

CAS 2013/A/3139 Fenerbahçe SK v. UEFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Manfred **Nan**, attorney-at-law, Arnhem, the Netherlands
Arbitrators: Mr Rui Botica **Santos**, attorney-at-law, Lisbon, Portugal
Prof. Luigi **Fumagalli**, Professor and attorney-at-law, Milan, Italy

in the arbitration between

FENERBAHÇE SPOR KULÜBÜ, Istanbul, Turkey

Represented by Mr Aziz **Yildirim**, President, Mr Ömer **Temelli**, Board Member, and Mr Tahir **Perek**, Board Member, Fenerbahçe Spor Kulübü, Istanbul, Turkey

as Appellant

and

UNION OF EUROPEAN FOOTBALL ASSOCIATIONS (UEFA), Nyon, Switzerland

Represented by Dr Emilio **Garcia**, Head of Disciplinary and Integrity, and Mr Carlos **Schneider**, Disciplinary Lawyer, UEFA, Nyon, Switzerland

as Respondent

I. PARTIES

1. Fenerbahçe Spor Kulübü (hereinafter: the “Appellant” or the “Club”) is a professional football club with its registered headquarters in Istanbul, Turkey. The Club is registered with the Turkish Football Federation (*Türkiye Futbol Federasyonu* – hereinafter: the “TFF”), which in turn is affiliated to the Union of European Football Associations (UEFA) and the Fédération Internationale de Football Association (FIFA).
2. The Union of European Football Associations (hereinafter: the “Respondent” or “UEFA”) is an association under Swiss law and has its registered office in Nyon, Switzerland. UEFA is the governing body of football at European level. It exercises regulatory, supervisory and disciplinary functions over national federations, clubs, officials and players in Europe.

II. FACTUAL BACKGROUND

A. Background Facts

3. On 18 October 2012, the UEFA Control & Disciplinary Body decided that the Club had to play its next UEFA club competition match behind closed doors because around 20 Bengal lights and flares were ignited by the supporters of the Club during a Champions League match between the Club and FC Spartak Moskva on 29 August 2012 and an unspecified number of objects were thrown by home supporters, two of which injured one of the referee’s assistants and one player of the opposing team. This sanction was deferred for a probationary period of three years. The Club was also fined with EUR 85,000. Because the Club did not submit an appeal, this decision became final and binding.
4. On 24 January 2013, the UEFA Control & Disciplinary Body decided to revoke the suspended sanction against the Club to play a match behind closed doors because supporters of the Club ignited at least 37 fireworks, blocked passageways and gateways and stewards did not conduct proper searches of spectators during an UEFA club competition match between the Club and VfL Borussia Mönchengladbach on 6 December 2012. Thus, the UEFA Control & Disciplinary Body ordered the Club to play its next UEFA Europa League match as host club behind closed doors. In addition, the Club was fined with EUR 40,000.
5. On 14 February 2013, the UEFA Appeals Body upheld the decision of the UEFA Control & Disciplinary Body of 24 January 2013.
6. On 21 February 2013, during an UEFA Europa League match played behind closed doors between the Club and FC Bate Borisov, several fireworks were launched, allegedly by supporters of the Club, from outside the stadium. Several of these items landed inside the stadium, one of them causing a small fire, another landed near the Club’s substitutes’ bench and a third one landed on the field of play, causing the game to be interrupted for about one minute. In addition, five players of the Club received a yellow card during the game and another player wore a tracksuit with a Turkish brand on it.

7. On 27 February 2013, the UEFA Control & Disciplinary Body decided the following:
 - “1. *To order [the Club] to play its next UEFA competition match as host club behind closed doors. This applies to the following match:*
 - a. *[The Club] v. FC Viktoria Plzeň of 14.03.2013.*
 2. *The club is excluded from participating in the next UEFA club competition for which it would otherwise qualify. This sanction is deferred for a probationary period of two years.*
 3. *To fine [the Club] €60,000.*
 4. *The above fine must be paid into the bank account indicated below within 30 days of communication of this decision.”*
8. On 11 March 2013, the UEFA Appeals Body rendered its decision (hereinafter: the “Appealed Decision”) rejecting the appeal filed by the Club and upholding the UEFA Control & Disciplinary Body decision of 27 February 2013. The Appealed Decision contains the following operative part:
 - “1. *The appeal lodged by [the Club] is rejected and the Control and Disciplinary Body’s decision of 27 February 2013 is upheld.*
 2. *The costs of the proceedings, totalling €8,000, are charged to the appellant, less the appeal fee already paid. The Turkish Football Federation is jointly liable for any failure to pay these costs and fine.*
 3. *This decision is final, subject to Article 66 DR.*
 4. *It is communicated to:*
 - a. *[the Club];*
 - b. *the UEFA disciplinary inspector;*
 - c. *the UEFA Control and Disciplinary Body;*
 - d. *the Turkish Football Federation (TFF);*
 - e. *the UEFA administration.*
9. On 14 March 2013, the Club played its match against FC Victoria Plzen behind closed doors.
10. On 28 March 2013, the Appealed Decision was communicated to the parties. The grounds of the Appealed Decision contain, *inter alia*, the following relevant considerations:

“*In this case, the Appeals Body has no reason to question the official reports, which are not disputed. These reports establish that, in the 55th minute of the match, pyrotechnic devices were launched from outside the stadium, passed over the stadium roof and landed on the ground, causing the referee to stop the game for approximately one minute. A second device landed near the Fenerbahçe SK substitutes’ bench and a third flag, which it set on fire.*”

The appellant disputes the application of Article 6(1) DR. According to the appellant, the club cannot be held responsible for these offences, since the application of this provision would require the presence of supporters in the stadium and the incidents were committed by supporters outside the stadium.

This argument is unfounded. Indeed, Article 11(2) DR, which expresses the notion enshrined in Article 6(1) DR in more particular terms, states that:

“2. The same disciplinary measures [foreseen in Articles 14 DR] may be taken against member associations or clubs in case of inappropriate behaviour on the part of their supporters, including:

a) (...)

b) the throwing of objects;

c) the lighting of fireworks or any other objects;

d) (...)”

The aim of this provision is clearly to protect the stadium, the field of play and the safety of the people inside the stadium, who are obviously also endangered if the objects are thrown or fireworks lit come from outside the stadium.

The only question is whether or not the people who violated this provision outside the stadium are to be considered Fenerbahçe SK supporters, which the club denies.

(...)

On the basis of the video footage shown at its request and its comments, the appellant appears to suggest that that four or six individuals seen in the stands and at the stadium gates during a domestic championship match were responsible for the incidents that occurred during the above-mentioned match.

The appellant also claims that the group’s leader and members, who take part in such acts, are well known and always commit such acts in the same section of the stadium.

The appellant also points out that the people responsible for the incidents in the present case also caused trouble at the club’s Euroleague basketball match, when they tried to assault the club president.

The Appeals Body notes in this regard that Fenerbahçe SK allows known troublemakers to enter the stadium during its domestic championship matches. By doing so, the club confirms and legitimates them as its supporters.

The fact that these individuals, who clearly have an affiliation with Fenerbahçe SK, were near the stadium on the occasion of the match played behind closed doors suggests that they can be considered supporters of the club, even if, as the appellant suggests, they oppose its current president.

In view of the above, the Appeals Body finds that the aforementioned violations of Article 11(2) DR were committed by Fenerbahçe SK supporters.

(...)

The team's misconduct and the violation of the kit regulations require no further analysis, as these points are not disputed.

In view of the UEFA officials' reports and the above-mentioned regulatory provisions, the Control and Disciplinary Body was therefore right to hold Fenerbahçe SK responsible for its players' and spectators' behaviour under the strict liability principle established in Article 6(1) DR, in conjunction with Article 11(1)(b) and 11(2)(b) and (c) DR.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 4 April 2013, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: the "CAS"). By means of this statement of appeal, the Appellant applied for a stay of execution of the Appealed Decision until there would be a final and legally binding decision concerning the Appellant's appeal in the present matter.
12. On 9 April 2013, the Appellant nominated Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal, as arbitrator.
13. On 15 April 2013, the Respondent nominated Prof. Luigi Fumagalli, Professor and attorney-at-law in Milan, Italy, as arbitrator.
14. On 17 April 2013, the Appellant filed its Appeal Brief. This document contained a statement of the facts and legal arguments. The Appellant challenged the Appealed Decision taken by the UEFA Appeals Committee on 11 March 2013, submitting the following requests for relief:

"1. To fully accept the present Appeal.

2. As consequence, to set aside the appealed Decisions, i.e. the decision passed by the UEFA Appeals Body in its session held on 11 March 2013 regarding [the Club's] appeal against the decision of the UEFA Control and Disciplinary Body of 27 February 2013 regarding the 2012/13 Europe [sic] League match between [the Club] and FC BATE Borisov on 21 February 2013 as well as the decision of the UEFA Control & Disciplinary Body of 27 February 2013 related to the present matter.

3. To establish that the sanction under finding 1 of the UEFA Control & Disciplinary Body of 27 February 2013 related to the present matter was not justified whereas the Appellant expressly reserves its right to claim in separate proceeding damages resulting from the fact that the match in the Competition against FC Viktoria Plzeň was played on 14 March 2013 behind closed doors.

4. *To establish that the Appellant is NOT excluded from participating in the next UEFA club competition for which it would otherwise qualify.*
 5. *To confirm that the Appellant shall not pay a fine equal to EURO 60,000.00/-.*
 6. *As consequence of the above to state that the Appellant shall not pay any costs at all related to the proceedings in front of the UEFA Judicial Bodies leading to the Decisions under appeal in the present proceedings and all advance payments paid shall be returned from UEFA to the Appellant as far as already paid.*
 7. *For the effect of the above, to state that the Respondent shall be condemned to pay any and all costs of the present arbitral [sic] proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts.
In this respect, the Appellant reserves the right to provide the Panel with all relevant documentation attesting the incurred amounts.”*
15. On 25 April 2013, UEFA filed its answer to the Club's request for a stay of execution of the Appealed Decision, seeking its dismissal.
 16. On 3 May 2013, the Deputy President of the Appeals Arbitration Division of CAS rendered an Order on Request for a Stay with the following operative part:
 - “1. *The application for a stay filed by [the Club] on 4 April 2013, completed on 17 April 2013, in the matter CAS 2013/A/3139 Fenerbahçe SK v. UEFA is dismissed.*
 2. *The costs of the present order shall be determined in the final award or in any other final disposition of this arbitration.”*
 17. In support of his decision to deny the Appellant's application, the Deputy President of the Appeals Arbitration Division of CAS noted that no irreparable damage would have been suffered if the Challenged Decision were not stayed. The Deputy President of the Appeals Arbitration Division of CAS in fact considered that the sanction was deferred for a probationary period in the event of a potential future disciplinary incident for which the Appellant would be held liable. As a result, the sanction was purely hypothetical and could not create an irreparable harm.
 18. On 10 May 2013, UEFA filed its Answer, whereby it requested CAS to issue an award:
 - “• *Rejecting the reliefs sought by [the Club].*
 - *Confirming the decision under appeal.*
 - *Ordering [the Club] to pay of all the costs of this arbitration and a significant contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings.”*

19. On 22 May 2013, the Club expressed its preference for a hearing to be held. UEFA did not deem a hearing to be necessary.
20. Also on 22 May 2013, pursuant to Article R54 of the Code of Sports-related Arbitration (hereinafter: the “CAS Code”), and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:
 - Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands, as President;
 - Mr Rui Botica Santos, attorney-at-law in Lisbon, Portugal; and
 - Prof. Luigi Fumagalli, Professor and attorney-at-law in Milan, Italy, as arbitrators.
21. On 12 June 2013, the Panel decided that a hearing would be held on 20 September 2013.
22. On 9 July 2013, both parties returned duly signed copies of the Order of Procedure to the CAS Court Office.
23. On 5 September 2013, the Club withdrew its request for a hearing to be held and asked CAS “*to issue an award on the basis of the written submission only*”.
24. On 6 September 2013, the Panel decided to cancel the hearing scheduled for 20 September 2013 and reserved its right to convene the parties to a new hearing or to request further submissions from the parties if it would realise that additional information is needed.
25. On 20 September 2013, the CAS Court Office informed the parties that, in light of its discretion pursuant to Article R57 of the CAS Code, the Panel deemed itself to be sufficiently well informed and therefore had decided not to hold a hearing.

IV. SUBMISSIONS OF THE PARTIES

26. The following outline of the parties’ positions is illustrative only and does not necessarily encompass every contention put forward by the parties. However, the Panel has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summaries.
27. The submissions of the Club, in essence, may be summarized as follows:
 - The Club is of the opinion that the Appealed Decision is “*incomplete with regards to the factual background of the matter at stake, incorrect concerning the representation of the facts and, moreover, is to great extent wrong and incomplete in its juridical considerations as well as wrong in the application of law*”.
 - The Club maintains that the Appealed Decision, and in particular the strict liability principle – without taking into account the absence of default of a club – violates the European Convention on Human Rights (hereinafter: the

“ECHR”). The fundamental rights deriving from the ECHR cannot be waived by any individual and/or juridical person. Article 6 ECHR also applies to associations.

- Furthermore, the Club argues that the Appealed Decision is a resolution as provided in Article 75 of the Swiss Civil Code (hereinafter the “SCC”), which resolution is based on the principle of strict liability provided by Article 6(1) of the UEFA Disciplinary Regulations (hereinafter: the “UEFA DR”) and Article 11(2) UEFA DR, which principle violates Article 6 ECHR. In light of this the Appealed Decision must be considered invalid and void.
- Alternatively, the Club puts forward that the actions of the perpetrators concerned do not fall under the scope of the strict liability principle of Articles 6(1) and 11(2) of the UEFA DR. More specifically, the Club finds that the violations did not take place “at the match” or “around the stadium”. Pursuant to the general legal principle of *nulla poena sine lege* no disciplinary measures may be imposed on the Club for the actions of the perpetrators.
- Alternatively, the Club argues that the perpetrators are not supporters in the sense of Articles 6(1) and 11(2) of the UEFA DR. According to the Club, UEFA did not establish that the perpetrators are supporters of the Club, although UEFA carried the burden of proof in this respect.
- Alternatively, according to the Club the requirements as per Article 11(2)(b) and (c) of the UEFA DR are not met, more particularly, the Club argues that no objects were “thrown” and that the use of parachute fireworks does not fall under the scope of application of Article 11(2)(c) of the UEFA DR and the perpetrators did not conduct their actions in the match venue or around the stadium or in its vicinity. Accordingly, the requirements as per Article 11(2)(c) of the UEFA DR are not fulfilled.
- Finally, and alternatively, the Club submits that the sanction imposed on it in the Appealed Decision is “*absolutely disproportionate in accordance with general legal principles*”, which principles are applicable in the present matter pursuant to Article 17(1) of the UEFA DR. More specifically, the Club sums up several factors that in its opinion shall be taken into account as mitigating circumstances. Also, the meaning of the imposition of a probation period remains unclear to the Club. In particular, the Club maintains that it remains uncertain under which conditions the probation period may be lifted and what would be the relevant proceedings. The Club finds this legal uncertainty unacceptable.

28. The submissions of UEFA, in essence, may be summarised as follows:

- UEFA refers to jurisprudence of CAS to argue that the application of the strict liability principle has a clear justification. In particular, UEFA maintains that it does not have any direct disciplinary authority over a club’s supporters, but only over European football associations and clubs and that without this indirect sanction, UEFA would be deprived of any means to act against the improper conduct of supporters if a club could not be charged with any fault in

connection with such conduct. Moreover, UEFA emphasises that CAS jurisprudence shows that sporting associations have disciplinary powers over its members and that this power does not rest on public or penal law, but on civil law. This stance of CAS has been confirmed by the Swiss Federal Tribunal (hereinafter: the “SFT”). Consequently, UEFA finds that the Club has not provided sufficient proven legal support to challenge the principle of strict liability contemplated in Articles 6(1) and 11(2) of the UEFA DR. In respect of Article 75 of the SCC, UEFA is of the opinion that the time limit of this provision has widely expired and is thus not applicable.

- UEFA emphasises that the Club, neither in its statement of appeal nor in its appeal brief, submits any argument that disproves the accuracy of the official reports, although the burden of proof lies on the Club as far as the inaccuracy of the reports provided by UEFA officials is concerned. No evidence has been submitted that could lead to any other conclusion than to admit that the Club’s supporters did launch parachute flares from outside the stadium.
- UEFA argues that it has to be considered that, at least, the UEFA officials’ conclusions regarding the incidents are in line with those of an objective observer and that accordingly, the incidents related to the match were conducted by supporters of the Club.
- UEFA maintains that the Club confuses responsibility for misconduct by individuals who are subject to the principle of strict liability contemplated by Article 6(1) of the UEFA DR and picked up in Article 11(2) of the UEFA DR with security issues that could arise before, during and after the match, irrespective of whether these incidents derive from the improper conduct of individuals. UEFA deems it necessary to point out that *“the term “at a match” used in the UEFA Disciplinary Regulations implies any incident that takes place during a match, irrespective of where the misconduct originated, provided that the incident occurs in the course of the match or is linked to the match in question, the criteria in this respect applying to before, during and after the match”*.
- UEFA finds that the Club is *“completely wrong in its approach to the term “supporter”*. UEFA submits that in the past CAS has accepted the approach of UEFA in its regulations to the notion of supporters, which leaves an open definition and provides UEFA with a more comprehensive and reasonable scope of action on disciplinary matters. The use of the term *“supporter”* must remain open in order to be able to act against conduct by individuals that could harm the aims and values of UEFA. In addition, UEFA finds that several particular circumstances of this specific case must be taken into account and should lead to the conclusion that the perpetrators were, in fact, supporters of the Club. Finally, UEFA highlights that the Club, during the UEFA disciplinary proceedings, accepted that the perpetrators were supporters of the Club, whereas in the proceedings before the CAS it maintains that the perpetrators have no link with the Club.

- With respect to the proportionality of the sanction, UEFA refers to jurisprudence of CAS and in particular to CAS 2012/A/2762, according to which, allegedly, “[t]he measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”. CAS thus has a very limited and restricted competence in this respect. UEFA finds that some mitigating circumstances submitted by the Club are in fact aggravating circumstances and provides several factors that, in the opinion of UEFA, must lead the Panel to conclude that the Club failed to prove that the sanction imposed in the Appealed Decision is evidently and grossly disproportionate.

V. ADMISSIBILITY

29. The appeal was filed within the deadline of ten days set by Article 62(3) of the UEFA Statutes (2010 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.
30. It follows that the appeal is admissible.

VI. JURISDICTION

31. The jurisdiction of CAS, which is not disputed, derives from Articles 62 and 63 of the UEFA Statutes and Article R47 of the CAS Code. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.
32. It follows that CAS has jurisdiction to decide on the present dispute.

VII. APPLICABLE LAW

33. Article 4 of the UEFA DR provides as follows:

“In the absence of specific provisions in these and other regulations, the competent disciplinary body shall take a decision on the basis of recognised legal principles and in accordance with justice and fairness. The disciplinary body shall base its decision on customary UEFA rules or, where this is not possible, on the rules it would establish were it to legislate.”

34. Article 63(3) of the UEFA Statutes stipulates the following:

“Moreover, proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS.”

35. Article R58 of the CAS Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or

sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

36. The Panel observes that the parties agreed to the primary application of the various regulations of UEFA and subsidiary to the application of Swiss law. The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various regulations of UEFA.

VIII. MERITS

A. The Main Issues

37. In view of the above, the main issues to be resolved by the Panel are:
- a) Were the facts as established in the Appealed Decision incomplete and incorrect?
 - b) Is the Appealed Decision based on a wrong application of Articles 6 and 11 UEFA DR?
 - c) Are the perpetrators supporters in terms of Articles 6 and 11 of the UEFA DR?
 - d) Is the strict liability principle as laid down in Articles 6 and 11 of the UEFA DR compatible with Article 6 of the ECHR?
 - e) Is the Appealed Decision void in light of Article 75 of the Swiss Civil Code?
 - f) Are the sanctions imposed in the Appealed Decision proportionate?

a) **Were the facts as established in the Appealed Decision incomplete and incorrect?**

38. The Club is of the opinion that the Appealed Decision is *“incomplete with regards to the factual background of the matter at stake, incorrect concerning the representation of the facts and, moreover, is to great extent wrong and incomplete in its juridical considerations as well as wrong in the application of law”*.
39. In light of its *de novo* competence pursuant to Article R57 of the CAS Code, which grants the Panel the power to review both the facts and the law, and CAS jurisprudence, any possible prejudice suffered by the Club before the UEFA Control & Disciplinary Body and the UEFA Appeals Body can be cured by virtue of this appeal, in which the Club has been able to present its case afresh (CAS 2008/A/1574, CAS 2009/A/1840 & CAS 2009/A/1851, CAS 2008/A/1545, CAS 2012/A/2702). Therefore, the Panel does not find it necessary to examine whether the alleged mistakes and errors in the interpretation of the events and/or the law in the Appealed Decision have indeed been established.
40. In relation to the above, the Panel refers to the fact that under these appeal proceedings the Club had the opportunity to present its case in the way to address and cure all the above mentioned irregularities as raised. The Panel confirms that it took into account all the facts, circumstances and submissions presented in the present appeal proceedings.

b) Is the Appealed Decision based on a wrong application of Articles 6 and 11 of the UEFA DR?

41. The Club puts forward that the actions of the perpetrators concerned were not closely linked to the match concerned and do not fall under the scope of the strict liability principle of Articles 6(1) and 11(2) UEFA DR.
42. More specifically, the Club finds that the violations did not took place “at the match” as provided for in Article 6(1) UEFA DR or “around the stadium” as provided for in Article 6(2) UEFA DR. Pursuant to the general legal principle of *nulla poena sine lege* no disciplinary measures may be imposed on the Club for the unforeseeable actions of the perpetrators as the Club bears no default, also because the dense settlement structure around the match venue makes it impossible to control the area and to prevent actions of this kind.
43. In the same way, according to the Club, the requirements as per Article 11(2)(b) and (c) of the UEFA DR are not met; more particularly, the Club argues that no objects were “thrown” and that the use of parachute fireworks does not fall under the scope of application of Article 11(2)(c) of the UEFA DR and that the perpetrators did not conduct their actions in the match venue or around the stadium or in its vicinity. Accordingly, the requirements as per Article 11(2)(c) of the UEFA DR are not fulfilled.
44. Conversely, UEFA maintains that the Club confuses responsibility for misconduct by individuals who are subject to the principle of strict liability contemplated by Article 6(1) of the UEFA DR and picked up in Article 11(2) of the UEFA DR with security issues that could arise before, during and after the match, irrespective of whether these incidents derive from the improper conduct of individuals. UEFA deems it necessary to point out that the term “at a match” used in the UEFA DR implies that any incident that takes place during a match, irrespective of where the misconduct originated, provided that the incident occurs in the course of the match or is linked to the match in question, the criteria in this respect applying to before, during and after the match.
45. The Panel notes that it is not disputed that on 21 February 2013, during an UEFA Europa League match played behind closed doors between the Club and FC Bate Borisov, several fireworks were launched from outside the stadium, and that some of these items landed inside the stadium, one of them causing a small fire, another landed near the Club’s substitutes’ bench and a third one landed on the field of play, causing the game to be interrupted. The file contains the match reports of two UEFA officials, Venue Director Mr Alexander Clerc and UEFA Delegate Mr Roland Ospelt, which read, respectively, as follows:
 - *“On 55 min fans from outside the stadium lit some fireworks over the roof of the stadium, from those fireworks three Bengal fires on parachutes landed in the stadium. One on the stand on a flag, which caused a small fire, one landed in the middle of the pitch and one behind the substitute bench of Fenerbahce. The referee stopped the game for about 1 min. Nobody was injured.”*
 - *“1.5 Match Operations/Home fans; Pyrotechnics/lasers within the stadium; Description: Fenerbahce fans outside the stadium launched a few fireworks*

with parachutes that came in the stadium. Fenerbahçe reacted very immediately by sending a tweet to their fans saying: don't use fireworks – you are harming us. We only want to hear your voices (...)."

46. In continuation, the Panel turns its attention to Article 6 of the UEFA DR and Article 11(2) of the UEFA DR. Article 6 of the UEFA DR (edition 2012) provides as follows:

"1. 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 on behalf of the member association or club.

2. The host associations or clubs are responsible for order and security both inside and around the stadium before, during and after the match. They are liable for incidents of any kind, and may be rendered subject to disciplinary measures and directives."

47. Article 11(2) of the UEFA DR provides as follows (as relevant):

"The same disciplinary measures may be taken against member associations or clubs in case of inappropriate behaviour on the part of their supporters, including:

b) the throwing of objects;

c) the lighting of fireworks or any other objects;

f) acts of damage;

g) any other lack of order or discipline observed inside or around the stadium."

48. Article 17(1) of the UEFA DR reads as follows (as relevant):

"(...) Subject to Article 6(1) of the present regulations, no disciplinary measures may be imposed in cases where the party charged bears no fault or negligence."

49. The Panel observes that pursuant to Article 17(1) in conjunction with Article 6(1) of the UEFA DR, clubs are strictly liable for misconduct of its supporters "at a match". Pursuant to Article 11(2) of the UEFA DR, disciplinary measures may be taken against clubs in case of inappropriate behaviour on the part of their supporters, including the throwing of objects (b), the lighting of fireworks or any other objects (c), acts of damage (f) and any other lack of order or discipline observed inside or around the stadium (g).

50. The Panel notes that there is a clear distinction between the first and second paragraph of Article 6 of the UEFA DR. Whereas Article 6(1) of the UEFA DR contains a strict liability rule providing that a club is responsible for its supporters, even if the club itself is not at fault, Article 6(2) of the UEFA DR deals with the responsibilities of host clubs in relation to the organisation and maintenance of order and security both inside and around the stadium before, during and after the match, which is not an issue of strict liability.

51. In continuation, the Panel turns its attention to the meaning of the expression “at a match” in Article 6(1) of the UEFA DR and finds that this expression does not limit the Club’s liability for misconduct of their supporters to the inner bounds of the stadium. The Panel finds that the notion “at a match” incorporates misconduct of supporters that could influence the smooth running of the match involved.
52. The Panel observes that although the perpetrators launched the fireworks from outside the stadium, three of them landed inside the stadium and therefore had a direct negative impact on the course or smooth running of the match, which becomes apparent because the referee felt obliged to shortly interrupt the game.
53. The Panel has no doubt in determining that the present case concerns a possible violation of the first paragraph of Article 6 of the UEFA DR and not a security issue as contemplated by the second paragraph of Article 6 of the UEFA DR. As a result thereof, the alleged disciplinary violation of the Club is in principle subject to the strict liability principle enshrined therein. The validity of the strict liability principle will be assessed in chapter d) below.
54. These findings entail that there is no need to discuss whether the actions of the perpetrators were unforeseeable, whether the area is hard to control due to its location, or whether parachute flares were launched from a distance of 800 meter, as alleged by the Club, or from a position that was very close to the stadium, as claimed by UEFA. It should be noted here however, superfluously, that from the video footage – in particular exhibit 3a and 3d of UEFA’s Answer – it appears that the fireworks were launched close to and in the immediate vicinity of the venue.
55. Moreover, the fact that the Club made efforts to prevent any disturbances, such as providing for the presence of 796 security personnel (600 mobile striking force personnel and 196 permanent staff) inside and around the stadium and the security measures taken at the entrance doors of the stadium and its surroundings, are of no avail to the Club as these are not circumstances that can serve as a ground for excuse or exculpation of the Club, as the strict liability rule as provided for by Article 6(1) of the UEFA DR applies.
56. Although these circumstances are irrelevant for the assessment of whether or not the Club committed a disciplinary infringement, these circumstances may however be taken into account in the determination of the proportionality of the sanction.
57. In continuation, the Panel finds that the launching of parachute flares from outside the stadium, but landing inside the stadium in any event fall within the inappropriate behaviour as covered by Article 11(2)(c) of the UEFA DR.
58. Therefore, the Panel has no hesitation in determining that the actions of the perpetrators, which actions undeniably influenced the smooth running of the match, fall under the scope of Article 6(1) of the UEFA DR and that the requirements as per Article 11(2)(c) of the UEFA DR are met, provided that the perpetrators are indeed supporters of the Club in terms of Articles 6 and 11 of the UEFA DR, which will be assessed in chapter c) below.

59. As a result, the Panel considers that the UEFA Appeals Body did not base its decision on a wrong application of Articles 6(1) and 11 of the UEFA DR.

c) Are the perpetrators supporters in terms of Articles 6 and 11 of the UEFA DR?

60. The Club argues that the perpetrators are no supporters in the sense of Articles 6(1) and 11(2) of the UEFA DR. According to the Club, UEFA did not establish that the perpetrators are supporters of the Club, although UEFA carried the burden of proof in this respect.

61. The Club refers to the CAS Award in CAS 2007/A/1217 and submits that the perpetrators cannot be regarded as supporters in the eyes of a reasonable and objective observer because the perpetrators did not “*support their team*” but “*rather intentionally tried to de-stabilize the entire Fenerbahçe club*” and carried out their actions “*from a long distance which cannot be considered to be in the surroundings of the Match Venue (...)*”

62. UEFA emphasises that the Club, neither in its statement of appeal, nor in its appeal brief, submits any argument that disproves the accuracy of the official reports, although the burden of proof lies with the Club as far as the inaccuracy of the reports provided by UEFA officials is concerned. No evidence has been submitted that could lead to any other conclusion than to admit that the Club’s supporters did launch parachute flares from outside the stadium.

63. UEFA argues that it has to be considered that the UEFA officials’ conclusions regarding the incidents are at least in line with those of an objective observer and that accordingly, the incidents related to the match were conducted by supporters of the Club.

64. UEFA finds that the Club is “*completely wrong in its approach to the term “supporter”*”. UEFA submits that in the past CAS has accepted the approach of UEFA in its regulations to the notion of supporters, which leaves an open definition and provides UEFA with a more comprehensive and reasonable scope of action on disciplinary matters. The use of the term “supporter” must remain open in order to be able to act against conduct by individuals that could harm the aims and values of UEFA. In addition, UEFA finds that several particular circumstances of this specific case must be taken into account and should lead to the conclusion that the perpetrators were, in fact, supporters of the Club. Finally, UEFA highlights that the Club, during the UEFA disciplinary proceedings, accepted that the perpetrators were supporters of the Club, whereas in the proceedings before the CAS it maintains that the perpetrators have no link with the Club.

65. The Panel observes that neither Article 6 of the UEFA DR, nor any other article in the UEFA Regulations defines the term “supporter”.

66. The CAS panel in CAS 2007/A/1217 considered this issue as follows:

“The only way to ensure that responsibility is to leave the word “supporters” undefined so that clubs know that the Disciplinary Regulations apply to, and they are responsible for, any individual whose behaviour would lead a reasonable and

objective observer to conclude that he or she was a supporter of that club. The behaviour of individuals and their location in the stadium and its vicinity are important criteria for determining which team or club they support.”

67. The Panel adheres to the considerations of the panel in CAS 2007/A/1217 and thus finds that the main issue here is to assess whether the perpetrators that launched the fireworks from outside the stadium (influencing the smooth running of the match) are to be considered supporters of the Club in the eyes of a reasonable and objective observer.
68. With regard to the burden of proof, the Panel observes that the Club - being a member of UEFA - is subject to the rules and regulations of UEFA, and as such is bound by rules of evidence to be applied in UEFA disciplinary proceedings.
69. Article 45 of the UEFA DR provides as follows (as relevant):

“As a rule, the Control and Disciplinary Body clarifies the facts of the case in a summary manner, on the basis of the official reports, the contents of which are presumed to be accurate (...)”
70. The Panel notes that Article 45 of the UEFA DR provides that the content of the official reports are presumed to be accurate, which means that the general principle for disciplinary cases according to which the burden of proof lies with the accuser is reversed as far as the inaccuracy of the reports is concerned. Notwithstanding this finding, the Panel is of the opinion that even if the burden of proof would be on UEFA, UEFA proved its case against the Club taking into account the available evidence.
71. The Panel observes that the official match reports of the UEFA Delegate and Venue Director expressly state that the Club’s fans were involved and that the Club warned their fans by a tweet message. One of the reports provides in this respect that *“Fenerbahce fans outside the stadium launched a few fireworks with parachutes that came in the stadium. Fenerbahce reacted very immediately by sending a tweet to their fans saying: don’t use fireworks – you are harming us. We only want to hear your voices (...)”*.
72. Furthermore, the Panel notes that the officials’ reports are supported by video footage which shows many people, obviously the Club’s fans, in the near vicinity of the stadium watching the football match on a big television screen, watching the fireworks and celebrating a goal of the Club. In continuation, the Panel observes that with regard to this match played behind closed doors, the file does not contain any reference to the possible involvement of fans of FC Bate Borisov (from Belarus) or fans of any other rivalling domestic club, which the Panel also deems to be unlikely considering that the match was played behind closed doors and a large crowd of fans was watching the match outside the stadium on a big screen.
73. It is the Club’s assertion that the officials’ reports are not accurate, but that the reports are only based on assumptions and speculations, because the officials were inside the stadium and could not have any knowledge whatsoever regarding the factual

background of the launching of the fireworks. Nevertheless, the Panel observes the Club did not take the opportunity to cross-examine the reporting officials.

74. Furthermore, the Club argues that the investigations of the Club and the State Authorities prove that the fireworks were ignited by a group of young criminals absolutely unknown to the Club and without any link to the Club.
75. The Panel has sympathy for the Club's difficult position in dealing with these kinds of troublemakers, but has nevertheless serious doubts with respect to the Club's position before CAS regarding its contention that these troublemakers were absolutely unknown to the Club. It appears from the Appealed Decision that at the hearing before the Appeals Body of UEFA on 11 March 2013, the Club showed video footage of a domestic football match and pointed out some individuals in the stands, who it claimed had been responsible for the incidents. The Panel notes that the Appealed Decision provides as follows:

“On the basis of the video footage shown at its request and its comments, the [Club] appears to suggest that four or six individuals seen in the stands and at the stadium gates during a domestic championship match were responsible for the incidents that occurred during the [Europa League match against FC Bate Borisov].

The [Club] also claims that the group's leader and members, who take part in such acts, are well known and always commit such acts in the same section of the stadium.

The [Club] also points out that the people responsible for the incidents in the present case also caused trouble at the Club's Euroleague basketball match, when they tried to assault the club president”.

76. Although the Club has changed its position in the proceedings before CAS and argues now that the perpetrators are completely unknown to the Club, the Panel has difficulties in accepting such sudden change of position. During the proceedings before the UEFA Appeals Body, the Club identified four or six persons responsible for the trouble during the match between the Club and FC Bate Borisov, which persons were seen in the stands of the Club's stadium during a domestic championship match. Furthermore, it was argued by the Club before the UEFA Appeals Body that these persons are well known and always commit such acts in the same section of the stadium. This position is consistent with the facts, in particular with the submissions of the Club that it immediately took action against the perpetrators in co-operation with the relevant authorities and penalized the perpetrators with a stadium ban (*“the perpetrators upon initiative of Fenerbahce already have been penalized insofar as they are not allowed to visit the Match Venue for any match of the Appellant”*).
77. Moreover, the Panel assesses that in its statement dated 8 March 2013, the Security Director of Istanbul confirmed that *“1 person had been caught and after the camera screening carried out by the Directorate of Replevin Office, 10 persons had been caught and legal action had been initiated against them on grounds of Violation of the Law with number 6222”* and that *“Protective Measures Banning Watching had been*

implemented for the 11 persons caught, in conformity with the provisions of article 18/3 of the Law with number 6222”.

78. In addition, the Panel observes that the file contains nine so-called stadium bans, notified to and signed on 5 March 2013 by the persons who were held responsible for the launching of fireworks during the match.
 79. The Panel notes that the served stadium bans explicitly prohibit the banned persons to attend matches and trainings of “*their team*” and obliges them to visit the nearest police station at kick off time and one hour after kick off time on match days of “*their team*”. The stadium bans however do not specifically state that the perpetrators were fans of the Club. However, the Club did not provide the Panel with any evidence whatsoever that “*their team*” as provided for in the stadium bans is not the Club. Contrarily, and as already indicated above, the Club submitted previously that the perpetrators were denied access to the match venue of the Club, from which it must be understood that the perpetrators were supporters of the Club.
 80. Consequently, based on the facts and circumstances of this case, the Panel is convinced that the perpetrators who launched the fireworks that influenced the smooth running of the match must be considered as supporters of the Club. Particularly in the eyes of a reasonable and objective observer in the sense of Article 6(1) of the UEFA DR. Therefore, the Club must be held responsible for the trouble caused by these people.
 81. For the avoidance of doubt, the Panel reiterates that it is of no avail to the Club that the actions of the perpetrators might have been unforeseeable, that the area around the stadium might have been hard to control due to its location and that the parachute flares were allegedly launched from a distance of 800m from the stadium. As set out *supra*, the fact that the Club made efforts to prevent any disturbances, such as providing for the presence of 796 security personnel (600 mobile striking force personnel and 196 permanent staff) inside and around the stadium and the security measures taken at the entrance doors of the stadium and its surroundings, are of no avail to the Club as these are only circumstances that can possibly be taken into account in respect of the proportionality of the sanction, but are not circumstances that can serve as a ground for excuse or exculpation of the Club, as the strict liability rule as provided for by Article 6(1) of the UEFA DR applies.
 82. Consequently, the Panel finds that the perpetrators are supporters of the Club and that the Club is directly responsible for the misbehaviour of its supporters based on Article 6(1) of the UEFA DR. The Club however challenges the application of the strict liability principle enshrined in Article 6 of the UEFA DR. Therefore, the Panel will subsequently assess the validity of this principle before determining whether the Club is liable for the behaviour of its supporters and should be sanctioned accordingly.
- d) Is the strict liability principle as laid down in Articles 6 and 11 of the UEFA DR compatible with Article 6 of the ECHR?**
83. The Club maintains that the Appealed Decision, and in particular the strict liability principle – without taking into account the absence of default of a club – violates the

fundamental rights of the Club under the ECHR. The Club refers to “*the principle of default (nulla poena sine culpa) as expressly provided for in Article 6 par. 2 ECHR*”.

84. UEFA refers to jurisprudence of CAS and the SFT to argue that the application of the strict liability principle has a clear justification. In particular, UEFA maintains that it does not have any direct disciplinary authority over a club’s supporters, but only over European football associations and clubs and that without this indirect sanction, UEFA would be deprived of any means to act against the improper conduct of supporters if a club could not be charged with any fault in connection with such conduct. Moreover, UEFA emphasises that the jurisprudence of CAS and the SFT shows that sporting associations have disciplinary powers over its members and that this power does not rest on public or penal law, but on civil law. Consequently, UEFA finds that the Club has not provided sufficient legal support to challenge the strict liability principle contemplated in Articles 6(1) and 11(2) of the UEFA DR.
85. First, the Panel takes a closer look at the structure of the concept of strict liability in the UEFA regulations.
86. As a starting point, the Panel observes that UEFA is a legal entity domiciled in Switzerland, and as such subject to Swiss law. Under Swiss law – as under most legal systems – sporting associations have a wide margin of autonomy to regulate their own affairs (see CAS 2005/C/976&986, para. 123 and 142 with reference to Swiss law; CAS 2007/A/1217, para. 11.1) and possess the power (i) to adopt rules of conduct to be followed by their direct and indirect members and (ii) to apply disciplinary sanctions to members who violate those rules, on condition that their own rules and certain general principles of law – such as the right to be heard and proportionality – be respected (CAS 2011/A/2426, para. 62; cf. M. BADDELEY, *L’association sportive face au droit*, Bale, 1994, pp. 107 ff., 218 ff.; M. BELOFF, T. KERR, M. DEMETRIOU, *Sports Law*, Oxford, 1999, pp. 171 ff.).
87. The Panel adheres to UEFA’s position and points out that the authority by which a sporting association may set its own rules and exert its disciplinary powers on its direct or indirect members does in principle not rest on public or penal law but on civil law (Judgement of the SFT dated 15 March 1993; Gundel v. FEI, consid. 5a, Digest of CAS Awards I, p. 545 (571), partially published in ATF 119 II 271).
88. With specific regard to the ECHR, which is invoked by the Club, the Panel observes that there is ample jurisprudence of the SFT determining that the ECHR can be applied in arbitration matters. (Judgement of the SFT dated 20 June 2008, 9C_132/2008 (no. 4.2); Judgement of the SFT dated 4 August 2006 CaS (causa sport) 2006, 575, 582; Judgement of SFT dated 21 February 2008, 4A_370/2007 (no. 5.3.2.); CAS 2010/A/2311-2312, no 6.13 *et seq.*; PLOUDRET/BESSON, *Comparative Law on International Arbitration*, 2007, no. 87; FAVRE-BULLE, *L’Arbitrage et la Convention Européenne der Droits de l’Homme*, 2001, p. 69, 73; HAAS, *Role and application of Article 6 of the European Convention on Human Rights [ECHR] in CAS Procedures*, I.S.L.R., Issue 3, 2012, p. 43).
89. On the contrary, in its decision of 21 February 2008, the SFT stated that the ECHR did not apply directly to arbitral jurisdiction (Judgement of the SFT dated 21 February 2008, 4A_370/2007, no. 5.3.2; in this sense also the Judgement of the SFT dated 4

August 2006, CaS 2006, 575, 582; see also KAUFMANN-KOHLER/RIGOZZI, *Arbitrage International*, 2nd ed. 2010, no. 64). However, according to the SFT, this does not preclude the values of the ECHR being taken into consideration when interpreting the grounds for appeal.

90. The Panel notes that Articles 6(2) and 6(3) of the ECHR contain specific provisions setting out ‘minimum rights’ applicable only in respect of those charged with a criminal offence and therefore are not applicable to the case at hand as these provisions apply to criminal proceedings only. According to Swiss law, sport-related disciplinary proceedings conducted by sports governing bodies against one of its members are qualified as civil law disputes and not as criminal law proceedings (CAS 2010/A/2311-2312, no. 7.6; HAAS, *Role and application of Article 6 of the European Convention on Human Rights [ECHR] in CAS Procedures*, I.S.L.R., Issue 3, 2012, p. 47).
91. Insofar as the Club relies on Article 6(2) of the ECHR in order to argue that UEFA violated the *nulla poena sine lege* principle, this argument must fail as Article 6(2) is only applicable to criminal proceedings and the present proceedings are not of a criminal nature.
92. However, Article 6(1) ECHR applies to both civil and criminal proceedings.
93. In this respect the Panel concurs with the opinion expressed by other CAS panels, like in CAS 2011/A/2426, where a CAS panel considered that “*some guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR are indirectly applicable even before an arbitral tribunal – all the more so in disciplinary matters – because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. These fundamental principles of procedural fairness thus form part of the Swiss procedural public policy and must be respected in sports disciplinary proceedings (Judgement of the Swiss Federal Tribunal of 11 June 2001, 4P.64/2001, ATF 127 III 429, Abel Xavier v. UEFA, consid. 2d, ibidem)*”. Furthermore the Panel refers to the decision in CAS 2011/A/2384 & 2386, no 172 *et seq.* in which a CAS panel expressed its view “*that even though it is not directly bound by the provisions of the ECHR (cf. Art. 1 ECHR), it should nevertheless account for their content within the framework of procedural public policy*”.
94. This CAS jurisprudence is in line with judgements of the SFT dated 21 February 2008 (4A_370/2007, no. 5.3.2.) and 10 June 2010 (4A_458/2009, no. 4.4.3.3.).
95. As a result, the Panel will limit its assessment of the ECHR to the fundamental principles of procedural fairness afforded by Article 6(1) ECHR, which forms part of the Swiss procedural public policy in order to adjudicate whether the principle of strict liability is justified.
96. Article 6(1) of the ECHR reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

97. The strict liability principle derives from Article 6(1) of the UEFA DR (edition 2012) in conjunction with Article 17 of the UEFA DR. As a reminder, Article 6 of the UEFA DR provides the following:

- “1. 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 on behalf of the member association or club.*
- 2. The host associations or clubs are responsible for order and security both inside and around the stadium before, during and after the match. They are liable for incidents of any kind, and may be rendered subject to disciplinary measures and directives”.*

98. Article 17(1) of the UEFA DR determines as follows:

“The competent disciplinary body shall determine the type and extent of the disciplinary measures to be imposed according to the objective and subjective elements of the offence, taking account of both aggravating and mitigating circumstances. Subject to Article 6(1) of the present regulations, no disciplinary measures may be imposed in cases where the party charged bears no fault or negligence.”

99. The Panel observes that Article 6(1) of the ECHR is not directly relevant for the assessment of the validity of the strict liability principle; however, the article provides that the Club is entitled to a fair hearing. Insofar as the Club intends to argue that UEFA, by applying the strict liability principle, violated Article 6(1) of the ECHR, the Panel will assess whether the application of the strict liability principle has prevented the Club from a fair hearing. The Panel observes that the other elements of Article 6(1) of the ECHR (public hearing, reasonable time, independent and impartial tribunal established by law, public pronouncement of judgments), are not directly relevant for the validity of the strict liability principle and shall be disregarded as such.

100. The essence of Articles 6(1) and 17(1) of the UEFA DR is to hold a club strictly liable for the behaviour of its supporters. In both CAS 2002/A/423 and CAS 2007/A/1217 the following was considered with regard to Article 6(1) of the UEFA DR:

“Under the terms of the first paragraph, 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 of club. According to this provision, UEFA members and clubs are

responsible for any breach of the UEFA regulations committed by any of those persons. There is therefore no doubt that, under this rule, member associations and clubs bear strict liability for the actions of third parties, who are nonetheless specifically identified.

This rule leaves absolutely no room for manoeuvre as far as its application is concerned. UEFA member associations and football clubs are responsible, even if they are not at fault, for the improper conduct of their supporters, including racist acts, which expressly breach the Disciplinary Regulations. Clubs are automatically held responsible once such an act has been established.

The object of this rule is very clearly to ensure that clubs that host football matches shoulder the responsibility for their supporters' conduct, which must comply with UEFA's objectives. It should be noted that UEFA has no direct disciplinary authority over a club's supporters, but only over European football associations and clubs. The latter are responsible for conforming to the standards and spirit of the UEFA regulations. If clubs were able to extricate themselves from any responsibility by claiming that they had taken all measures they could reasonably be expected to take to prevent any breach of the UEFA rules, and if supporters still manage to commit such an act, there would be no way of penalising that behaviour, even though it constituted a fault in itself. UEFA's rules of conduct would therefore be nothing more than vague obligations, since they would be devoid of any sanctions. 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 Disciplinary Regulations, under which clubs assume strict liability for their supporters' actions, therefore has a preventive and deterrent effect. Its objective is not to punish the clubs as such, which may have done nothing wrong, but to ensure that the club assumes responsibility for offences committed by its supporters.

The strict liability by Article 6 para. 1 of the Disciplinary Regulations can therefore not be deemed contrary to Article 20 of the CO, particularly since Article 72 para. 1 of the CC allows associations to expel their members without giving their reasons for doing so. It would therefore seem paradoxical if an association were able, through its statutes, to expel its members without having to show that they had committed some kind of violation, whilst only being allowed to sanction its members if it could prove that they had breached their obligations."

101. The Panel fully adheres with the considerations set out above and is of the opinion that the strict liability principle as construed in Articles 6(1) and 17(1) of the UEFA DR is neither in violation of Swiss law, nor of Article 6(1) of the ECHR and that the application of such principle neither prevents the Club from a fair hearing, nor does it constitute a violation of Swiss procedural public policy.

102. The Panel finds that a club's right to a fair hearing is, in general, not violated by the application of the strict liability principle, particularly not because the Panel finds that the application of such principle is justified in light of the responsibility of clubs over its supporters and UEFA's lack of disciplinary authority over clubs' supporters, but also because of the membership structure of European football and the clubs' subordination to UEFA's regulatory power over its members.
103. Consequently, the Panel finds that UEFA, by applying the strict liability principle enshrined in Article 6(1) of the UEFA DR, neither violated the legal principle of *nulla poena sine lege*, nor the ECHR or Swiss procedural public policy.

e) Is the Appealed Decision void in light of Article 75 of the Swiss Civil Code?

104. The Club argues that the Appealed Decision is a resolution as provided in Article 75 of the SCC, which resolution is based on the principle of strict liability provided by Articles 6(1) and 17(1) of the UEFA DR, which principle the Club considers to be a violation of Article 6 EHCR. In light of this, the Club finds that the Appealed Decision must be considered invalid and void.
105. UEFA is of the opinion that the time limit of this provision has widely expired and is thus not applicable, as the principle of strict liability "*has been a keystone of the UEFA Disciplinary Regulations for a long time*". In addition, UEFA argues that CAS "*has already considered that the principle of strict liability is justified in the light of Articles 20 and 163 of the Swiss Code of Obligations*".
106. The Panel observes that under Swiss law, a decision by an association like UEFA may be challenged pursuant to Article 75 SCC. Under the heading "*protection of member's rights*", Article 75 SCC provides as follows:

"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof."

107. The Panel concurs with the views of a CAS panel in CAS 2008/A/1639, which held that:

"[T]he purpose of this provision is to protect the individual in its membership related sphere from any unlawful infringements by the association (cf. ATF 108 II 15, 18). In view of this legislative purpose, Article 75 SCC is construed and interpreted in a broad sense (cf. ATF 118 II 12, 17 et seq.; 108 II 15, 18 et seq.; Handkommentar zum Schweizer Recht/NIGGLI, 2007, Art. 75 ZGB marg. no. 6 et seq.; HEINI/PORTMANN, Das Schweizer Vereinsrecht, Schweizerisches Privatrecht II/5, 2005, marg. no 278; Basler Kommentar ZGB/HEINI/SCHERRER, 3rd ed. 2006, Art. 75 marg. no. 3 et seq.; Berner Kommentar zum schweizerischen Privatrecht/RIEMER, 1990, Art. 75 marg. no. 7 et seq., 17 et seq.; FENNERS H., Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, marg. no. 208). In particular the term "resolution" in Article 75 SCC does not only refer to resolutions passed by the assembly of an association but, instead, encompasses any other (final and binding) decision of any other organ of the association irrespective of the nature of such decision

(disciplinary, administrative, etc.) and the composition of said organ (one or several persons)."

108. In light of the foregoing, the Panel finds that the Appealed Decision must be interpreted as a "resolution" by UEFA in the terms of Article 75 SCC.
109. However, as determined *supra*, the Panel finds that the principle of strict liability as construed in Articles 6(1) and 17(1) of the UEFA DR does not violate Swiss procedural public policy or Article 6 of the ECHR. This principle of strict liability is a well-established rule in worldwide sports organisations which does not "*infringe the law or the articles of association*" and as such the Panel finds that the Appealed Decision is not void in light of Article 75 SCC.
110. Consequently, the Panel finds that UEFA rightly sanctioned the Club for the behaviour of its supporters during the match against FC Bate Borisov. The only remaining question to be answered by the Panel is therefore whether the sanction imposed on the Club by UEFA is proportionate.

f) *Are the sanctions imposed in the Appealed Decision proportionate?*

111. The UEFA Control & Disciplinary Body decided to impose the following sanction on the Club:

"1. To order [the Club] to play its next UEFA competition match as host club behind closed doors. This applies to the following match:

a. [The Club] v. FC Viktoria Plzeň of 14.03.2013.

- 2. The club is excluded from participating in the next UEFA club competition for which it would otherwise qualify. This sanction is deferred for a probationary period of two years.*
- 3. To fine [the Club] €60,000.*

112. This sanction was subsequently upheld by the UEFA Appeals Body.

113. The Club submits that the sanctions imposed on it in the Appealed Decision are "*absolutely disproportionate in accordance with general legal principles*", which principles are applicable in the present matter pursuant to Article 17(1) of the UEFA DR. More specifically, the Club sums up the following factors that in its opinion, shall be taken into account as mitigating circumstances:

- "the usage of parachute fireworks was not predictable;*
- the perpetrators were absolutely unknown to the club prior to the incidents;*
- the perpetrators had no control where the parachute fireworks would land;*
- the match was played behind closed doors;*

- *the Club took all reasonable security efforts, in particular arranged the presence of approximately 800 security staff inside and outside the stadium;*
- *the fireworks were not lighted in and/or around the match venue but from a distance of approximately 800 to 1000 meters;*
- *the Club cannot control the entire city of Istanbul, especially not the dense settlement structure in the neighbourhood of the match venue;*
- *the perpetrators are criminals having harming intentions;*
- *the perpetrators are neither members nor in any other way affiliated to the Club;*
- *the Club immediately took action against the perpetrators in co-operation with the relevant authorities and penalized them with a stadium ban;*
- *only three fireworks landed “in the Match Venue and did neither cause severe damage to the Match Venue and/or the Match which was continued after a short break of one minute only”.*

114. With respect to the proportionality of the sanction, UEFA refers to jurisprudence of CAS and in particular to CAS 2012/A/2762, according to which, allegedly, “[t]he measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rule can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”. CAS thus has a very limited and restricted competence in this respect. UEFA finds that some mitigating circumstances submitted by the Club are in fact aggravating circumstances and provides several factors that, in the opinion of UEFA, must lead the Panel to conclude that the Club failed to prove that the sanction imposed in the Appealed Decision is evidently and grossly disproportionate.

115. The Panel first turns its attention to the legal framework for assessing the proportionality of a sanction based on the applicable UEFA regulations and notes that according to Article 14 of the UEFA DR, the following disciplinary measures may be imposed against member associations and clubs in accordance with Article 53 of the UEFA Statutes:

- “1.
- 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) *Declaration of a match forfeit;*
- h) *Playing of a match behind closed doors;*
- i) *Full or partial stadium closure;*
- j) *Playing of a match in a third country;*
- k) *Withholding of revenues from a UEFA competition;*
- l) *Prohibition of registering new players in UEFA competitions;*
- m) *Restriction on the numbers of players that a club may register for participation in UEFA competitions;*
- n) *Disqualification from competitions in progress and/or exclusion from future competitions;*
- o) *Withdrawal of a title or award;*
- p) *Withdrawal of a licence.*

2.

A fine shall be no less than EUR 100 and no more than EUR 1.000.000.”

116. Pursuant to Article 15bis(1) of the UEFA DR, all disciplinary sanctions may be suspended except for warnings, reprimands and bans on all football-related activities. Article 15bis(2) of the UEFA DR provides *inter alia* that the probationary period shall be a minimum of one year and a maximum of five and Article 15bis(3) of the UEFA DR provides *inter alia* that if a further offence is committed during the probationary period, the competent disciplinary body, as a rule, orders the original sanction to be executed.

117. Article 17 of the UEFA DR provides as follows – as relevant:

- 1. *“The competent disciplinary body shall determine the type and extent of the disciplinary measures to be imposed according to the objective and subjective elements of the offence, taking into account of both aggravating and mitigating circumstances. Subject to Article 6(1) of the present regulations, no disciplinary measures may be imposed in cases where the party charged bears no fault or negligence;*

(...)

- 4. *If the party charged has committed multiple disciplinary offences, the disciplinary body assesses the sanction according to the most serious offence and increases it accordingly.”*

118. Article 18 of the UEFA DR provides as follows – as relevant:

1. *“Recidivism occurs if disciplinary measures have to be imposed within five years of a previous offence of a similar nature;*
2. *Recidivism counts as an aggravating circumstance.”*

119. The Panel observes that it is undisputed that, before the match between the Club and FC Bate Borisov was played, the Club had already been sanctioned by UEFA for throwing and setting off fireworks by its supporters at nine UEFA competition matches of the Club in the period between 30 September 2008 and 26 August 2010 and at the following eight UEFA competition matches of the Club in 2012:

“06-12-2012 against VfL Borussia Monchengladbach;

22-11-2012 against Olympique de Marseille;

08-11-2012 against AEL Limassol FC;

04-10-2012 against VfL Borussia Monchengladbach;

20-09-2012 against Olympique Marseille;

29-08-2012 against FC Spartak Moskva;

08-08-2012 against Sporting Club Vaslui;

01-08-2012 against Sporting Club Vaslui”

120. This overview provided by UEFA remained undisputed by the Club.
121. Looking at the recent history with regard to the sanctions imposed on the Club by UEFA, the Panel observes that on 18 October 2012, the Club was fined with EUR 85,000 and sanctioned to play its next UEFA club competition match behind closed doors, deferred for a probationary period of three years.
122. In continuation, the Panel observes that on 24 January 2013, the UEFA Control & Disciplinary Body decided to revoke the suspended sanction against the Club to play a match behind closed. In addition, the Club was fined with EUR 40,000.
123. Due to the infringements during the match against FC Bate Borisov behind closed doors on 21 February 2013, the UEFA Appeals Body excluded the Club from participating in the next UEFA club competition for which it would otherwise qualify, deferred for a probationary period of two years, fined the Club with EUR 60,000 and decided that the Club had to play its next UEFA competition match as host club behind closed doors. In coming to this conclusion, the UEFA Appeals Body also took into account the violation of the kit regulation infringements and the fact that the team received numerous yellow cards in this particular match. These violations are not disputed by the Club in the present appeal arbitration proceedings and therefore do not require a review by this Panel.
124. Numerous CAS panels have dealt with issues concerning the proportionality of sanctions imposed by UEFA. The steady line of CAS jurisprudence provides that the

sanctions imposed must not be evidently and grossly disproportionate to the offence (see CAS 2007/A/1217, para. 12.4; CAS 2012/A/2762, para. 122).

125. The Panel finds that the interruption of the football match behind closed doors, caused by supporters of the Club by launching fireworks from outside the stadium that landed inside the stadium is a serious offence. The violation shows that earlier sanctions imposed on the Club by UEFA - (mainly) because of the throwing of missiles and/or fireworks from the stands - did not reach their goal and failed to act as a deterrent to stop the unacceptable behaviour of the Club's supporters. The Panel finds that the fact that the interruption of the match only lasted for about one minute and no severe damage was caused cannot be regarded as a mitigating circumstance in light of the numerous comparable violations of the Club's fans that took place in the past.
126. The Panel finds that the only mitigating circumstances that can be taken into account are that the Club took certain security measures and arranged the presence of approximately 800 security staff inside and outside the stadium and that the Club immediately took action against the perpetrators in co-operation with the relevant authorities and penalized them with a stadium ban. The other alleged mitigating circumstances are in fact aggravating, not relevant or contrary to the facts as established by the Panel.
127. The Panel finds that the Club should have taken account for the usage of parachute fireworks in light of its disciplinary record and has no hesitation to qualify as aggravating that the match was played behind closed doors and that the perpetrators had no control where the parachute fireworks would land. Moreover, the Club's record in disciplinary cases in the five years prior to the match against FC Bate Borisov is definitely an aggravating circumstance as provided for in Article 18(2) of the UEFA DR.
128. As such, the sanction to order the Club to play its next UEFA competition match as host club behind closed doors and to exclude the Club from participating in the next UEFA club competition for which it would otherwise qualify, deferred for a probationary period of two years, is a logical further step taken by UEFA in light of the range of sanctions at its disposal pursuant to Article 53 of the UEFA Statutes and is not evidently and grossly disproportionate to the offence. The same applies to the fine imposed. The Panel considers there to be no justification for a reduction of the fine.
129. Furthermore, the Club argues that the meaning of the imposition of a probationary period remains unclear to the Club. In particular, the Club maintains that it remains uncertain under which conditions the probationary period may be lifted and what would be the relevant proceedings. The Club finds this legal uncertainty unacceptable.
130. In this respect, the Panel refers to Article 15bis of the UEFA DR which clearly provides – as relevant – that *“if a further offence is committed during the probationary period, the competent disciplinary body, as a rule, orders the original sanction to be executed. This may be added to the disciplinary sanction imposed for the second offence”*. The Panel finds that this rule is not ambiguous and clarifies the issues regarding the conditions under which the suspended sanction may be executed and what would be the relevant proceedings. The Panel is of the view that no legal

uncertainty exists. Whether it would be justified to finally impose the suspended sanction on the Club – assuming that the Club would commit a new disciplinary infringement within the probationary period – is not for this CAS Panel to determine. This would have to be assessed by the legal bodies allocated with such future legal proceedings, as the imposition of the suspended sanction may depend on the specific circumstances of the future case.

B. Conclusion

131. Based on the foregoing, and after having taken into due consideration both the regulations applicable and all the evidence produced and all arguments submitted, the Panel finds that the appeal filed by the Club is dismissed and the decision of the UEFA Appeals Body is confirmed.
132. Any other prayers or requests for relief are dismissed.

IX. COSTS

133. Article R65.1 of the CAS Code provides that:

“This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body.”

134. Article R65.2 of the CAS Code stipulates the following:

“Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.- without which CAS shall not proceed and the appeal shall be deemed withdrawn. (...)”

135. Article R65.3 of the CAS Code determines that:

“Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.”

136. Since the present appeal – including the request for a stay - is lodged against a decision of an exclusively disciplinary nature rendered by an international federation, no costs are payable to the CAS by the parties beyond the Court Office fee of CHF 1,000 paid by the Club prior to the filing of its statement of appeal, which is in any event retained by the CAS.

137. Pursuant to Article R65.3 of the CAS Code and in consideration of the complexity and the outcome of the proceedings as well as the conduct and the financial resources of the parties, in particular the fact that UEFA was not represented by external Counsel, the Panel rules that each party shall bear its own expenses incurred in connection with these arbitration proceedings. The Panel adds that although the Club reserved its right to provide the Panel with documentation attesting the incurred amounts, the Club did not provide any documents in this regard.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Fenerbahçe Spor Kulübü on 4 April 2013 against the Decision issued on 11 March 2013 by the Appeals Body of the Union of European Football Associations is dismissed.
2. The Decision issued on 11 March 2013 by the Appeals Body of the Union of European Football Associations is confirmed.
3. The award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Fenerbahçe Spor Kulübü, which is retained by the CAS.
4. Each party shall bear its own costs and expenses incurred in connection with these arbitration proceedings.
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 5 December 2013

THE COURT OF ARBITRATION FOR SPORT

Manfred Nan
President of the Panel

Rui Botica Santos
Arbitrator

Luigi Fumagalli
Arbitrator