

## Decision of 7 July 2016

Liverpool FC - Mamadou Sakho

(doping)

### **Circumstances of the case**

On 17 March 2016, the Liverpool FC player Mr. Mamadou Sakho (the "Player") underwent a doping control test after the UEFA Europa League match between Manchester United FC and Liverpool FC. The analysis of the Player's A sample (the "Sample") revealed the presence of a substance called Higenamine, this analysis was carried out at the World Anti-Doping Agency ("WADA") accredited laboratory in Cologne (the "Cologne Laboratory"). On 22 April 2016, UEFA notified the Player of this finding, noting that in conformity with the WADA Prohibited List of 1 January 2016, the above substance is prohibited at all times, in-and out-of-competition under the category S3. Beta-2 agonists, and its presence in the sample may result in a possible anti-doping rule violation. On 28 April 2016, disciplinary proceedings were initiated by UEFA against the Player in respect of his alleged breach of the UEFA Anti-Doping Regulations (the "ADR"). Following a request from the Player, on 28 April 2016, the Chairman of the CEDB decided to provisionally suspend the Player from participating in all matches for which he would otherwise be eligible for a period of 30 days, this provisional suspension was not subsequently extended by the Chairman of the CEDB.

**Legal framework** Article 2 (1) (a) and 4 (1) of the UEFA Anti-Doping Regulations.

### **Decision**

WADA has not formally communicated any determination to its accredited laboratories and that some (if not all) WADA accredited laboratories are uncertain of Higenamine's status on the prohibited list. In light of the foregoing, the CEDB decided to dismiss the case against the Player.

Acting Chairman: Hansen Jim Stjerne (DEN)

Members: Partl Thomas (AUT)  
Antenen Jacques (SUI)  
Bonett Chris (MLT)  
Gea Tomás (AND)  
Larumbe Beain Kepa (ESP)  
Lorenz Hans (GER)  
Řepka Rudolf (CZE)

## I. Facts Of The Case

1. The elements set out below are a summary of the main relevant facts, as established by the Control, Ethics and Disciplinary Body (the "**CEDB**") on the basis of the official reports, the written submissions, the exhibits filed and the statements produced in the course of the CEDB proceedings.
2. Whilst the CEDB has considered all of the facts, allegations, legal arguments and evidence submitted in these proceedings, it refers in the present decision only to the submissions and evidence it considers necessary to explain its reasoning.
3. The most relevant facts of this case can be summarised as follows:
  - on 17 March 2016, the Liverpool FC player Mr. Mamadou Sakho (the "**Player**") underwent a doping control test after the UEFA Europa League match between Manchester United FC and Liverpool FC;
  - the analysis of the Player's A sample (the "**Sample**") revealed the presence of a substance called Higenamine;
  - this analysis was carried out at the World Anti-Doping Agency ("**WADA**") accredited laboratory in Cologne (the "**Cologne Laboratory**");
  - on 22 April 2016, UEFA notified the Player of this finding, noting that (emphasis added):

*"In conformity with the WADA Prohibited List of 1 January 2016, the above substance is prohibited at all times, in-and out-of-competition under the category S3. Beta-2 agonists, and its presence in your sample may result in a possible anti-doping rule violation."*
  - on 28 April 2016, disciplinary proceedings were initiated by UEFA against the Player in respect of his alleged breach of the UEFA Anti-Doping Regulations (the "**ADR**");
  - following a request from the Player, on 28 April 2016, the Chairman of the CEDB decided to provisionally suspend the Player from participating in all matches for which he would otherwise be eligible for a period of 30 days;
  - this provisional suspension was not subsequently extended by the Chairman of the CEDB;
  - on 27 May 2016, the Chairman of the CEDB appointed a UEFA Ethics and Disciplinary Inspector (the "**EDI**") to investigate the nature of the substance Higenamine and its categorisation as a prohibited substance on WADA's prohibited list;

- in this regard, the EDI contacted Mr. Adam Klevinas at WADA, Dr. Hans Geyer at the Cologne Laboratory and Dr. Martial Saugy at the WADA accredited laboratory in Lausanne (the "**Lausanne Laboratory**");
- on 31 May 2016, the EDI submitted his report (which included response letters from the representatives of WADA, the Cologne Laboratory and the Lausanne Laboratory) and this was sent to the Player;
- on 7 July 2016, the CEDB met in Paris to consider the case;
- the hearing was attended by representatives of the Player; and
- Dr. Hans Geyer (on behalf of the Cologne Laboratory) and Dr. Martial Saugy (on behalf of the Lausanne Laboratory) were also present at the hearing for cross-examination.

## **II. The Respondent's position**

4. The Player submitted his statements on 23 May 2016, 15 June 2016 and 22 June 2016.
5. The most relevant elements of these statements can be summarised as follows:
  - the Player accepts that Higenamine was present in the Sample;
  - however, the Player does not accept that he committed a violation of the ADR;
  - the Player argues that Higenamine is not listed on WADA's prohibited list;
  - the Player argues that Higenamine is not a Beta-2 Agonist under Category S3 on WADA's prohibited list; and
  - the Player provides various scientific reports to support this claim (including specially commissioned expert reports prepared by Professor Brian Kobilka and Professor Richard Bloomer).
6. The more detailed arguments made by the Player are set out below in so far as they are relevant.

## **III. Merits of the Case**

### **A. UEFA's competence**

7. Pursuant to Article 23 DR, the CEDB is competent to deal with this case.
8. In light of the above, UEFA's statutes, rules and regulations are applicable to these proceedings (in particular the UEFA Disciplinary Regulations (the "**DR**") and the ADR).

B. The alleged anti-doping offence

a) *Applicable legal framework and general remarks*

9. Article 13 DR provides that doping offences are to be punished in accordance with the ADR and the DR.

10. Article 2.01(a) ADR provides as follows (emphasis added):

*"2.01 The following constitute anti-doping rule violations:*

a) *Presence of a prohibited substance or its metabolites or markers in a player's sample*

(i) *It is each player's personal duty to ensure that no prohibited substance enters his body. Players are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the player's part be demonstrated in order to establish an anti-doping rule violation."*

11. Article 4.01 ADR states that (emphasis added):

*"Prohibited substances and prohibited methods comprise everything on the Prohibited List published by WADA from time to time. Unless provided otherwise in the Prohibited List or a revision, the Prohibited List and revisions go into effect under these regulations three months after publication by WADA, without requiring further action by UEFA. All players and other persons are bound by the Prohibited List and any revisions from the date they go into effect, without further formality. It is the responsibility of all players and other persons to familiarise themselves with the most up-to-date version of the Prohibited List and all revisions. The Prohibited List in force is available on WADA's website at [www.wada-ama.org](http://www.wada-ama.org). In addition, UEFA notifies national associations and clubs participating in UEFA competitions of any revisions to the Prohibited List in due time."*

b) *The responsibility of the Player*

12. The CEDB notes that the fact that Higenamine was correctly found to be in the Sample by the Cologne Laboratory is not contested.

13. There has, however, been considerable debate throughout the proceedings regarding the nature of Higenamine and its categorisation as a prohibited substance under Category S3 (Beta-2 Agonists) on WADA's prohibited list.

14. Having examined the various submissions and evidence (including the report of the EDI), the CEDB considers that there are several important questions to ask in this analysis:
  - Is Higenamine on WADA's prohibited list?
  - Is Higenamine a Beta-2 Agonist?
  - What has WADA communicated to its accredited laboratories about Higenamine?
  - Are the WADA accredited laboratories consistently testing for Higenamine?

15. The CEDB has addressed each of these issues in its deliberations as follows.

*Is Higenamine on WADA's prohibited list?*

16. To answer the first question, the CEDB logically began with a consideration of the language of the prohibited list itself.
17. In this regard, it is important to note that Higenamine is not expressly mentioned by name on WADA's prohibited list.
18. Indeed, the S3 category is only defined in very general terms and no specific substances at all are expressly mentioned as being included (emphasis added):

*"All beta-2 agonists, including all optical isomers, e.g. d- and l- where relevant, are prohibited."*

19. This situation raises immediate concerns for the CEDB, since it is clearly not possible for anyone - laboratory, disciplinary body, football player or otherwise - to know whether or not Higenamine is a prohibited substance just by reading WADA's prohibited list.
20. It is of course acknowledged that it is potentially difficult for WADA to list all of the relevant substances under a particular heading in its prohibited list, however, having regard to the other sections of the list, the S3 section is particularly light on detail.
21. On this basis, the CEDB considers that it is not enough for WADA to simply state in its prohibited list that all substances that might possibly fit a very general description (e.g. all Beta-2 Agonists) are prohibited. This is not specific enough.
22. Based on the foregoing, it is not possible for the CEDB to conclude (solely based on the language of WADA's prohibited list) that Higenamine is a prohibited substance and this clearly has a bearing on the present case.

*Is Higenamine a Beta-2 Agonist?*

23. There is, however, also an underlying scientific question about whether Higenamine does fit into the category of Beta-2 Agonists under section S3 and this is where the second of the questions outlined above must be considered.
24. To answer this, the CEDB has been provided with a significant volume of scientific research and expert analysis during the course of these proceedings, as well as statements from WADA, the Cologne Laboratory and the Lausanne Laboratory – all of which have been very helpful.
25. Having analysed such materials in detail, the CEDB concludes that it is not clear that Higenamine has been proven to be a Beta-2 Agonist.
26. The CEDB notes that the studies that have been generally carried out in the scientific community cast significant doubt on the classification of Higenamine as a Beta-2 Agonist.
27. In addition, the expert reports commissioned by the Player - which the CEDB notes come from very reputable sources in Professor Brian Kobilka and Professor Richard Bloomer – cast serious doubts on this categorisation.
28. Under this weight of evidence, and without receiving anything to the contrary from WADA, it is impossible for the CEDB to accept that Higenamine is scientifically proven to be a B2-Agonist.
29. This is in no way a determination of the CEDB based on its own scientific expertise. Rather this is the only conclusion that can be reasonably drawn by the CEDB based on the significant scientific information provided to it.
30. Further, it appears from documents in the case file that WADA has not completed its own internal scientific/procedural analysis of Higenamine and is not certain of its status as a Beta-2 Agonist.
31. The CEDB understands that WADA has an internal process of analysis and review in order to ensure that any substance is thoroughly investigated prior to it being added to the prohibited list. The first part of this process involves WADA gathering complete documentation on the pharmacological effects of the relevant substance and making a proposal to include the relevant substance under the relevant category of prohibited substances. Next, the proposal (along with the relevant arguments and scientific evidence) is circulated to WADA's stakeholders (including its accredited laboratories) in order to get feedback on the possible addition of the relevant substance to the prohibited list. Finally, if the proposal is accepted, the next step is for WADA to inform all of the accredited laboratories to implement the relevant substance in their screening processes.

32. Looking at the facts of the present case, this WADA procedure does not appear to have been completed yet for Higenamine.
33. This has also been confirmed by Dr. Saugy of the Lausanne Laboratory who, as well as expressing his own doubts about the categorisation of Higenamine as a Beta-2 Agonist, also questioned the steps that WADA has taken to reach its conclusion. Dr. Saugy is an extremely well-regarded and experienced professional – in this regard, his full and frank opinion of the status of Higenamine is persuasive.
34. In the opinion of the CEDB, there must be legal certainty as to the substances on WADA's prohibited list. Any uncertainty must be interpreted in favour of the accused and, based on the foregoing discussion of Higenamine, there is clearly considerable uncertainty in this case about the categorisation of Higenamine as a Beta-2 Agonist on WADA's prohibited list.
35. This uncertainty was also confirmed in a very convincing way by the statements of Dr. Hans Geyer of the Cologne Laboratory who explained that, after the Sample tested positive for Higenamine, he needed to check with WADA if Higenamine was actually a prohibited substance before making his determination. Dr. Geyer clearly did not know - based on the information available – whether or not Higenamine was a Beta-2 Agonist. He is an experienced professional who makes a valuable contribution in the fight against doping, it is therefore telling that he felt the need to check the position of Higenamine.

*What has WADA communicated to its accredited laboratories about Higenamine?*

36. By considering the third of the questions set out above, the CEDB was alerted to another issue in the present case – a lack of effective communication.
37. The CEDB notes that, even if Higenamine is a Beta-2 Agonist and is adequately covered by the general wording of Category S3, this fact was not properly communicated by WADA to its accredited laboratories.
38. The fact that the Cologne Laboratory tested for Higenamine but had to check with WADA before making a determination indicates a problem, as does the fact that the Lausanne Laboratory does not test for Higenamine at all.
39. In this regard, Dr. Saugy explained that he has not received any formal instruction from WADA to test for Higenamine and explained that the Lausanne Laboratory would not start testing for Higenamine until such communication is received.
40. The onus is clearly on WADA to communicate to its laboratories what is and what is not on the prohibited list. There are clearly gaps in communication with regard to Higenamine, something which also tends to support the suggestion that WADA's own internal procedure and analysis in respect of this substance is incomplete (as discussed above). Had WADA finished its own internal process, it would surely have formally

communicated this to all of its accredited laboratories (rather than simply making a one-off determination on request to the Cologne Laboratory).

Are the WADA accredited laboratories consistently testing for Higenamine?

41. Looking now at the last of the questions outlined above, the CEDB notes that the inconsistency of testing amongst WADA accredited laboratories is concerning - since this raises questions of legal certainty.
42. Frankly, the CEDB struggles to understand the value of a code which lacks universal enforcement. A code, for example, where different laboratories are looking for different things.
43. In the present case, the CEDB was presented with a situation where the Player tested positive for Higenamine because the Sample was sent to Cologne, but would not have tested positive if the Sample had been sent to Lausanne.
44. From a purely legal point of view, this is not robust.

Conclusions

45. As a final point, the CEDB feels compelled to make some mention of the rights of athletes and how they are affected by the uncertainty discussed above. Fundamentally, it is unreasonable to expect an athlete to have a greater understanding of a substance than a WADA accredited laboratory and its scientists.
46. Accordingly, in the present case, the CEDB must be mindful of what it could reasonably expect the Player (and his club and personal trainer) to have been able to learn about Higenamine from publicly available sources, given the fact that it does not appear by name in WADA's prohibited list, that WADA does not appear to have made a firm determination itself, that WADA has not formally communicated any determination to its accredited laboratories and that some (if not all) WADA accredited laboratories are uncertain of Higenamine's status on the prohibited list.
47. The identity of prohibited substances should not be a secret. The CEDB considers that athletes have a legitimate expectation that they will be able to determine what is on the prohibited list, otherwise they will constantly be 'in the dark'.
48. To conclude, the CEDB determines that:
  - it has not been proven that Higenamine is on WADA's prohibited list;
  - indeed, significant doubts exist as to whether Higenamine is even a B2-Agonist;
  - there has been a clear lack of communication from WADA, something which left even its own accredited laboratories unsure about the status of Higenamine; and



- the fact that the majority of WADA accredited laboratories do not test for Higenamine is inconsistent with the principle of legal certainty.
49. On this basis, the CEDB concludes that the Player has not committed a violation of the ADR.

**IV. The determination of the appropriate disciplinary measure**

50. In light of the foregoing, the CEDB decides to dismiss the case against the Player.