *inter alia* DRC 18 May 2016, no. op0516646, DRC 29 February 2016, no. op0216229, DRC 15 July 2016, no. op0916308 and DRC 30 November 2015, no. 11151578. See for the longer procedures: *inter alia* DRC 3 June 2016, no. op0616046, DRC 7 April 2016, no. op04161633, DRC 15 October 2015, no. op1015914 and DRC 1 October 2015, no. 1015648.

of the decisions were rendered within a period of 2 months, and what is striking, more than 30% of the 12bis cases were not finished within 4 months. In other words, the average duration of the 12bis procedure is due to rise. It will be interesting to see how this will further develop in the future.

The scope of Article 12bis

The three years and five months of jurisprudence show that the personal scope of Article 12bis must be interpreted strictly. As follows from the text of Article 12bis(3) RSTP, only players and clubs are entitled to lodge a claim before FIFA. Put another way, coaches, national associations and intermediaries do not have standing to sue in the 12bis procedure. This textual interpretation of the provision can be derived from the jurisprudence of the DRC and the PSC. In fact, none of the 260 reviewed decisions of the DRC and the PSC involved a party other than a club or a player.

Additionally, it can be concluded that claims for training compensation or related to solidarity mechanism are also excluded from the scope of Article 12bis, as this opportunity is not provided in the provision. Moreover, the current jurisprudence still does not leave room for any other interpretation. With regard to training compensation and solidarity mechanism, this means that FIFA gives to "*overdue payables*" a different meaning than the UEFA Club Licensing and Financial Fair Play Regulations, since outstanding amounts for training compensation and solidarity mechanism are considered by UEFA as overdue payables. The same is true for outstanding payments due by clubs to other (than player) club employees and debts by clubs to social/tax authorities; such outstanding amounts will not be considered by FIFA as '*overdue*' under Article 12bis RSTP. Furthermore, the authors do not want to leave unmentioned that in one decision, the PSC decided that an *agreement* regarding payment of training compensation is not excluded from the scope of 12bis.[10]

Generally, the DRC mainly deals with contracts signed by clubs with professional players. These include employment contracts but it is to be expected that separate agreements could also fall under the scope of Article 12bis as long as specific elements of that separate agreement suggest that it was in fact meant to be part of the actual employment relationship, as the DRC decided in many other cases (not being 12bis procedures). This is for example the DRC's position with regard to image right contracts.[11] Based on the jurisprudence reviewed, it follows that termination agreements fall under the scope of Article 12bis.[12] The PSC will only deal with transfer agreements, including both transfers on a definite[13] as well as on a temporary basis.[14] Agreements between clubs that do not concern the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations, will most likely not fall under Article 12bis.[15]

10 PSC 23 March 2018, no. op.03180119.

11 DRC 13 December 2013, no. 12131045 and DRC 17 January 2014, no. 114396. See also DRC 30 August 2013, no. 08133402, DRC 10 February 2015, no. 02151030 and DRC 28 March 2014, no. 03141211. See also CAS 2014/A/3579, *Anorthosis Famagusta FC* v. *Emanuel Perrone*, award of 11 May 2015.

12 See *inter alia* DRC 26 November 2015, no. op11151356 and DRC 7 June 2017, no. op06170224.

13 See *inter alia* PSC 13 September 2016, no. op09161090 and PSC 25 August 2017, no. op08171031.

14 See *inter alia* PSC 11 June 2015, no. op0615618; PSC 20 February 2017, no. op02172015 and PSC 3 October 2017, no. op10170695.

15 Article 1(1) RSTP, edition 2018.

Finally, it also follows from Article 12bis(3) that the creditor (player or club) must have put the debtor club in default in writing, granting a deadline of at least 10 days to comply with its financial obligations. Regarding this deadline, the jurisprudence shows that FIFA follows a strict interpretation, as we will see in the next paragraph.

The existence of an 'overdue payable'

As follows from the wording of Article 12bis and the corresponding jurisprudence, two prerequisites mustbe met to establish that an overdue payable exists under Article 12bis. Firstly, the club must have delayed a due payment for more than 30 days without a "*prima facie contractual basis*". Secondly, the creditor (which is the player or club) must have put the debtor club in default in writing, granting a deadline of at least 10 days to comply with its financial obligations. In all the published decisions, the FIFA committees verified that a 10-day deadline had been granted. We can therefore assume that this 10-day deadline is a prerequisite for FIFA to proceed with the claim. Although Article 12bis is not fully clear as regards the start of the "*10-day deadline*", jurisprudence shows that it runs as soon as the 30 days have elapsed.

Disputes can arise with regard to the fulfilment of the "*10-day deadline*". For example, in the CAS award of 9 May 2016, the player had filed a statement of claim before the DRC on 25 March 2015 and then sent a letter to the club on 30 March 2015 (*i.e.* five days after filing a claim at the DRC) putting the club in default for the overdue payment. The club however argued that this was a violation

of Article 12bis(3) of the RSTP, edition 2015, as it did not make any legal sense whatsoever to address a default notice to a party *after* lodging a claim at FIFA. The CAS, however, stated that it was clear that the player had already given the club ample opportunity (the player stated that it had already provided three separate notices of default) to fulfil its obligations in conformity with Article 12bis.[16] The CAS therefore found it curious that the FIFA administration still requested the player to issue yet another default notice in such a situation when it was clear that the player had already given the club many opportunities to fulfil its obligations. On the one hand it shows that (the) FIFA (administration) obliges creditors to send a "*10-days deadline*" default letter *under all circumstances*, while on the other hand it is to be expected that the CAS might show some more flexibility. Interestingly, in a case before the PSC, the claimant club put the respondent club in default of payment, starting the 10-day deadline on the exact same date of the submission. This practice was accepted by the PSC.[17] In other words, in order to gain time, claimants might be able to lodge a claim in front of FIFA before the "*10-day deadline*" of Article 12bis has passed.

To establish whether "*overdue payables*" exist, it is decisive that the "*overdue payables*" existed after 1 April 2015 (the date on which Article 12bis came into force). This is also confirmed by the CAS. In its CAS award of 17 June 2016, the Italian club *Pescara* referred to the fact that the agreement between *Pescara* and the Belgian club *Standard Liège* was entered into on 10 July 2012, while Article 12bis did not take effect until 1 April 2015. *Pescara* stated that it had no means to know that Article 12bis would be enacted nearly three years later. The Sole Arbitrator, however, found it decisive and stressed that the claim made by *Standard Liège* was made after 1 April 2015 and that *Standard Liège* referred clearly to the overdue payables from *Pescara*. At the end, all that mattered, according to the CAS, was the existence of overdue payables at the assessment date and that date was after 1 April 2015.[18]

For the sake of clarity, the fact that the DRC and the PSC have decided in 12bis procedures that a defaulting club must pay to the claimant overdue payables does not touch upon the question of whether the contract has been terminated with just cause. To put it bluntly, a decision in a 12bis procedure does not justify a unilateral termination based on Article 14bis of the RSTP; no legal connection exists in this regard. The existence of overdue payables under Article 12bis does not automatically give the claimant the right to unilaterally terminate the contract with the defaulting club. It should also be noted that it follows from Article 12bis(9) that the terms of Article 12bis are without prejudice to the application of further measures derived from Article 17 RSTP in case of a unilateral termination of the contractual relationship.

Sanctions under Article 12bis

Introduction

The possibility to impose sanctions under article 12bis constitutes one of the pillars of the 12bis procedure. Pursuant to Article 12bis of the RSTP, edition 2018, the DRC and the PSC may impose a sanction on a club if the club is found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis[19] and the creditor have put the debtor club in default in writing, granting a deadline of at least 10 days.[20] The jurisprudence in relation to Article 12bis also shows that sanctions are imposed *ex officio* by the DRC or the PSC and not per request of the claimant.

If the basic conditions for the application of Article 12bis are fulfilled, said provision provides for the following sanctions that may be imposed on the defaulting club:

1. a warning;
2. a reprimand;
3. a fine; or
4. a ban from registering any new players, either nationally or internationally, for one or two entire and consecutive registration periods ("*the registration ban*").[21]

Based on the wording of Article 12bis, *i.e.* the use of the word '*may*', it is left to the discretionary power of the DRC and the PSC to decide whether or not to impose a sanction on the debtor club.[22]

16 CAS 2015/A/4153, *Al-Gharafa SC* v. *Nicolas Fedor* & FIFA, award of 9 May 2016. From this award it follows that FIFA applied the incorrect version of the RSTP in its decision of 22 June 2015 as a result of which Art. 12bis was not applicable.

17 PSC 30 November 2015, no. 10151052.

18 Also in its award of 17 June 2016, another Sole Arbitrator stressed that as Article 12bis has been implemented within the 2015 edition of the RSTP, FIFA has the power to impose a sanction listed in Article 12bis(4) RSTP in that specific case. See CAS 2015/A/4310, *Al Hilal Saudi Club* v. *Abdou Kader Mangane*, award of 17 June 2016.

19 Article 12bis(2) RSTP, edition 2018.

20 Article 12bis(3) RSTP, edition 2018.

21 Article 12bis(4) RSTP, edition 2018.

22 Article 12bis(2) RSTP and Article 12bis(4) RSTP, edition 2018.

However, this discretionary power has never been used in favour of a defendant in all the published DRC or PSC decisions under review. In other words, a sanction, going from a warning to a transfer ban of two entire and consecutive periods, was imposed in all decisions. Despite the fact that it follows from Article 12bis(4) that sanctions may apply cumulatively, this option was only used three times.[23] It seems that it will come into play only if the debtor club did not comply with its obligations on multiple occasions and only after the maximum sanction of a transfer ban of two entire and consecutive periods has been imposed on the debtor club (not in the PSC decisions). The discretionary power under Article 12bis is different from the sanction of a transfer ban as laid down in Article 17(4) of the RSTP. The latter article states that the competent body '*shall*' sanction, as opposed to Article 12bis, which states that the competent body '*may*' sanction.[24]

> ***"This discretionary power has never been used in favour of a defendant in all the published DRC or PSC decisions under review"***

Please note that FIFA bodies have a wide discretion regarding the choice of sanctions, as also follows from CAS jurisprudence.[25]

However, after analysing the jurisprudence between 1 April 2015 and 1 September 2018, the jurisprudence does provide for certain guidelines that give more direction under what circumstances respectively a warning, a reprimand, a fine or a registration ban will be imposed.

The Warning

Out of the 186 published 12bis decisions of the DRC, 36 warnings have been imposed. Additionally, fifteen warnings have been imposed out of the 74 published 12bis decisions before the PSC. As follows from the jurisprudence of FIFA[26], (only) a warning will be given by the FIFA committees if two conditions are cumulatively met:

1. the club (duly) replied to the claim; and

2. it is not a repeated offence.

The height of the outstanding amount of overdue payables is, however, not correlated to the imposition of a warning. The outstanding overdue payables in the 51 proceedings ending with a warning range from an overdue payable of EUR 3,468 in two decisions of the DRC[27], up to an amount of USD 1,500,000 (approx. EUR 1,300,000) in a PSC decision.[28]

The jurisprudence also points out that the debtor club must reply to the claim in order to limit the possible sanction to a warning.

Although several decisions refer to the fact that the club should have "*duly replied to the claim*"[29], other decisions do not mention "*duly*" and these consider it enough that the club only "*replied to the claim*".[30] Despite this difference in terminology, almost any form of reply provided by the debtor club will be considered sufficient. In fact, no distinctive value is ascribed to the word "*duly*".

The respondents gave divergent reasons for their non-compliances. One club contested the applicability of Article 12bis[31], other clubs stated to have administrative difficulties[32] or financial difficulties[33], whereas others claimed that they were communicating with the player's agent to settle the matter amicably.[34] Apart from the claim related to the applicability of Article 12bis, which was rejected because the claimant lodged his claim after the entry into force of Article 12bis RSTP[35], all the arguments raised were not considered valid reasons for non-payment of the outstanding monies. Although the jurisprudence does not give an exact answer to the question of what would

23 DRC 14 November 2016, no. op11161545-E.; PSC 20 December 2017, no. op1217181; PSC 23 March 2018, no. op03180119.

24 Although it follows however from a literal interpretation of Article 17(4) RSTP that it is a duty of the competent body to impose sporting sanctions whenever a club is found to have breached an employment contract during the protected period, according to the CAS there is a well-accepted and consistent practice of the FIFA DRC not to apply automatically a sanction but to leave it to its free discretion to evaluate the particular and specific circumstances on a case by case basis. See CAS 2014/A/3765 *Club X. v. D. & FIFA*, award of 5 June 2015.

25 CAS 2016/A/4675, *Sporting Club Olhanense v. Gonzalo Mathias Borges Mastriani & FIFA*, award of 7 August 2017.

26 See *inter alia* DRC 16 February 2016, no. op02161765 and DRC 20 August 2018, no. op08181127.

27 DRC 28 January 2016, no. op1501703 and DRC 28 January 2016, no. op01161539.

28 PSC 7 May 2015, no. op0515353. Even EUR 50,000 higher in PSC 2 June 2016, no. op0616540. The highest outstanding payable in a DRC decision is EUR 950,000. See DRC 11 September 2015, no. 09151030. See PSC 9 June 2017, no. op06170408 (1,5 million USD).

29 See *inter alia* DRC 28 January 2016, no. op01161539; DRC 20 August 2018, no. op08181127.

30 See *inter alia* DRC 13 January 2016, no. op0116826; PSC 5 September 2017, no. op09171147.

31 DRC 15 October 2015, no. op1015914. See also CAS 2015/A/4153, *Al-Gharafa SC v. Nicolas Fedor & FIFA*, award of 9 May 2016 and CAS 2016/A/4387, *Delfino Pescara 1936 v. Royal Standard Liège & FIFA*, award of 8 July 2016.

32 PSC 9 July 2015, no. op0715599 and PSC 7 May 2015, no. op0515353.

33 DRC 13 January 2016, no. op0116826, DRC 25 April 2016, no. op0416115, DRC 7 July 2016, no. op0716778, PSC 2 June 2016, no. op0616540 and PSC 13 September 2016, no. op09161090. , PSC 5 September 2017, no. op09171147, PSC, PSC 21 December 2017, no. op12171895, PSC 8 February 2018, no. op021817669, PSC 12 October 2017, no. op02181794, PSC 2 March 2018, no. op03181520, DRC 9 November 2017, no. op11171372, DRC 6 April 2018, no. op04182199

34 DRC 16 February 2016, no. op02161765 and DRC 15 March 2016, no. op0316303.

35 Also confirmed in CAS 2016/A/4387, *Delfino Pescara 1936 v. Royal Standard Liège & FIFA*, award of 8 July 2016.

be considered "*a prima facie contractual basis*", it can be concluded that the aforementioned circumstances did not fulfil these criteria.

Notwithstanding the above, the condition of having "*(duly) replied to the claim*" has been tackled earlier by the DRC. In its decision of 23 May 2016, the respondent replied to the claim *via* e-mail.[36] The DRC considered this reply not to be sufficient to fulfil the standards of "*(duly) replied to the claim*" because "*the Respondent only replied to the claim by e-mail and e-mail petitions shall have no legal effect in accordance with Article 16 par. 3 of the Procedural Rules.*" In other words, the respondent should have replied by fax or ordinary mail. Nowadays, this will not be relevant considering that communication in FIFA proceedings is *via* e-mail. Indeed, as also follows from FIFA Circular no. 1603 dated 24 November 2017, FIFA had developed a system of communication with parties to such proceedings *via* email.

In line with the above, the DRC or the PSC has only imposed a warning when there was no repeated offence and if the respondent replied to the claim. In other words, the respondent in a 12bis procedure must actually be considered as a "*first offender*" in order to (only) get a warning. From the 51 decisions in which a warning has been imposed, there is only one not fulfilling the abovementioned two conditions.[37] In this (PSC) decision, the respondent party did not reply to the claim. However, during the course of the FIFA proceedings the respondent made a partial payment to the claimant.

Therefore, the PSC decided in this case to impose a warning on the respondent party, irrespective of the absence of a reply on his behalf. In light of this PSC decision, it cannot be excluded that making a partial payment during the course of a pending 12bis proceedings might alleviate the duty to "*reply to the claim*".

The Reprimand

Only four of the decisions published by FIFA contain a reprimand as sanction.[38] Three[39] decisions were issued by the DRC, one[40] decision was issued by the PSC.

In a DRC decision of 26 November 2015, overdue payables of EUR 40,000 were due to the claimant based on a termination agreement.[41] In its reply to the claim, the respondent admitted that it had to pay compensation to the claimant, but only until he would have found a new club. The respondent considered that, since the claimant found a new club immediately after the agreed termination, no compensation was due.[42] Notwithstanding this, the DRC judge considered that there was no documentary evidence with regard to the argument of the respondent. Therefore, the DRC judge considered that the respondent had delayed a due payment for more than 30 days without a *prima facie* contractual basis. Based on the foregoing paragraph and the fact that the respondent replied to the claim, one would think that a sanction in the form of a warning should be imposed on the respondent. However, the DRC highlighted that the DRC judge had already imposed a warning on the respondent previously. Thus, it referred to Article 12bis(6), which establishes that "*a repeated offence will be considered as an aggravating circumstance and lead to more severe penalty.*"[43] Therefore, in that case a reprimand was imposed.[44]

In a similar decision of 26 May 2016, the PSC also imposed a reprimand.[45]

> ***A reprimand is considered as a severe sanction and will not be imposed on a first offender***

In conclusion, one could say that a reprimand is considered as a severe sanction and will not be imposed on a first offender. Although there have only been four (published) decisions of FIFA wherein a reprimand was imposed, one can expect that a reprimand will be imposed on a repeated offender who replied to the claim in his first and second 12bis procedure. The lesson that can be learned from the above analysis is that a respondent club should always reply in a 12bis procedure, because warnings and reprimands do not generally lead to any financial or sportive consequences, contrary to the fine and transfer ban, which are discussed hereunder.

The Fine

The only sanction that leads to direct financial consequences is the fine. The fine is a sanction that can be imposed in a 12bis procedure

36 DRC 23 May 2016, no. op0516571. The DRC can be quite sceptical towards information that is contained in emails. See *inter alia* DRC 31 July 2013, no. 07133206.
37 PSC 3 June 2015, no. op0615400.
38 However, some decisions - wherein a heavy sanction such as a transfer ban was issued - refer to an earlier conviction of the debtor club wherein a reprimand was given. See *inter alia* DRC 26 October 2016, no. op10160931-E.
39 DRC 26 November 2015, no. op11151356; DRC 6 September 2017, no. op0917118 and DRC 17 May 2018, no. op05181884.
40 See PSC 26 May 2016, no. op05160482.
41 DRC 26 November 2015, no. op11151356.
42 DRC 26 November 2015, no. op11151356, par. (II) 7 and 8.
43 DRC 26 November 2015, no. op11151356, par. (II) 17.
44 DRC 26 November 2015, no. op11151356, par. (II) 18.
45 PSC 26 May 2016, no. op05160482.

and needs to be paid by the debtor club to FIFA. As opposed to the warning and the reprimand, the jurisprudence shows that a fine will be imposed in the event that the respondent did not reply to the claim. The authors want to lay emphasis on the fact that even if the respondent replied to the claim, the DRC and PSC may still impose a fine or a registration ban.[46]

> ***It is necessary to make a distinction between a fine in a DRC procedure and a PSC procedure. In fact, the amount of the outstanding overdue payables differs considerably in both procedures***

In 122 of the 186 DRC and in 42 of the 74 PSC decisions, a fine was imposed. After analysing the jurisprudence, we conclude that it is necessary to make a distinction between a fine in a DRC procedure and a PSC procedure. In fact, the amount of the outstanding overdue payables differs considerably in both procedures.

Additionally, the level of the corresponding fines in *DRC procedures* compared to the PSC procedures are different.[47] The amounts of overdue payables in a 12bis procedure before the PSC are structurally higher than the amounts in a 12bis procedure before the DRC, while the amount of the fine is not structurally higher in a PSC procedure. Due to these differences between the DRC and the PSC, we decided to discuss the use of fines in the DRC and PSC procedures separately. Our aim was to determine how the judges define the level of the fine in a 12bis procedure. To do so, we use the "*category method*", which will be explained below.

After analysing the decisions of the FIFA DRC in which fines were imposed, it seems that they do not correspond to a percentage of the outstanding overdue payables. Instead, the level of a fine can be determined by means of several categories.

Four conclusions can be drawn from the DRC cases regarding the level of the fine:

Firstly, the level of the fine imposed increases when the overdue payable is higher.

Secondly, there are three categories of fines:

- i) a fine for the club which did not reply to the claim and is considered to be a first offender (First Category Offence)[48];
- ii) a fine for a club which did not reply to the claim and has been found by the DRC to have neglected its contractual obligations in the recent past (not being a 12bis procedure) (Second Category Offence)[49]; and
- iii) a fine for a club which did not reply to the claim and has been sanctioned in a 12bis procedure previously (Third Category Offence).[50]

Thirdly, it can be concluded that the fine for a respondent in a Second Category Offence is double the size of the fine for a respondent in a First Category Offence.

Fourthly, it can finally be concluded that the imposed fine in a Third Category Offence is three times the size of the given fine in a First Category Offence.

Based on our study, we can conclude that the DRC determines the level of the fine by taking into consideration the three above-mentioned categories (First, Second and Third Category Offence) subject to an approximate range in relation to the outstanding amount due. Although it must be taken into account that our conclusions are based on 122 DRC decisions, the table below sheds some light and provides for eight standard situations referring to various ranges of overdue payables:

Situation	Range overdue payables (in $/€)	Height of the fine (in CHF)
Situation 1	0,01 – 11,000	First Category Offence: 1,000 Second Category Offence: 2,000 Third Category Offence: 3,000

46 See *inter alia* DRC 7 May 2018, no. op05180341 wherein a fine was imposed even though the respondent replied to the claim. It must be noted that in this particular case, the respondent had already been found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis and without the respondent having responded to the relevant claims, as a result of which 2 fines had been imposed on the respondent by the DRC judge.

47 DRC 28 January 2016, no. op01161541 and PSC 12 October 2015, no. op10151035. In the DRC decision, the debtor club had an overdue payable of USD 100,807 (approx. EUR 87,000). In this case, the DRC imposed a fine of CHF 15,000 (approx. EUR 13,000). In the PSC decision, the debtor club had an overdue payable of EUR 1 million. However, the PSC imposed the same fine of CHF 15,000.

48 If these criteria were cumulatively met, the jurisprudence points out that a fine was given by FIFA to a club in a 12bis procedure. A First Category Offence was also given to a debtor club who responded to the claim but was already sanctioned with a warning and reprimand in earlier 12bis procedures. In that case, the warning and the reprimand sanctions were exhausted and, thus, a fine was ordered by the DRC.

49 See *inter alia* DRC 18 May 2016, no. op0516646 and DRC 23 November 2017, no. op11171633.

50 See *inter alia* DRC 3 July 2015, no. op0715641 and DRC 6 April 2017, no. op04180161.

Situation	Range overdue payables (in $/€)	Height of the fine (in CHF)
Situation 2	11,001 – 20,000	First Category Offence: 2,000 Second Category Offence: 4,000 Third Category Offence: 6,000
Situation 3	20,001 – 50,000	First Category Offence: 5,000 Second Category Offence: 10,000 Third Category Offence: 15,000
Situation 4	50,001 – 75,000	First Category Offence: 7,500 Second Category Offence: 15,000 Third Category Offence: 22,500
Situation 5	75,001 – 100,000	First Category Offence: 10,000 Second Category Offence: 20,000 Third Category Offence: 30,000
Situation 6	100,001 – 150,000	First Category Offence: 15,000 Second Category Offence: 30,000 Third Category Offence: 45,000
Situation 7	150,000 > at least 350,000	First Category Offence: 20,000 Second Category Offence: 40,000 Third Category Offence: 60,000
Situation 8	950,000[50] and higher	First Category Offence: 30,000 Second Category Offence: 60,000 Third Category Offence: 90,000

Figure 1

By way of example, we refer to the DRC decision of 19 May 2017.[51] In this case, the respondent was liable to pay to the claimant the overdue payable in the total amount of USD 1,500,000 (situation 8). Considering this amount, and in the absence of a repeated offence (first category offence), the DRC imposed a fine amounting to CHF 30,000 (approx. EUR 26,000) on the respondent. By way of another example, in the DRC decision of 12 June 2018[52], the Single Judge imposed a fine of CHF 3,000 (approx. EUR 2,600) on the respondent, taking into consideration the amount due of in total EUR 10,500 (situation 1) and the existence of aggravating circumstance of a repeated offence (third category offence).

With regard to the PSC decisions, the authors tried to use the same method as for the DRC procedures. At first sight, it looks as if the PSC and the DRC use the same ranges for fines. However, the PSC

51 DRC 19 May 2017, no. op05172183.
52 DRC 12 June 2018, no. op06180840.

decisions seem more arbitrary. It is therefore more difficult to draw definitive conclusions in relation to the PSC 12bis decisions.

For example, in the decision of 12 October 2015, decided by a PSC's Single Judge, a fine of CHF 15,000 (approx. EUR 13,000) was handed out to a first offender club with an overdue payable of EUR 1 million.[53] However, one can doubt whether this fine can be considered appropriate. In fact, a first offender club in other decisions received the same fine, although with smaller overdue payables of EUR 200,000[54], and EUR 100,000.[55]

Another striking decision involves a fine of CHF 7,500 (approx. EUR 6,500) based on an overdue payable of USD 50,000 (approx. EUR 43,000).[56] In a comparable situation before the DRC, also with regard to a first offender, the club was sanctioned with a fine of CHF 5,000 (approx. EUR 4,500).[57] It is also remarkable that (only) in some cases the Single Judges did motivate the higher fines by mentioning the criteria for a Second or Third Category Offence. Because of the absence of motivation, one cannot definitely conclude whether these decisions fall into the Second and Third Category Offence as defined in the context of the DRC's jurisprudence. However, looking past these (minor) inconsistencies, we believe that most of the PSC decisions do fall within the ranges set out in Figure 1.[58]

Figure 2 provides for an overview of the height of the fines in 12bis procedures in relation to the various overdue payables imposed by FIFA in proceedings in front of the PSC.

Situation	Range overdue payable ($/€)	Height of the fine (in CHF)
Situation 1	0,01 – 11,000	First Category Offence: 1,000[60] Second Category Offence: 2,000 Third Category Offence: 3,000
Situation 2	11,000 – 20,000	First Category Offence: 2,000 Second Category Offence: 4,000 Third Category Offence: 6,000
Situation 3	20,000 – 50,000	First Category Offence: 5,000 Second Category Offence: 10,000 Third Category Offence: 15,000
Situation 4	50,000 – 75,000	First Category Offence: 7,500 Second Category Offence: 15,000 Third Category Offence: 22,500
Situation 5	75,000 – 100,000	First Category Offence: 10,000 Second Category Offence: 20,000 Third Category Offence: 30,000

53 PSC 12 October 2015, no. op10151035.

54 PSC 12 October 2015, no. op10151010. Even more striking is the fact that this decision was dealt with on the same date as the aforementioned decision in footnote 61 above, by the same Single Judge. Only two weeks later, in PSC 29 October 2015, no. op10151014, the PSC imposed a fine of CHF 25,000 (approx. EUR22,000) with regard to an overdue payable of EUR 590,000 to a first offender club.

55 PSC 19 June 2017, no. op06170603.

56 PSC 9 July 2015, no. op0715584.

57 DRC 5 October 2015, no. op10151049.

58 Only PSC 12 October 2015, no. op10151035; PSC 12 May 2017, no. op05172190; PSC 3 October 2017, no. op10170695 and PSC 23 March 2018, no. op03180119 seem to be the odd ones out. Additionally, one starts to see emerging an additional category, which is the fine of CHF 25,000.

59 In 2 PSC decisions, the Single Judge imposed a fine of CHF 1,500 (approx. EUR 1,300) on a first category offender: PSC 18 October 2017, no. op10171346, based on an overdue payable of EUR 2,000 and PSC 18 October 2017, no. op10171347, based on an overdue payable of EUR 3,000.

Situation	Range overdue payable ($/€)	Height of the fine (in CHF)
Situation 6	100,000 – 250,000	First Category Offence: 15,000 Second Category Offence: 30,000 Third Category Offence: 45,000
Situation 7	250,000 - 500,000	First Category Offence: 20,000[60] Second Category Offence: 40,000 Third Category Offence: 60,000
Situation 8	500,000 – 750,000	First Category Offence: 25,000 Second Category Offence: 50,000 Third Category Offence: 75,000
Situation 9	750,000 and higher	First Category Offence: 30,000 Second Category Offence: 60,000 Third Category Offence: 90,000

Figure 2

By way of an example, the authors refer to the PSC decision of 16 August 2017.[61] In this case, the single judge of the PSC imposed a fine of CHF 5,000 on the respondent bearing in mind that the respondent was a "*first offender*" (category 1) and taking into consideration the amount due of EUR 25,000 (situation 3).

Registration Ban

The most severe sanction that can be imposed by the DRC or the PSC in a 12bis procedure is the ban from registering any new players, either nationally or internationally, for one or two entire and consecutive registration periods. Contrary to the transfer ban enshrined in Article 17(4) of the RSTP, in a 12bis procedure a club can be banned from registering new players for the next one or two registration periods. This ban is imposed if the amount due to the claimant is not paid by the respondent within 30 days from the date of notification of an Article 12bis decision.[62]

However, it must be noted that in several cases in front of FIFA, the PSC and the DRC decided to suspend the execution of the registration ban imposed on a club during a probation period[63]. For example, in the decision of 9 May 2018.[64] wherein a registration ban for one entire registration period was imposed, the PSC decided to suspend the execution of the registration ban during a probationary period of one year following the notification of the decision and determined that "*if the respondent commits another infringement under art. 12bis during one year probationary period, the suspension shall be automatically revoked and the registration ban executed*".[65] In this particular case before the PSC, the respondent had delayed a due payment for more than 30 days without a *prima facie* contractual basis for the fifth time.

Out of the 260 published 12bis decisions under review, 43 decisions (25 from the DRC and 18 from the PSC) indicated that a registration ban will be imposed if the amount due to the respective claimant is not paid by the respondent within 30 days as from the date of notification of the decision or in case the respondent commits another infringement under Article 12bis during a probationary period. Moreover, 34 decisions of FIFA refer to a ban for one entire registration period. In five decisions the DRC decided to threaten a ban for the entire

60 See *inter alia* PSC 18 January 2018, no. op01182001.
61 PSC 16 August 2017, no. op08171027.
62 See *inter alia* DRC 8 September 2016, no. op0916308. However, this may differ in a situation where sanctions are imposed cumulatively.
63 See *inter alia* PSC 20 December 2017, no. op12171781; PSC 30 January 2018, no. op01181135; PSC 9 May 2018, no. op05181563 and DRC 7 June 2018, no. op06180657.
64 PSC 9 May 2018, no. op05181563.
65 PSC 9 May 2018, no. op05181563, para (II) 19.

next two registration periods. The PSC imposed a registration ban for two entire and consecutive periods in four decisions.[66]

What is striking is that in all decisions rendered before April 2017, the respondents did not only not reply to the claim (or only after the investigation phase was closed which is equivalent to not replying)[67], but more importantly the respondents were found to have breached their financial obligations several times before. Either, the defaulting clubs were found to have delayed several outstanding payments for more than 30 days, or the respondent had (also) been found by the DRC and the DRC judge responsible for not complying with its financial obligations on various other recent occasions. We also encountered cases in which both conditions were met.[68]

The authors want to lay emphasis on the significant increase of transfer bans imposed by the PSC during the last year of the published 12bis jurisprudence. Out of the 36 published 12bis decisions before the PSC between April 2017 and the end of August 2018, 17 transfer bans were imposed by the PSC (13 times a ban for one registration period, 4 times a ban for the next two registration periods). Moreover, the PSC even imposed a registration ban in seven cases notwithstanding the respondent had replied to the claim. Obviously, the reason behind the increase of transfer bans imposed by the PSC can be found in the overall increase of 12bis cases. As a consequence of the increase of 12bis decisions, the PSC is more often confronted with repeated offenders. For example, in the decision of 20 December 2017[69], the PSC was confronted with a respondent found to have delayed a due payment for more than 30 days without a *prima facie* contractual basis for the eight (!) time.

Another striking element of the decisions in 12bis procedures is that the amount due is not relevant to justify the imposition of a registration ban on the debtor club. In fact, a ban has been imposed with regard to an overdue payable of EUR 4,100[70] and EUR 7,500[71] but also regarding an overdue payable amount of EUR 2,750,000.[72]

It seems that a ban for one entire period will be imposed in case:

- 1) the debtor club has been found by the DRC or the PSC to have delayed a due payment for more than 30 days without a *prima facie* contractual basis twice[73], as a result of which a fine was imposed in at least one of the decisions and the respondent did not reply to the claim[74];
- 2) the debtor club has been found by the DRC or the PSC to have delayed a due payment for more than 30 days without a *prima facie* contractual basis more than 2 times as a result of which a fine was imposed in at least one of the decisions[75] and the respondent replied to the claim[76];
- 3) the debtor club has been found by the DRC or the PSC to have delayed a due payment for more than 30 days without a *prima facie* contractual basis once, as a result of which a fine was imposed, and the debtor club has been found by the DRC to be responsible for not complying with its financial obligations towards players on various occasions in the recent past.[77]

Put differently: the jurisprudence of the DRC and the PSC clearly shows a debtor club systematically receiving a registration ban for one entire period if the club had neglected its financial obligation in more than one earlier decision by the DRC or the PSC, and if in these proceedings the respondent failed to reply to the claim and therefore received a fine from FIFA. What remains not entirely clear to us is what the DRC and PSC mean by "*various occasions in the recent past*". This could, for example, also refer to convictions prior to the introduction of the 12bis procedure.

The first two years of jurisprudence show that a registration ban for two entire and consecutive periods will be imposed when the debtor club has been found by the DRC or the PSC to have delayed a due payment for more

66 PSC 25 August 2017, no. op08171031; PSC 13 February 2018, no. op02181943; PSC 13 February 2018, no. op02181892 and PSC 23 March 2018, no. op03180119.

67 DRC 8 September 2016, no. op0916308 and DRC 15 July 2016, no. op0716703.

68 In the context of a retroactive application of Article 12bis, as discussed in the context of the CAS award of 17 June 2016 (see CAS 2015/A/4310, *Al Hilal Saudi Club v. Abdou Kader MANGANE*, award of 17 June 2016), it can be questioned whether the decisions of FIFA bodies prior to the date of 1 April 2015 (which per definition were decisions in 'regular' FIFA proceedings) can be taken into account and held against the club in default. For a more detailed analysis of this legal issue of retro-active application, see our pending ISLJ article. See also *LOMBARDI, P.*, Worlds Sports Law Report, September 2016, *"Article 12bis of the FIFA Regulations: 18 months on"*, p. 5.

69 PSC 20 December 2017, no. op1217181.

70 DRC 29 April 2018, no. op04180403.

71 DRC 26 May 2016, no. op0516585.

72 DRC 17 May 2018, no. op05180180.

73 However, in the decision of the PSC of 20 June 2016, no. op0616676, a registration ban was imposed on the debtor while the debtor club had only once been found by the PSC to have delayed a due payment for more than 30 days without a *prima facie* contractual basis, as a result of which a fine was imposed.

74 PSC 25 August 2017, no. op08171014; PSC 18 September 2017, no. op09171172; PSC 5 December 2017, no. op12171821; PSC 2 May 2018, no. op05180504.

75 See *inter alia* DRC 27 October 2015, no. op10151248, wherein the debtor club had received a fine in both earlier decisions. In DRC 17 October 2016, no. op10161355-E, the debtor club had only received a fine in the second decision.

76 See *inter alia* PSC 12 May 2017, no. op05171637 and PSC 12 May 2017, no. op05172185.

77 See *inter alia* DRC 8 September 2016, no. op0916308 and DRC 15 June 2017, no. op06170224.

than 30 days without a *prima facie* contractual basis twice, as a result of which fines (or even a registration ban of 1 period)[78] have been imposed and the debtor club has been found by the DRC to be responsible for not complying with its financial obligations towards players on various occasions in the recent past. However, recent jurisprudence of the DRC[79] and PSC[80] seems to refer to at least three sanctions imposed on the respondent.

Final Remarks

The 12bis procedure can (still) be considered as a powerful instrument for swift dispute resolution, which could be of great benefit to players and clubs. Analysing over three years of jurisprudence, FIFA has put in place a fast track procedure and a strong enforcement system with respect to overdue payables by defaulting clubs towards players and clubs. So far, FIFA has contributed to the resolution of international disputes in 12bis procedures in a very efficient manner leading to a shortened timeframe for decisions. However, a critical note is that the more recent 12bis procedures seem to take more time, as the latest jurisprudence points out.

The sanctioning power of FIFA is one of the fundamental strengths of the 12bis procedure. In all 260 published decisions of the DRC and the PSC, a sanction was imposed on the defaulting clubs, varying from a warning to a registration ban.

From the FIFA decisions, in which fines were imposed on defaulting clubs, it can also be derived that the level of the fine is determined by taking into consideration the three above-mentioned categories of wrongdoings (First, Second and Third Category Offence), subject to an approximate range in relation to the outstanding amount due. However, the 12bis decisions of the DRC so far are more systematic and predictable than the PSC's. Finally, the heaviest sanction, a transfer ban, will only be imposed if the defaulting club breached its financial obligations several times in the past. Fortunately, FIFA does not shy away from using sanctions, on the understanding that only clubs that went too far will face the more severe ones. Nowadays, more and more defaulting clubs are faced with a transfer registration ban in 12bis procedures.

Although the conclusions drawn by the authors can help practitioners confronted to 12bis procedures, they are only based on the published jurisprudence between 1 April 2015 and 1 September 2018. It must be taken into account that FIFA committees might change their interpretation and implementation practice regarding the 12bis procedure in the future. However, the jurisprudence reviewed and analysed in this article can at least shed some light on the functioning of FIFA's 12bis procedure, and in particular on its effective sanctioning regime, over the last years.

78 DRC 29 July 2016, no. op0716699. The previous decision, wherein a transfer ban for one entire period was imposed, is also published: DRC 4 February 2016, no. op02161733.

79 DRC 20 September 2017, no. op09171180 and DRC 8 March 2018, no. op03181334.

80 PSC 25 August 2017, no. op08171031; PSC 13 February 2018, no. op02181943; 13 February 2018, no. op02181892; ≠ PSC 23 March 2018, no. op03180119.