

Informative note on the eligibility checks

(Internal Working Document no. 2)¹

1. FIFA rules on eligibility and the purpose of this note

Candidates for the office of FIFA President (art. 27 par. 1 of the FIFA Statutes, art. 4 of the FIFA Governance Regulations [FGR] and art. 48 par. 1 (d) of the FGR), candidates for the FIFA Council (art. 27 par. 5 and art. 30 par. 6 of the FIFA Statutes, art. 4 of the FGR and art. 72 par. 1 of the FGR), candidates for the positions of chairperson, deputy chairperson and members of the Audit and Compliance Committee and each of the judicial bodies (art. 27 par. 8 of the FIFA Statutes, art. 4 of the FGR, art. 37 par. 1 (c) of the FGR and art. 38 par. 3 of the FGR), candidates for the position of Secretary General (art. 37 par. 3 of the FIFA Statutes and art. 4 of the FGR) as well as candidates for the standing committees (art. 39 par. 5 of the FIFA Statutes and art. 4 of the FGR) must pass an eligibility check carried out by the Review Committee. The Review Committee also conducts the independence reviews for the respective candidates (where applicable). Candidates for the Governance Committee must pass an eligibility check carried out by the investigatory chamber of the Ethics Committee. The investigatory chamber of the Ethics Committee also conducts the respective independence reviews (where applicable; art. 39 par. 5 of the FIFA Statutes and art. 27 par. 6 of the FGR).

Details regarding these eligibility checks are included in Annexe 1 to the FGR, in particular regarding the self-disclosure process by the candidate concerned, the collaboration of the candidate concerned, the margin of appreciation of the Review Committee and the confidentiality of such check. Convictions of intentional indictable offences or offences corresponding to violations of the rules of conduct as set out in part II section 5 of the Code of Ethics (cf. art 13 et seq.) as well as respective sanctions and pending civil, criminal or disciplinary proceedings or investigations are therefore explicitly mentioned in the eligibility questionnaire.

Members of FIFA bodies shall furthermore always be aware of, and comply with, the provisions of the Code of Ethics. Some of these provisions, such as Article 14 on the duty of neutrality or Article 19 (regarding conflicts of interest) may have consequences at the moment of assessing eligibility itself, either by actually excluding eligibility or by imposing certain conditions in order for someone in a particular position to be eligible.

The definition of independence, and in particular the restrictions resulting from this requirement, is included in art. 5 of the FGR.

The text of these rules is, in some respects, open-ended and vague, requiring its clarification on a case-by-case development of criteria aimed at making their application as objective and certain as possible. Such criteria are required to provide FIFA bodies and football associations, as well as any potential candidates, with the necessary guidance and legal certainty but also for the sake of transparency with respect to football stakeholders and the public at large.

¹ Last updated: 8 March 2017.

It is in light of those two objectives that this note is prepared. **The note is not a general and abstract presentation of the criteria to be employed by the Review Committee in the interpretation and application of all rules relevant for deciding future cases. Instead, it summarises the more important criteria resulting fundamentally from the cases already decided by the Review Committee. It also takes into account the interpretation of certain provisions made by the Governance Committee (to which the Review Committee belongs) and whose interpretation guides the Review Committee in conducting the eligibility checks. The decisions on eligibility taken by the Review Committee are, with respect to the President and FIFA Council candidates part of the process of admissibility conducted by the Governance Committee. This is not a legal document but a short informative note that, as stated, the committee hopes may contribute to making known the criteria guiding the decisions taken by it and that may help the relevant bodies and potential candidates in future decisions on who to appoint or whether to run or apply for a particular position. Its publication also aims to promote increased transparency and accountability regarding the workings of FIFA and provide football stakeholders and the general public with an insight into the new eligibility mechanism and its practical implementation.**

The experience that the Review Committee has had with the first set of eligibility tests it has had to conduct has also informed a discussion being held by the Governance Committee on further improvements that may be made to the eligibility process both of a substantive and a procedural type.

2. Guidelines established by the Court of Arbitration for Sport

In developing its criteria for interpreting the relevant FIFA rules, the Review Committee has been mindful of the guidelines resulting from the decisions taken by the Court of Arbitration for Sport (CAS) on a small number of cases of relevance for conducting eligibility checks. The Review Committee is aware of the importance of complying with the guidelines resulting from such decisions, particularly in light of the individual's right of appeal.

In CAS 2015/A/4311 (*Musa Hassan Bility v. FIFA*), CAS held that an integrity check is rather an abstract test as to whether a person, based on the information available, is perceived to be a person of integrity for the function at stake and that a direct violation of the FIFA Code of Ethics is no prerequisite to a person not passing the integrity check (§57).

A member of high rank “must under any circumstance appear as completely honest and beyond any suspicion. In the absence of such clean and transparent appearance by top football officials, there would be serious doubts in the mind of the football stakeholders and of the public at large as to the rectitude and integrity of football organizations as a whole. This public distrust would rapidly extend to the general perception of the authenticity of the sporting results and would destroy the essence of the sport” (CAS 2011/A/2426, §129).

Nevertheless, “the allegations at the basis of the refusal must be of a certain severity and should not be based on mere speculation” (CAS 2015/A/4311, §63). However, the FIFA Ad-hoc Electoral Committee was, at the time, given a certain deference in its decision as to whether a person is a suitable candidate for the office and that such decision “shall only be overturned if the Panel is of the view that the FIFA Ad-hoc Electoral Committee could not reasonably have come to the conclusion reached” (§64).

In CAS 2015/A/4311, the decision not to admit Mr Bility had been based on a multitude of proceedings in which he was involved, some of which concerned his companies. In this respect, CAS stated that while he might not have been directly responsible for the conviction (for tax evasion) based on the principle of the corporate veil, it could nevertheless be considered because “such finding has consequences for the public perception in respect of the Appellant’s integrity and is therefore relevant for the outcome of the integrity check conducted by FIFA” (§76).

Regarding a suspension pronounced by the CAF Disciplinary Committee against Mr Bility, CAS not only considered it important that he had abandoned the appeal against the suspension but also that he had stated that he had “never at any given time been convicted or found guilty by any final court order and/or decision or football association”, a statement later found to be incorrect (§§78-82).

CAS, however, also considered it important to “emphasise that the outcome of the present arbitral proceedings shall not be interpreted as a ruling that the Panel perceives the Appellant as being corrupt, dishonest or not a person of integrity” (§90).

CAS confirmed these principles in CAS 2016/A/4579 (Gordon Derrick v. FIFA). In particular, CAS held that *prima facie* violations of some of the most serious provisions of the FIFA Code of Ethics and, in particular, the mismanagement of FIFA funds, as well as serious questions as to whether the Appellant is being very collaborative with FIFA in the ethics investigation, justified the decision of the FIFA Audit and Compliance Committee (which, at the time of the decision, was the competent body to decide on the admissibility of candidates for the office of FIFA vice-president and members of the Council), which had declared the Appellant not eligible (§85ff). Moreover, CAS held that due to the recent events of the past years with regard to football organisations and in particular FIFA, “it has become necessary to increase and enhance the checks and controls of the potential high officials that operate in these organisations” and that there was a special duty of care to be applied by the organisation (§87). Furthermore, CAS confirmed that the body responsible to conduct the eligibility checks was provided with a wide margin of appreciation in order to carry out the eligibility check and to determine whether a candidate is suitable (§88). Finally, CAS held that the legal nature of this proceeding is administrative and not disciplinary (§91).

3. General standards elaborated by the Review Committee

Based on these considerations by the Court of Arbitration of Sport and the applicable regulatory framework, the Review Committee has elaborated certain general standards regarding eligibility checks, while, however, acknowledging that cases need to be decided on a case-by-case basis, always bearing in mind the specificities of the case at hand.

For conducting the eligibility checks, the Review Committee relies on a report established by an independent international investigative services company specialising in integrity checks as well as on information provided by the candidate concerned, in particular the eligibility questionnaire (cf. Annexe 1 to the FGR), his/her CV and a copy of his/her passport.

In this regard, it must be noted that candidates are subject to a check of their integrity as well as of potential conflicts of interest.

With regard to both aspects, the committee considers it important to be able to ask for additional information should it not deem the information available (in particular the report on

the background check and the eligibility questionnaire) sufficient. Additional information can be requested either from the candidate him-/herself or a third party. It should be noted that the candidates, in light of the regulations, commit themselves to provide such information or authorise access to the additional information that the committee may consider necessary to obtain from a third party. This said, it is also important to recall that the Review Committee has no investigatory powers and makes a decision on the basis of the information available to it at the moment of that decision.

a. Eligibility/integrity

(1) Past proceedings

Regarding past criminal convictions and disciplinary sanctions pronounced against a candidate, the committee has always considered both the basis and the nature of the convictions and the sanctions applied. Accordingly, the committee took into account the type of crime (for example, the assessment would have to be different if the crime was of a financial nature or was, instead, related to matters that could fall under the freedom of expression), whether the underlying behaviour was a substantive issue or whether it concerned a minor infraction or procedural misbehaviour. The severity of the sanctions applied was also taken into account in ascertaining the character and nature of the past criminal and/or disciplinary convictions. If, on the other hand, national law would expunge a particular conviction from a criminal record after a certain period of time, as if it had never existed, the Committee has considered it had to take into account that consequence resulting from national law.

Criminal convictions or disciplinary sanctions regarding offences of a financial nature were, in particular, considered to be issues that were not compatible with a function within a FIFA committee and have therefore led to candidates not being eligible.

(2) Ongoing proceedings

With regard to ongoing proceedings, the committee recognises that these require a delicate balance between opposing risks and interests.

On the one hand, a candidate should benefit from the presumption of innocence and due account should be taken of the fact that his or her rights may be affected if he or she were not admitted and the case dismissed at a later stage. In addition, it cannot be excluded that, in particular during electoral periods, allegations and complaints may be brought against candidates purely for the purpose of excluding them from the elections.

On the other hand, eligibility and integrity checks, as made clear in the CAS decisions, are not a judicial assessment of the individual in question and cannot be dependent on the existence of a past criminal or disciplinary conviction. If it was so, the introduction in FIFA rules of an eligibility check would be largely redundant and deprived of useful effect. The control must therefore be broader and guided, as well, by the underlying objective of both preserving the public credibility of FIFA and protecting the integrity of football. This could be affected if the respective candidate is admitted and convicted at a later stage.

In balancing these opposing interests, the committee has held that while a candidate has not been officially charged, due consideration should be given to the presumption of innocence except if the committee is presented with compelling information for which the candidate

does not offer a plausible explanation. The committee has no investigatory powers and has neither the means nor the legal basis to replace the competent bodies at national and international level (including judicial and other bodies of sports organisations) in assessing allegations brought against the candidates. It has, however, when confronted with certain allegations and information that it does not have the powers to investigate, forwarded the relevant information to the competent bodies.

However, once a candidate has been officially charged and/or provisional judicial measures have been taken, the committee has decided that it may be sufficient to exclude eligibility even if no final decision has been taken. This is due to the need to preserve the credibility and authority of FIFA and does not imply a judgment on the candidate or on the substance of the case involving him or her before the judicial or disciplinary bodies. The decision on eligibility is decided, in such circumstances, on a case-by-case basis, taking into account the nature of the charges officially brought against a candidate using similar criteria to those employed regarding past convictions.

(3) Procedural cooperation

The candidate's compliance with the requirements included in the eligibility questionnaire, in particular the commitments he or she undertakes in this questionnaire as well as the truthful and accurate provision of information, is an absolute requirement for eligibility. Furthermore, his or her transparency and willingness to cooperate further with the Review Committee are also determinant in the final assessment. This includes, where relevant, the requirement that candidates not only reply to requests for information of the Review Committee in a general manner, but also provide proof as to their statements.

b. Political neutrality and prevention of any form of government interference

FIFA's general principles of political neutrality and the prevention of any form of government interference and, in particular, the obligation imposed by art. 14 of the FIFA Code of Ethics on FIFA officials to remain politically neutral with respect to governments, create a structural and inherent incompatibility with being a member of government.

Article 14 of the Code of Ethics requires FIFA officials to "remain politically neutral... in dealings with government institutions". The view of the Committee (following an interpretation of the Governance Committee to which it belongs) is that the position of member of government is structurally in conflict with the duty of neutrality with respect to government institutions since, by definition, a government member cannot be neutral with respect to the government of which he or she is a member. The Committee considered the possibility that a FIFA official who also served as a Government Minister would recuse himself or herself from any decision affecting his or her country. However, this possibility would not provide a viable solution since the political interests of a government are not restricted to matters directly involving their country but also on many matters involving other States. Having a Government Minister that is at the same time a FIFA official (at least in non purely advisory bodies) can, additionally both directly affect the relations between FIFA and such government and indirectly entangle FIFA in unrelated controversies associated with this or that government.

c. Conflicts of interest

With respect to potential conflicts of interest, the standard to be applied differs depending on the position for which the respective person is proposed. For example, depending on whether the person is a candidate for a full-time and/or executive position or for a part-time and/or non-executive position, the standard to be applied and the expectation to be had must be different. The independent nature of the position is another relevant factor requiring the candidates to comply with additional conditions.

In certain cases, a potential conflict of interest may be sufficient for someone not to be eligible; an actual conflict of interest does not have to exist at the time of consideration. In other instances, the remedy may be of a different nature.

The committee has, in particular, been faced with cases of potential conflicts of interest involving candidates for non-executive positions (standing committees in particular). The committee recognised that, in these circumstances, it would be impossible to expect candidates coming from football not to have professional occupations and/or economic interests linked to football. These might create, however, potential, albeit not actual, conflicts of interest. In the absence, at the current stage, of a public register of interests at FIFA, the committee has required candidates to disclose their interests to the chairperson of the committee concerned as well as both chairmen of the Ethics Committee and to formally confirm that he or she will recuse themselves from any decisions concerning any cases in which he/she may have any potential, direct or indirect, conflict of interest, notably in light of the geographical market in question.

On other occasions, depending on the function that the respective candidate would assume as well as on the nature of the (potential) conflict of interest, the committee has admitted candidates subject to their resignation from specific functions or subject to them suspending their respective functions.

d) Independence

As mentioned, the definition of independence, and in particular the restrictions resulting from this requirement, is included in art. 5 of the FGR. These restrictions include the prohibition of other official functions in FIFA, in a confederation or in a member association as well as the prohibition of material business relationships with FIFA, a confederation or a member association for candidates themselves as well as for their immediate family members, including during the four years preceding the initial term. In this regard, it may be noted that independence criteria for members of standing committees who must be independent and for chairpersons and deputy chairpersons of the Audit and Compliance Committee and the judicial bodies differ from the independence criteria for other members of the Audit and Compliance Committee and the judicial bodies. Several cases have been decided by the Review Committee on the basis of this provision, both with regard to official functions in FIFA, in a confederation or in a member association and with regard to material business relationships with FIFA, a confederation or a member association.

e) Withdraw of candidates

Until the Committee communicates to the relevant body the final result of the eligibility check, a candidate is allowed to withdraw his candidacy. If that is the case, the Committee will not communicate, nor make public, the result of the eligibility check. The Committee takes into

account that the eligibility check is not a judicial or disciplinary judgment and, as such, it is not necessary, nor fair to the candidate, to communicate the result if he or she have in the meanwhile withdraw their candidacy. On the contrary, whenever possible the Committee has tried to facilitate this process to the candidates.