



**Arbitration CAS 2004/A/593 Football Association of Wales (FAW) v. Union des Associations Européennes de Football (UEFA), award of 6 July 2004**

Panel: Prof. Michael Geistlinger (Austria), President; Mr. Peter Leaver QC (United Kingdom); Prof. Massimo Coccia (Italy)

*Football*

*Doping (Bromantan)*

*CAS jurisdiction*

*Arbitrability of the dispute*

*Complicity of the federation or the club*

1. A decision, which effect is to permit one of the national football team concerned to compete in the last stages of Euro 2004 has obviously serious financial repercussions. Following a case-by-case approach and taking into account its effects, the disputed decision is predominantly of a pecuniary nature (as opposed to sporting nature) for both parties. According to art. 62 UEFA Statutes, CAS has jurisdiction to hear an appeal filed against a decision of a pecuniary nature.
2. *“Implicated”* is more than just being *“involved”*. This technique, applied to art. 12 UEFA DR, leads to the legitimate conclusion that *“implicated association”* means participation of an association in the voluntary or negligent use of a banned substance or method by a player being aware of his doing so.
3. When there is no evidence that a federation or a club cooperated intentionally or negligently in the use of the banned substance by the Player, the said federation or club cannot be assimilated to an *“accomplice or abettor”* of player under the terms of the UEFA Disciplinary Regulations and consequently cannot be sanctioned.

The Appellant is the Football Association of Wales, which is a member of UEFA.

The Respondent is the Union des Associations Européennes de Football, which by art. 1 of its Statutes is a society entered in the register of companies under the terms of art. 60 et seq. of the Swiss Civil Code, and which has its headquarters in Switzerland. By art. 2 of its Statutes the objects of UEFA are inter alia *“a) to deal with all questions relating to European football; b) to promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination as to politics, gender, religion or race; ... d) to respect the interests of Member Associations, and to settle disputes between Member Associations; ...”*. By art. 3 para. 2 of its Statutes UEFA is a Confederation recognised by FIFA (Fédération Internationale de Football Association).

By letter dated 10 April 2004 the FAW submitted an appeal (Statement of Appeal) against the decision of the Appeals Body of UEFA (the “Appeals Body”) made on 19 March 2004 and issued in writing on 2 April 2004 and asked for

*“(1) a declaration that the decision appealed against is flawed by errors of law and is void and of no effect;*

*(2) a declaration that on the correct interpretation of the relevant UEFA rules and regulations, the FUR (Football Union of Russia) is implicated as an accomplice or abettor of Titov for having fielded a player who had a prohibited substance in his body, irrespective of the fact that the FUR was unaware when the matches in question were played that Titov had a prohibited substance in his body; and*

*(3) a declaration that on the correct interpretation of the relevant UEFA rules and regulations UEFA’s disciplinary organs are accordingly empowered to impose on the FUR an appropriate sanction, and UEFA’s (UEFA’s) disciplinary organs are obliged on the basis of the FAW’s complaint to consider what sanction to impose within the powers conferred by the relevant rules and regulations”.*

The Statement of Appeal was supported by the FAW’s Appeal Brief submitted on 20 April 2004. The circumstances in which the appeal came to be made were that the Appeals Body had rejected the FAW’s appeal against the decision of the UEFA Control and Disciplinary Body (the “Control & Disciplinary Body”) dated 3 February 2004. The Control & Disciplinary Body had previously rejected the FAW’s complaint against the Football Union of Russia (FUR) arising from the participation of a doped player (Mr. Titov) in the EURO 2004 play-off between the teams of Wales and Russia in November 2003. The FAW argues in its Appeal Brief that the Appeals Body had misinterpreted UEFA’s disciplinary rules. The FAW contends that, contrary to the Appeals Body’s view, the disciplinary rules impose strict liability on a national association with regard of doping offences committed by a player of the national team squad. The Appeals Body did not reverse the result of the play-off matches which had resulted in the qualification of Russia for Euro 2004 by a score of 1-0 over the two matches, notwithstanding the fact that it did not exclude the possibility that in the second match, which took place in Cardiff on 19 November 2003, the Russian player Titov still was under the influence of the prohibited substance bromantan. The FAW contend that the result of the games having been secured “through illegal and corrupt sporting advantage, and not fairly according to the rules of the game” should not be allowed to stand.

The case originates from the first match between Russia and Wales during the Euro 2004 qualifier on 15 November 2003, when the Russian player Titov was selected at random for a doping test. Titov was a substitute, who did not actually play in that match. The match ended in a goal-less draw. The return match took place in Cardiff on 19 November 2003. Titov played until the 59<sup>th</sup> minute and is said by the FAW to have made a substantial contribution to Russia’s victory. Russia won the match 1-0, and so qualified for the Euro 2004. Titov was not tested on 19 November 2003.

On 3 December 2003 UEFA was informed by the Seibersdorf Research Laboratory, an IOC accredited Laboratory, that Titov’s A sample had tested positive for the presence of bromantan metabolites. Bromantan continues to be a prohibited substance under the WADA 2004 Prohibited List International Standard.

On 11 December 2003 the FUR informed UEFA and attached a written statement of Titov that neither he nor the FUR had any doubts about UEFA doping control findings and that he did not request a B sample analysis.

By letter dated 15 December 2003 Mr. A. Katulin, doctor of Titov's club, FC Spartak Moscow, stated, that due to an acute respiratory illness on the eve of UEFA Cup match the player Egor Titov had *"received the medication of Remantadin (10 pills on 14. 11. 2003 and 6 pills on 15. 11. 2003). It is known that Remantadin can produce a false positive reaction for Bromantan, which is on the list of prohibited substances. Therefore our doping test revealed negative results. The doping control tests in Russian National team also revealed negative results"*.

With regard to the medication indicated by the club doctor in his statement, the laboratory declared that it was highly unlikely that the medicine Remantadin was the cause of the positive bromantan test.

On 22 January 2004 the Control & Disciplinary Body concluded the disciplinary proceedings against Titov, the FUR and against FC Spartak Moscow regarding the doping offence (bromantan) by suspending Titov for a period of 12 months (until 21. 01. 2005) from all UEFA competition matches, and imposing a fine of CHF 10'000.- on him as well as a fine of CHF 20'000.- on FC Spartak Moscow, and by ordering UEFA to extend this decision on a worldwide basis. The decision was based on art. 27 UEFA Disciplinary Regulations 2002 (hereafter: "UEFA DR") with regard to jurisdiction of the body and on arts. 17 para. 1, 12 para. 4 and 6 para. 1 UEFA DR with regard to the sanctions imposed. Concerning the responsibility of the FUR, the Control & Disciplinary Body held: *"There was no element whatsoever indicating a responsibility of the Football Union of Russia and that consequently, there were no reasons to impose any sanction on this entity"*.

By fax and letter dated 26 January 2004 the FAW lodged a formal protest under art. 43 UEFA DR at the continued inclusion of Russia in the Euro 2004 finals: the FAW contended that Russia should be excluded from participation in the Euro 2004 finals in Portugal and that Wales should be awarded their place in the tournament. The FAW argued that art. 12 UEFA DR and art. 4.02 UEFA Doping Regulations provided that a national association was to be called to account when a player used banned substances. The FAW referred to art. 14 para. 1 lit. (g) in combination with art. 14 para. 2 UEFA DR which allowed UEFA to award a match by default and to art. 14 para. 1 lit. (l) UEFA DR which allowed UEFA to disqualify the national association from the competition in progress. The FAW also referred to arts. 18.01 and 18.02 of the UEFA Football Championship Regulations 2002/4, which provided for the application of UEFA DR during Euro 2004.

By fax dated 28 January 2004 the FUR reacted to the protest of the FAW by emphasizing that Titov had not been fielded on 15 November 2003 and submitting that he was eligible for the match on 19 November 2003 because the doping-test results were submitted to the FUR only on 10 December 2003 and the player has been disqualified by decision of UEFA Control & Disciplinary Body on 22 January 2004. The Disciplinary Inspector, whose task according to art. 30 para. 2 UEFA DR is to represent UEFA in disciplinary proceedings, held that, since UEFA was informed of the positive result of Titov only on 3 December 2003, *"there was no legal reason whatsoever for UEFA to declare this*

*player ineligible for the match on 19 November 2003 ...*". The Disciplinary Inspector further argued that it had not been demonstrated that Titov was also doped for the match of 19 November.

On 2 February 2004 the FAW supplemented its letter of protest of 26 January 2004. The FAW in its submissions further emphasised, relying on Dr. Spear's Report, that bromantan was largely a Russian problem. With regard to UEFA law the FAW held that there was "*nothing in the UEFA statutes which states that a player found guilty of doping cannot retrospectively be deemed to have been 'ineligible' for a match*" and enumerated examples for overturned results at UEFA games.

On 3 February 2004 the Control & Disciplinary Body decided to reject the complaint of the FAW for being unfounded and followed the arguments of the Disciplinary Inspector. Further to that, the Control & Disciplinary Body referred to the World Anti-Doping Code ("WADC"), which, irrespective of being known "*for a harsh disciplinary regime following the occurrence of a doping case, does not provide for consequences to teams in the event of one team member having been tested positive for a prohibited substance; in particular, the WADC Article 11 provides for consequences for teams only if more than one team member was found to have committed an anti-doping rule violation*".

By fax and letter dated 6 February 2004 the FAW appealed against the decision of the Control & Disciplinary Body of 3 February 2004.

On 19 February 2004 the FUR lodged a Statement (dated 17 February 2004) in response to the appeal of the FAW, in which it did not contest the finding of traces of Bromantan Metabolites in the sample provided by Titov. The FUR relied upon the WADC for holding "*that sanctions may be imposed on the squad in team sports only if banned substances are revealed in the body of 2 or more athletes*".

On 1 April 2004 the Appeals Body ruled that the appeal of the FAW was rejected inasmuch as it was admissible and confirmed the Control & Disciplinary Body's decision of 3 February 2004. The object of the appeal was confined to the framework of questions which were the object of the previous proceedings, that is, the result of the return match between Wales and Russia on 19 November 2003. The Appeals Body held that the player Titov fulfilled all eligibility requirements for this match and the FUR, therefore, could not be penalised for having fielded him. The suspension for doping was effective only from 21 January 2004 onwards and did not apply retroactively.

On 10 April 2004, the FAW filed its timely appeal against the Appeals Body's written decision notified to the FAW on 2 April 2004.

The Order of Procedure was sent to the parties on 4 May 2004 and signed by both. However, UEFA included a reservation with regard to the jurisdiction of the CAS.

In its Answer, filed on 7 May 2004, UEFA disputed the jurisdiction of the CAS in this case.

## LAW

### CAS Jurisdiction

1. The preconditions and the extent of the jurisdiction of the CAS for UEFA matters are laid down by arts. 61 and 62 UEFA Statutes.

Art. 61 reads as follows:

*“Ordinary Court of Arbitration*

*<sup>1</sup> CAS shall have exclusive jurisdiction to deal with all law disputes (of a pecuniary nature) relating to UEFA matters which arise between UEFA and Member Associations, clubs, players or officials, and between themselves.*

*<sup>2</sup> There shall be no recourse to legal action in the ordinary courts of law in relation to such disputes.*

*<sup>3</sup> Proceedings before CAS shall take place in accordance with the Code of Sports-related Arbitration of CAS”.*

Art. 62 reads as follows:

*“Legal Challenge to Decisions of the Organs for the Administration of Justice*

*1 CAS shall have exclusive jurisdiction to deal with any challenge against a decision under civil law (of a pecuniary nature) of the Organs for the Administration of Justice. Any such challenge must be made at CAS within 10 days of the notification of the decision which is challenged.*

*2 A decision of the Organs for the Administration of Justice of a sporting nature, or any part or parts of a decision that is of a sporting nature, may not be challenged in civil law.*

*3 A civil law challenge through CAS may only be brought after UEFA’s official internal procedures have been exhausted.*

*4 There shall be no recourse to legal action in the ordinary courts of law in relation to such matters.*

*5 A civil law challenge shall not have any suspensory effect as a stay of execution of a disciplinary sanction, subject to the power of the President of the Division or the President of the Panel appointed to deal with the matter after hearing the parties, to order that any disciplinary sanction be stayed pending the arbitration”.*

2. As the Panel cannot see any other agreement between the parties upon which the jurisdiction of the CAS could be based, and as it is the decision of the Appeals Body dated 1 April 2004 which is challenged, it is art. 62 UEFA Statutes which needs to be considered. According to art. 32 para. 1 lit. b) UEFA Statutes, the Appeals Body is an organ for the administration of justice within the UEFA system. It is therefore decisive for the case in hand whether the mentioned decision of the Appeals Body mentioned above is a decision *“under civil law (of a pecuniary nature)”*. In its submissions UEFA did not differentiate between the words *“civil law disputes (of a pecuniary nature) relating to UEFA matters”* in art. 61 para. 1 UEFA Statutes and *“a decision under civil law (of a pecuniary nature)”* in art. 62 para. 1 UEFA Statutes. UEFA submits that

the FAW's appeal, which seeks annulment of the appealed decision and the imposition of an appropriate sanction on the FUR, does not relate to any pecuniary dispute between the FAW and UEFA and argues that the CAS may have jurisdiction only if the interest of the FAW in having such sanctions imposed on the FUR is of a pecuniary nature. Relying on the Minutes of UEFA 8<sup>th</sup> Extraordinary Congress, which was referred to and quoted by the CAS in its award of 9 October 1998 (CAS 98/199, in Digest of CAS Awards II, 490-499, at 492 para. 5), UEFA submits that disputes "*of a pecuniary nature are those relating to contracts, torts, company law, or intellectual property and the like. By contrast, matters of a sporting nature are those relating to the preparation, organisation and running of matches, tournaments and competitions, including the Laws of the Game, match-related sanctions, etc.*". UEFA further submits that the ratio of the CAS 98/199 award is that the mere fact that a decision has financial implications (for the players, the club etc.) is not sufficient for the dispute to be of a pecuniary nature. In UEFA's view as CAS ruled in the CAS 98/199 award, "*if the contested decision has financial and sporting effects, the arbitrators must decide which aspect is predominant in casu*".

3. The FAW contends that the exclusion of the CAS jurisdiction in cases "of a sporting nature" must be narrowly construed against the party seeking so to characterise a dispute and that, when properly so construed, the present dispute is not excluded from the CAS jurisdiction. The FAW underlines that it has a strong pecuniary interest in the annulment of the playoff result and refers to the evidence given by Mr. Collins. The FAW understands the CAS 98/199 award as reflecting the principle "*contra proferentem*", that is, "*a provision relied upon by a party seeking to exclude the supervisory jurisdiction of a court or arbitral body, must be strictly construed against the party relying on it*". In the opinion of the FAW this position is supported by the CAS awards in the CAS 98/185 case (of 22 July 1998, in Digest of CAS Awards II, 469-478) and in the CAS 98/200 case (of 20 August 1999, in Digest of CAS Awards II, 38-105).
4. The Panel does not concur with either party's position as to the proper construction of the relevant article. The Panel wishes to emphasise that the CAS expressly stated in the CAS 98/199 award that it "*does not wish to lay down a general rule on how Article 57 of UEFA Statutes*", which now is art. 62 UEFA Statutes, "*should be interpreted. It merely resolves the current case, since it believes the CAS should determine the scope of its jurisdiction on a case-by-case basis, taking into account, where both elements are present, whether the sporting or pecuniary nature of the disputed decision is predominant*". (CAS 98/199, at 496 para. 20). It cannot be concluded from this award that "*the arbitrators must decide which aspect is predominant in casu*", but merely that they "*should take [such matters] into account*". Nor did the CAS intend to express a general principle for interpreting this provision. This Panel adheres to the case-by-case approach in order to assess whether the sporting or pecuniary nature of the disputed decision is predominant by reference to the specific elements of the case. The predominant element should be determined, particularly, on the basis of the effects of the disputed decision (see CAS 98/199, at 493 paras. 10 and 11). The Panel finds, however, that the genesis of the provision of art. 62 UEFA Statutes offers further criteria which need to be taken into account in addition to the predominant nature of a disputed decision. As can be seen from the Minutes of the 8<sup>th</sup> UEFA Extraordinary Congress quoted in the CAS 98/199 award, the

*"UEFA Disciplinary Regulations and the distinction they make between disputes of a sporting nature and civil law disputes (of a pecuniary nature) illustrate UEFA's desire to exclude, as far as possible, recourse to*

*the Swiss ordinary courts. ... When the nature of a dispute is contested, the Court of Arbitration for Sport (CAS) should decide, on a case-by-case basis, whether it is of a sporting nature or a civil law dispute (of a pecuniary nature). Article 177.1 of the Swiss Federal Code on Private International Law (LDIP) is applicable where distinctions between these two types of dispute are concerned”.*

5. Art. 177 para. 1 Swiss Federal Code on Private International Law (“LDIP”) reads as follows:

*“Toute cause de nature patrimoniale peut faire l’objet d’un arbitrage”.*

The term “nature patrimoniale”, which means in English “of a pecuniary nature”, is understood by the Swiss Federal Tribunal as follows:

*“Est de nature patrimoniale au sens de cette disposition toute prétention qui a une valeur pécuniaire pour les parties, à titre d’actif ou de passif, autrement dit tout qui présente, pour l’une au moins des parties, un intérêt pouvant être apprécié en argent”* (see ATF 118 II 353, 356 = JdT 1994 I 125 as quoted by PATOCCHI/GEISINGER, Arbitrage International, Lausanne 1995, 439 f.).

The Swiss Federal Tribunal has also explicitly stated that disciplinary sanctions imposed by sports organizations are arbitrable under art. 177 para. 1 LDIP if: (i) the sanctions do not involve the rules of play *stricto sensu*, (ii) the sanctions concern the association’s life or participation in competitions, and (iii) some personal and financial consequences arise for the sanctioned person or entity (see ATF 119 II 271 ff.).

6. The Panel finds that UEFA, when drafting art. 62 UEFA Statutes, obviously wanted to use the Swiss understanding of the term “of a pecuniary nature”, which is a wide one, in order to enable as many disputes as possible to be decided by the alternative dispute resolution mechanism of the CAS rather than by resort to the Swiss courts. It would be contradictory to this approach if UEFA were to be able to confine cases of a pecuniary nature to the examples enumerated above and those in the minutes of the 8<sup>th</sup> UEFA Extraordinary Congress. If UEFA’s submission to the Panel were to be adopted, the number of cases of a sporting nature would be increased, many of them accessible to recourse to Swiss ordinary courts since they would be excluded from arbitration. Only actual rules of play, which do not involve significant pecuniary or comparable interests, such as honour, personal development through sport, etc., could neither be disputed by arbitration, nor by ordinary courts in accordance with the Swiss Federal Court’s case law. In the CAS 98/199 award the CAS came close to deciding, but finally did not decide, whether it could assimilate the notion of a “*decision of a sporting nature*” with “*that of non-enforceable rules of play as set out by the Swiss Federal Tribunal*” (see page 495 para. 17). The Panel, therefore, draws the conclusion from the genesis of art. 62 UEFA Statutes that in cases in which it is not clear whether the sporting or the pecuniary nature of the decision is predominant, it should normally be the case that the matter will be considered to be of a pecuniary nature. With this approach, the construction of the relevant provisions would be most closely assimilated to the Swiss understanding of a case having a pecuniary nature; as a result, a dispute is of a pecuniary nature if an interest of a pecuniary nature can be found in at least one of the parties. The Panel also takes comfort from the fact that its approach is consistent with the widely recognized interpretative principle “*contra proferentem*” (also known as “*contra stipulatorem*”), according to which an unclear clause should be interpreted against the party who drafted it (in Swiss case law see, with specific reference to

arbitration clauses, ATF 22 October 2002 4C.186/2002; ATF 126 V 499, 3b; ATF 122 III 118, 2d).

7. The Panel finds that the case in hand deals with a decision of a body of an international sports federation based in Switzerland. The decision, therefore, is a decision under civil law. The Panel has considered the parallels and differences of the case in hand concerning the nature of the effects of the disputed decision in comparison with previous decisions of the CAS in UEFA matters. In the CAS 98/185 award the CAS found that the ban of a club from UEFA club competitions for one season “*clearly does not concern the actual practice of a sport, but irrefutably affects the pecuniary interests of one of the parties*”. In the CAS 98/199 award (see number 2 above) the CAS ruled that the decision to suspend the use of a stadium for one match was primarily of a sporting nature and fell outside the jurisdiction of the CAS, whereas a fine and a confiscation of money fell under jurisdiction of CAS (see paras. 15 and 16). With regard to the ban of the stadium the CAS concluded that the appellant had failed to show or substantiate its argument that the ban of the stadium would have pecuniary or other consequences deserving legal protection. In the CAS 98/200 award the CAS based its jurisdiction on an arbitration agreement and only noted as an *obiter dictum*, without further discussion, that the CAS could also have been deemed to have jurisdiction under the then art. 56 UEFA (now 61) Statutes. This case, therefore does not help to clarify the issue in the present case any more than does the case TAS 2002/A/423, award of 3 June 2003. In the latter case the parties had expressly agreed to the jurisdiction of the CAS by signing the order of procedure (see para. 4).
8. The Panel holds that the effects of the disputed decision are to permit either the Russian or the Welsh team to compete in the last stages of Euro 2004. The effect of the decision of the Appeals Body is that the Russian team will compete. To upset the decision of the Appeals Body, as requested by the FAW, would lead to the exclusion of the FUR from the last stages of the Euro 2004. The Panel holds that the financial repercussions of exclusion of the FUR from the final stages of the Euro 2004 would be similar to those stated by the Secretary General of the FAW for Wales if Wales did not participate in the final stages. The FUR would lose a minimum prize money of CHF 7,5 million paid by UEFA to each of the 16 finalists. Further to that it can be assumed that bonuses comparable to those of Wales would be lost (in the case of Wales more than GBP 60’000). In addition, the effects of the disputed decision involve other interests beyond non-enforceable rules of play, *i.e.* reputation and credibility of a team, the value on the market of the players of the team etc. It can, therefore, be seen that both Wales and Russia have an interest of a pecuniary nature. Considering the financial repercussions the Panel holds that the case in hand comes much closer to the CAS 98/185 case than to the facts of the CAS 98/199 award. The Panel finds that the disputed decision, following a case-by-case approach and taking into account its effects, is predominantly of a pecuniary nature. The Panel, thus, rules that it has jurisdiction to hear the appeal filed by the FAW.

## Merits

9. In the FAW's view, it is not the club, but the FUR which bears legal responsibility for the doping of Titov because doping occurred while the player was on international duty, not club duty. The FAW contends that art. 6 UEFA DR creates strict liability in the FUR, and that art. 12.4 UEFA DR does not alter this conclusion. In the alternative, should negligence be required to establish the offence, the FAW holds that evidence of the FUR's negligence is very strong, but that the burden of proof beyond reasonable doubt lies with the FUR, being the federation of the cheat. The FAW reads art. 12.4 UEFA DR as meaning that "*implicated associations are accountable like accomplices or abettors*". The FAW understands the term "*implicated*" meaning no more than "*involved*". The FAW relied upon the TAS 2002/A/423 award (see above at number 7), dealing with art. 6.1 UEFA DR as being directly applicable to art. 12.4 UEFA DR. As a consequence, the latter provision would not require knowledge or fault on the part of the member association that is held liable for the wrongdoing of its player. The FAW argues that the FUR should be deemed to be an accomplice or abettor by virtue of being "*involved*", and should be held accountable for the player's doping offence, because the player was under its direction or control at the time the offence was committed. The FAW construes the provision of art. 12.4 UEFA DR as being identical with the provision of art. 4.02 UEFA's Doping Regulations. Both provisions would apply to the Euro 2004 by virtue of the Euro 2004 Regulations, arts. 18 and 22. Due to the small number of doping tests at a match by UEFA, the criterion of more than one player per team for mandatory exclusion of a team from a competition would not be apt to be applied by UEFA, in the FAW's opinion.
10. UEFA submits, on the contrary, that art. 6.1 UEFA DR does not apply to the case in hand, because art. 12.4 UEFA DR is the special rule which governs the matter. Art. 12.4 UEFA DR does not adhere to the principle of strict liability, but it should be concluded from the definition of the terms "*accomplices*" and "*abettors*" that an association will be liable for having participated intentionally or by negligence in the preparation or commission of an offence. UEFA maintains that there is no evidence that the FUR was implicated in the doping of Titov and that it have participated intentionally or by negligence in the preparation or commission of this offence. UEFA relies upon the language of art. 12.4 UEFA DR in the French and German language and the TAS 2002/A/423 award to argue that the whole disciplinary system is not based upon a regime of strict liability. In UEFA's opinion, each rule should be examined for itself in order to determine whether or not it creates a regime of strict liability. UEFA concludes from the difference between arts. 3.03 and 4.02 of UEFA's Doping Regulations that the regime is not the same for players and for associations and argues that UEFA disciplinary authorities are bound to apply the special rule of art. 12.4 UEFA DR instead of art. 6.1.
11. UEFA reads art. 12.4 UEFA DR as requiring first of all "*implication*" of an association in the violation of anti-doping regulations. In case of "*implication*" associations, clubs and individuals would be subject to the same rule. "*Individual*" mentioned in this provision would be any other person than the doped player. For UEFA it is unthinkable that these individuals other than the doped player(s) would be subject to a regime of strict liability. From this follows that, as a whole, art. 12.4 does not institute a regime of strict liability. Last but not least, UEFA deduces

from the wording of art. 12.4 UEFA DR that implicated associations would incur the liability of an accomplice or abettor. UEFA refers to art. 25 Swiss Criminal Code which requires intent on the part of an accomplice or abettor in order to allow for punishment. Under Swiss civil law it is intent or negligence which makes a person an accomplice to an illegal action performed by a third person assisted by such a person. “Accomplice” is to be construed in the same sense as the German word “Gehilfe” and the French word “complice”. “Abettor” (German: “Mittäter”; French: “coauteur”) are defined under Swiss criminal law “as those who participate intentionally and in a decisive manner in the preparation or commission of the offence”. UEFA accepts that it is conceivable – at least theoretically – to think of an “abettor” by negligence, UEFA contends that the liability of “accomplices” as well as of “abettors” requires fault and participation. UEFA further submits that even it was demonstrated that Titov could have had bromantan during the second match, the FUR would not be liable for this in the absence of any evidence as to its implication in the doping offence.

12. UEFA also comments on the sanction which could be pronounced in case the Panel were to determine that art. 12.4 UEFA DR institutes a regime of strict liability. UEFA points at a different rule that had to be applied by the CAS in a previous case relied upon by the FAW, and which did not allow for any discretion in that case (TAS 95/122, in Digest of CAS Awards I, 173-185). UEFA holds also to be in line with art. 11 WADC and further submits that the IAAF rules, mentioned by the FAW, which provide for automatic disqualification of the whole relay team, cannot be compared with those of UEFA. UEFA points at the legitimate interests and rights of the other undoped players of a team which provide good reasons for not applying automatically such severe sanctions in the case of one single player’s doping; otherwise, the principle of proportionality would be violated. UEFA considers its unwritten rule, whereby, absent the proven involvement of others in the team, the violation of doping rules by one single player in a team does not cause the match result to be altered or the match replayed, as appropriate.
13. The provisions in UEFA DR (edition 2002) which need to be carefully considered by the Panel read as follows:

*“Article 5 – Principles of conduct*

<sup>1</sup> *Member associations, clubs, as well as their players, officials and members, shall conduct themselves according to the principles of loyalty, integrity and sportsmanship.*

<sup>2</sup> *For example, a breach of these principles is incurred by anyone:*

- a) who engages in or attempts to engage in active or passive bribery;*
- b) whose conduct is racist, discriminatory, politically extremist, insulting or of any other such nature as to violate the basic rules of conduct;*
- c) who uses sporting events for manifestations of a non-sporting nature;*
- d) whose conduct brings the sport of football, and UEFA in particular, into disrepute;*
- e) who defies decisions and directives of the Organs for the Administration of Justice;*
- f) who does not comply with instructions given by the referee or delegate”.*

*“Article 6 – Responsibility*

<sup>1</sup> *Member associations and clubs are responsible for the conduct of their players, officials, members, supporters and any other persons exercising a function at a match at the request of the association or club.*

<sup>2</sup> *The host association or club is responsible for order and security both inside and around the stadium before, during and after the match. It is liable for incidents of any kind, and can be rendered subject to disciplinary measures and bound to observe directives”.*

*“Article 11 – Other facts*

*Disciplinary measures provided for in the present regulations may be taken against member associations or clubs if:*

- a) a team, player, official or member is in breach of Article 5 of the present regulations;*
- b) a team continues to conduct itself improperly, even after several individual disciplinary sanctions have been imposed by the referee;*
- c) spectators invade or attempt to invade the field of play, objects are thrown, fireworks ignited, or if order and discipline in the stadium area are otherwise not guaranteed”.*

*“Article 12 – Doping*

<sup>1</sup> *Any player who voluntarily or negligently uses banned substances or methods is suspended:*

- a) for 12 months for the first doping offence;*
- b) for two years for the first instance of recidivism;*
- c) for more than two years or indefinitely for the second instance of recidivism.*

<sup>2</sup> *The suspension can be combined with a fine.*

<sup>3</sup> *The Regulations governing doping controls at UEFA competition matches and list of banned substances and methods are authoritative.*

<sup>4</sup> *Implicated associations, clubs, and individuals are called to account for being accomplices or abettors”.*

*“Article 14 – Disciplinary measures against member associations and clubs*

<sup>1</sup> *The following disciplinary measures may be imposed against member associations and clubs in accordance with Article 53 of the Statutes:*

- a) warning*
- b) reprimand*
- c) fine*
- d) annulment of the result of a match*
- e) order that a match be replayed*
- f) deduction of points*
- g) awarding of a match by default*
- h) playing of a match behind closed doors*
- i) stadium ban*

*k) playing of a match in a third country*

*l) disqualification from competitions in progress and/or exclusion from future competitions.*

<sup>2</sup> *If a match is awarded by default, the result 3-0 applies, and away goals do not count double. If the goal difference is higher than 3, the result of the match actually played stands. If, after normal playing time, both teams have scored the same number of goals in both legs, under consideration of the awarding of the match by default, the team in whose favour the match is awarded by default goes through to the next round”.*

*“Article 17 – General principles*

<sup>1</sup> *The disciplinary bodies determine the type and extent of the disciplinary measures to be imposed, according to the objective and subjective elements, under consideration of incriminating and exonerating factors.*

<sup>2</sup> *The disciplinary measures enumerated in Articles 10 and 12 are standard penalties. In particular circumstances, they can be either scaled down or extended.*

<sup>3</sup> *If the fallible party has incurred several disciplinary measures, the disciplinary body assesses the sanction according to the most serious offence and increases it accordingly”.*

14. The Panel finds that Article 53 of UEFA Statutes referred to by art. 14.1 UEFA DR does not provide further guidelines to those arising from the latter provision.
15. The provisions in UEFA Regulations governing doping controls at UEFA competition matches and list of banned substances and methods (edition 2002) (“UEFA Doping Regulations”) which need to be considered by the Panel read as follows:

*“2. Obligations of national associations, clubs and players*

*2.01 Every player designated to undergo a doping control, either as a result of the draw or according to Article 4 below, will be obliged to undergo any medical examination considered necessary by the DCO, and to cooperate with the latter in this respect.*

*2.02 Every player selected will be obliged to provide a sample of his urine.*

*2.03 If a player refuses to undergo a doping control, he or any other implicated persons must provide written confirmation of the reasons for this refusal. The persons responsible may be subject to sanctions according to the UEFA Disciplinary Regulations”.*

*“4. Sanctions*

*4.01 Any player who voluntarily or negligently uses banned substances or methods is suspended:*

*a) For at least 6 months for the first doping offence.*

*b) For at least 12 months for the first case of recidivism.*

*c) For more than 12 months or indefinitely for the second instance of recidivism.*

*The suspension can be combined with a fine.*

*4.02 Implicated associations, clubs and individuals are called to account for being accomplices or abettors”.*

16. The Panel reads art. 13.1 of the UEFA European Football Championship Regulations 2002/2004 as meaning that the provisions of the UEFA Disciplinary Regulations apply for all disciplinary offences in connection with competitions covered by these regulations, unless these regulations stipulate otherwise. Art. 13.2 provides that acts *“in infringement of the regulations, or disciplinary offences by associations, officials, members or other individuals exercising a function at a match on behalf of an association, will be punished by the Control and Disciplinary Body on the basis of the UEFA Disciplinary Regulations”*.
17. As the Panel indicated at the hearing, it is prepared to assume that Titov was doped also during the return leg in Cardiff on 19 November 2003, in order to demonstrate that even on the basis of such an assumption the FUR cannot be considered to be liable under art. 12.4 UEFA DR and art. 4.02 UEFA Doping Regulations. By concluding according to the principle *in maiore minus*, the same result can then be taken for granted in the case of Titov not having been doped during the return match.
18. The Panel finds that the scheme of UEFA DR is, that arts. 5 and 6.1 are general provisions and are to be contrasted with arts. 6.2, 11 and 12, which are specific provisions. If the Panel focuses on member associations, art. 5 establishes a fundamental obligation for member associations to conduct themselves according to the principles of loyalty, integrity and sportsmanship. The provision mentions as one example of a violation of this obligation a member association whose conduct brings the sport of football, and UEFA in particular, into disrepute. Art. 6.1 supplements art. 5 on an equally general level by adding to the responsibility of the member associations for their own conduct, a general responsibility for the conduct of their players. Art. 6.2 opens the range of special provisions by creating a special responsibility only for the host association and host club. The host association and the host club are responsible for order and security inside and around the stadium before, during and after the match. With regard to this matter of security, the host association and host club are declared liable for incidents of any kind and can be rendered subject to disciplinary measures and bound to observe directives. Thus, art. 6.2 is a special rule with regard to the totality of member associations which provides that one association, which is the host association, is specifically responsible for any kind in the context of special responsibility for matters of security.
19. The Panel would wish to emphasise in this context that arts. 5, 6.1, and 6.2 UEFA DR make a clear distinction between *“responsibility”* and *“liability”*. The term *“responsibility”* in art. 6.1 forms the basis for a sanction of UEFA which by its very essence is an indirect one. It does not aim at punishing a member association or club itself, but aims at assisting, through its member associations and clubs, in establishing the liability for wrongful acts of their public. The CAS has stated in the TAS 2002/A/423 award to this end:

*“UEFA's rules of conduct would therefore be nothing more than vague obligations, since they would be devoid of any sanction. By penalising a club for the behaviour of its supporters, it is in fact the latter who are targeted and who, as supporters, will be liable to pay the penalty imposed on their club. This is the only way in which UEFA has any chance of achieving its objectives. Without such an indirect sanction, UEFA would be literally powerless to deal with supporters' misconduct if a club refused to take responsibility for such behaviour.”*

*Article 6 para. 1 of the DR, under which clubs assume strict liability for their supporters' actions, therefore has a preventive and deterrent effect. Its objective is not to punish the club as such, which may have done nothing wrong, but to ensure that the club assumes responsibility for offences committed by its supporters". (See TAS 2002/A/423, number 7 above, page 12, translation).*

20. With regard to art. 6.2 the CAS in the TAS 2002/A/423 award held:
- "A purely literal interpretation of this rule suggests that this is no longer a question of strict liability. Although this provision does impose a duty of care and diligence, requiring clubs and associations to do their utmost to guarantee order and security in and around the stadium when a match takes place, the simple fact that an incident occurs does not automatically mean that the host association or club should be penalised. The body responsible for dealing with such incidents is given a free hand to penalise the national association or club concerned in accordance with the circumstances. It would be outrageous if an association or club could be sanctioned even though it had committed no fault in relation to the organisation and maintenance of order and security at the match in question". (See TAS 2002/A/423, number 7 above, page 13, translation).*
21. This Panel holds that it follows from the character of art. 6.1 of imposing a sanction, which by its very nature is an indirect one and which leads to a sanction on the member association which is based on fault that neither the FAW nor UEFA are correct in their submission that art. 6 follows the regime of strict liability. Neither art. 6.1 nor art. 6.2 UEFA DR can serve as a legal basis for reading into UEFA DR a concept of strict liability. On the contrary, the general principle for fixing of penalties laid down in art. 17.1 UEFA DR requires the disciplinary bodies *"to determine the type and extent of the disciplinary measures to be imposed, according to the objective and subjective elements, under consideration of incriminating and exonerating factors"*. This principle, which explicitly mentions subjective elements side by side with objective ones, is much more expressive of a culpability concept in the understanding of apportionment and attribution of blame, than of strict liability and is consistent with the construction of art. 6.2 by the CAS in the TAS 2002/A/423 award. The preconditions of knowledge and fault are particularly laid down with regard to players' doping by art. 12.1 UEFA DR.
22. In distinction with art. 6.1, the responsibility stated by art. 5 UEFA DR is sanctioned directly by means of art. 11 lit. a) UEFA DR, which puts the general principles and the examples of breaches of art. 5 into specific terms. Art. 5, however, has been placed in a chain of three articles ruling on specific facts: art. 10, which provides for sanctions on players and enumerates the types of misconduct of players sanctioned by this article; art. 11, which provides for sanctions on member associations and clubs and enumerates the types of misbehaviour sanctioned by this article, one of them by reference to art. 5; and art. 12, which exclusively deals with doping, with regard to both, players and associations. The Panel, therefore, cannot accept the FAW's reasoning at the hearing to have art. 11 lit. a) applied to the present case so as to impose the principle of strict liability. Art. 12 must be considered to be the special norm for doping, which leaves room neither for the application of art. 6, nor of art. 5 to such a case. The particularity of a case of issue of doping in comparison to the other sanctioned conducts derives from the UEFA Doping Regulations, which rule on the definition of doping, the procedure of establishing a case of doping, the respective facilities and authorities, but also provide for particular sanctions in art. 4. Art. 4.01 and 4.02 UEFA Doping Regulations are repeated by art. 12.1, 12.2 and 12.4 UEFA DR. Art. 12.3 declares the

UEFA Doping Regulations as authoritative and thus links the two sets of UEFA rules to each other.

23. The Panel finds that there is no other way than to apply art. 12 UEFA DR in the present case. By art. 12.1 a suspension is to be imposed on any player *“who voluntarily or negligently uses banned substances or methods”*. By art. 12.4 implicated associations *“are called to account for being accomplices or abettors”*. Art. 12.4, which, as part of the doping provision in the UEFA DR, must be read together with the UEFA Doping Regulations is not the only article using the term *“implicated”*. Art. 2.03 UEFA Doping Regulations states that if a player refuses to undergo a doping control, *“he or any other implicated persons must provide written confirmation of the reasons for this refusal. The persons responsible may be subject to sanctions according to the UEFA Disciplinary Regulations”*. Both provisions relate to the system for imposing sanctions. The particular context and general logic prevent the Panel from accepting the FAW’s submission at the hearing that *“implicated”* means no more than *“involved”*. The Panel finds that UEFA is correct in interpreting the term like the two other terms *“accomplices”* and *“abettors”* used by art. 12.4 UEFA DR and art. 4.02 UEFA Doping Regulations taking guidance from Swiss criminal law and Swiss law on civil liability for damages. Both systems of law know the term *“implication”* and use it in the particular meaning of *“accessory before the fact”*. This requires that before a person can be fixed with liability he must at least have participated in the violation of a law and been aware of the violation, and, therefore, is more than just being *“involved”*. Swiss law, which is the applicable law for this case and the law UEFA had to consider when drafting its rules, uses the technique of ruling on *“implication”* depending on the principal offence (for the Swiss criminal law, see e.g. TRECHSEL/EGETER, Schweizerisches Strafgesetzbuch. Kurzkomentar, Zürich 1997, vor Art. 24, number 22; for the Swiss civil law, see e.g. BREHM R., Berner Kommentar, Obligationenrecht, Bd. VI/1/3/1, Bern 1998, art. 50, number 22).
24. The Panel holds that, this technique, applied to art. 12 UEFA DR, leads to the legitimate conclusion that *“implicated association”* means participation of an association in the voluntary or negligent use of a banned substance or method by a player being aware of his doing so. This finding by the Panel is also supported by general logic. The FAW had to admit at the hearing that its understanding of *“implicated”* as *“involved”* would lead to the logical result that there would be no need for art.12.4 UEFA DR, which could thus be omitted.
25. As the FAW in its submissions at the hearing concentrated on arguing that art. 12.4 UEFA DR must not be interpreted *“as affording a defence to a national association or club in a case where it is unaware that one of its players has committed a doping offence”*, the FAW failed to adduce any evidence that the FUR had been aware that Titov had committed a doping offence. The FAW submitted that *“if, contrary to the correct interpretation of the rules advanced above, it were necessary in order to determine the liability of the FUR, to determine whether any of its staff apart from Titov himself were at fault or had knowledge of Titov’s misconduct, the evidence accepted by the Control and Disciplinary Body and its findings of fact were, correctly, to the effect that the doping offence must have been committed after and not before Titov had joined the national squad and therefore at a time when he was under the direction and control of the FUR and not his club”*. The FAW supported this contention by the following arguments: Titov joined the national squad on 11 November 2003, four days before the first match; Titov was tested by the Doping Centre at Moscow on 11 November 2003; the presumption that an

IOC accredited laboratory conducted the testing and custodial procedures in accordance with prevailing and acceptable standards of scientific practice; the conclusion that Titov's body was free from Bromantan on 11 November 2003 and he, therefore was correctly considered to be eligible and in fact was admitted by the FUR for selection for the first match in Moscow. The FAW concluded by asserting that the doping offence was committed by Titov *"while he was under the direction and control of the FUR, and not while he was under the direction and control of his club"*.

26. The Panel is willing to assume, in the FAW's favour, that Titov's body was free from bromantan on 11 November 2003 and his doping offence was committed at a time when he was under the direction and control of the FUR. However, even assuming, that the banned substance entered the body of Titov after 11 November 2003, there is no evidence at all that the FUR cooperated intentionally or negligently in the use of this banned substance by Titov. Even from a logical point of view, it is impossible for a federation or a club to control a player every day for 24 hours; the player will always have a chance sooner or later to hide and take by himself a forbidden substance.
27. Given the result that there was no implication by the FUR, irrespective of whether or not Titov was doped during the return leg in Cardiff on 19 November 2003, the Panel finds no need to attempt to define the difference between an *"accomplice"* and an *"abettor"* in the UEFA DR. The Panel would like to repeat that, in principle, the approach of UEFA to orient on the respective terms used by the Swiss criminal and civil law and to link both to art. 12.1 UEFA DR in order to clarify which forms of fault are required, seems to be convincing. The Panel, therefore, dismisses the FAW's appeal in as much as it does not find that the decision of the Appeals Body was flawed by errors of law and was void and of no effect. The Panel also dismisses the appeal in as much as it does not find the FUR implicated in any asserted doping violation by Titov. The Panel dismisses the appeal in as much as it finds that, since there was no implication by the FUR in any doping offence, there is no legal basis for applying a sanction on the FUR.
28. Although the Panel understands and sympathises with the FAW's concerns at having played a team with a cheat, at least in the first match, the Panel, like all UEFA bodies involved before had to apply the UEFA rules, and not allow its sympathy to distract it or to dictate the outcome of the appeal.

**The Court of Arbitration for Sport:**

1. Has jurisdiction to hear the appeal filed by the Football Association of Wales on 10 April 2004.
2. Dismisses the appeal filed by the Football Association of Wales.

(...)