



**Arbitration CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), award of 20 August 1999**

Panel: Mr. Massimo Coccia (Italy), President; Dr. Christoph Vedder (Germany); Dr. Dirk-Reiner Martens (Germany)

*Football*

*Conflicts of interest related to multi-club ownership within the same competition*

*Application of EC law to sport*

*Status of UEFA according to EC law*

*Right to be heard*

*Principle of procedural fairness*

1. If clubs with the same owner can take part in the same competitions, whether national or international, doubts may arise as to whether the outcome is really undecided in advance. The challenged UEFA Rule is therefore an essential feature for the organization of a professional football competition and is not more extensive than necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and then the uncertainty, of results in UEFA competitions.
2. Membership of UEFA is open only to national football associations situated on the continent of Europe who are responsible for the organization and implementation of football-related matters in their particular territory. The UEFA Statutes attribute voting rights only to national federations, and article 75 of the Swiss Civil Code (CC) refers to members which have voting rights within the association whose resolution is challenged. Clubs do not meet these requirements.
3. Under Article 75 CC, members of an association have the right to be heard when resolutions are passed which affect them to a significant extent. However, requiring an international sports federation to provide for hearing to any party potentially affected by its rule-making authority could quite conceivably subject the international federation to a quagmire of administrative red tape which would effectively preclude it from acting at all to promote the game.
4. The doctrine of *venire contra factum proprium* provides that where the conduct of one party has led to the legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party. *In casu*, UEFA may not change its Cup Regulations without allowing the clubs sufficient time to adapt their operations to the new rules accordingly. However, such procedural defect by itself does not warrant the permanent annulment of the contested UEFA Rule.

- 5. Sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty. EC law does not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.**

The Claimant AEK PAE (hereinafter «AEK») is a Greek football club incorporated under the laws of the Hellenic Republic and having its seat in Athens. AEK currently plays in the Greek first division championship and over the years has often qualified for the European competitions organized by UEFA. At the end of the 1997/98 football season AEK ranked third in the Greek championship, thus becoming eligible to participate in the 1998/99 UEFA club competition called «UEFA Cup». AEK is owned as to 78.4% by ENIC Hellas S.A., a company wholly controlled, through subsidiaries, by the English company ENIC plc.

The Claimant SK Slavia Praha (hereinafter «Slavia») is a Czech football club incorporated under the laws of the Czech Republic and having its seat in Prague. Slavia currently plays in the Czech-Moravian first division championship and along the years has often qualified for the UEFA competitions. At the end of the 1997/98 football season, Slavia ranked second in the Czech-Moravian championship, thus becoming eligible to participate in the 1998/99 UEFA Cup. Slavia is owned as to 53.7% by ENIC Football Management Sarl, a company wholly controlled, through subsidiaries, by ENIC plc.

Both AEK and Slavia are under the control of ENIC plc (hereinafter «ENIC»), a company incorporated under the laws of England and listed on the London Stock Exchange. In the last couple of years ENIC, through subsidiaries, has invested in several European football clubs, acquiring controlling interests in AEK, Slavia, the Italian club Vicenza Calcio SpA, the Swiss club FC Basel, and a minority interest in the Scottish club Glasgow Rangers FC.

The Respondent Union of European Football Associations (hereinafter «UEFA»), association which has its seat in Nyon, Switzerland, is a sports federation which has as its members all the fifty-one national football associations (*i.e.* federations) of Europe. UEFA is the governing body for European football, dealing with all questions relating to European football and exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players. Pursuant to the UEFA Statutes, member associations must comply with such Statutes and with other regulations and decisions, and must apply them to their own member clubs. Until the 1998/99 European football season UEFA has organized three main club competitions: the Champions' League, the Cup Winners' Cup and the UEFA Cup. UEFA has recently resolved to cancel the Cup Winners' Cup and, as of the 1999/2000 season, has reduced the main club competitions to the Champions' League and the UEFA Cup.

During 1997 ENIC acquired the above-mentioned controlling interests in AEK, Slavia and Vicenza. In the 1997/98 European football season, these three clubs took part in the UEFA Cup Winners'

Cup and all qualified for the quarter final. At this stage, the three ENIC-owned clubs were not drawn to play against each other and only one of them reached the semi-finals (AEK lost to the Russian club Lokomotiv Moscow, Slavia lost to the German club VfB Stuttgart, whereas Vicenza defeated the Dutch club Roda JC). Being confronted with a situation where three out of eight clubs left in the same competition belonged to a single owner, UEFA started to consider the problems at stake.

On 24 February 1998, at ENIC's request, representatives of UEFA and ENIC met in order to discuss the issue of «multi-club ownership», that is the ethical and non-ethical questions raised by the circumstance that two or more clubs controlled by the same owner take part in the same competition. In that meeting ENIC proposed to UEFA a «code of ethics» to be adopted by football clubs, with a view to convincing UEFA not to adopt a rule banning teams with common ownership from participating in the same UEFA competition.

After the meeting, ENIC exchanged correspondence with UEFA and submitted a draft code of ethics for consideration. Thereafter, UEFA referred the issue of multiple ownership to some of its internal bodies, namely the Committee for Non-Amateur Football, the Juridical Committee and the Committee for Club Competitions. These came to the conclusion that there was no guarantee that a code of ethics would be effectively implemented and that a code of ethics was not a viable solution. They therefore recommended to the Executive Committee of UEFA that the rule at issue in this arbitration be adopted.

On 7 May 1998, UEFA sent to its member associations several documents to be communicated to the clubs entitled to compete in the 1998/99 UEFA Cup. In particular, UEFA sent the regulations and the entry forms for the 1998/99 UEFA Cup and the booklet entitled «Safety and security in the stadium – For all matches in the UEFA competitions». The UEFA Cup regulations set forth the conditions of participation without any mention of a limitation related to multi-club ownership. Moreover, the regulations did not make reservation for future amendments, except in the event of «force majeure». At that time, pursuant to the regulations, both AEK and Slavia were entitled to compete in the 1998/99 UEFA Cup because of their results in the 1997/98 national championships.

On 19 May 1998, the UEFA Executive Committee finally addressed the issue of multi-club ownership and adopted the rule at issue in these proceedings (hereinafter the «Contested Rule»). The Contested Rule is entitled «*Integrity of the UEFA Club Competitions: Independence of the Clubs*» and reads as follows:

*«A. General Principle*

*It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition.*

### *B. Criteria*

*With regard to admission to the UEFA club competitions, the following criteria are applicable in addition to the respective competition regulations:*

1. *No club participating in a UEFA club competition may, either directly or indirectly:*
  - (a) *hold or deal in the securities or shares of any other club, or*
  - (b) *be a member of any other club, or*
  - (c) *be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or*
  - (d) *have any power whatsoever in the management, administration and/or sporting performance of any other club participating in the same UEFA club competition.*
2. *No person may at the same time, either directly or indirectly, be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA club competition.*
3. *In the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it:*
  - (a) *holds a majority of the shareholders' voting rights, or*
  - (b) *has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or*
  - (c) *is a shareholder and alone controls a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club in question.*
4. *The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs to these competitions. It furthermore reserves the right to act vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition».*

On 20 May 1998, UEFA released a press statement announcing the adoption of the Contested Rule. On 26 May 1998, UEFA communicated the Contested Rule to all its member associations through Circular Letter no. 37, a copy of which was sent to ENIC, informing that the new provision would be effective as of the start of the new season.

Subsequently, pursuant to Paragraph B.4 of the Contested Rule, the UEFA Committee for Club Competitions decided that the following criteria would determine which of two or more commonly owned clubs should be admitted to a UEFA club competition: first, the club with the highest «club coefficient» (based on the club's results of the previous five years) would be admitted; then, if the club coefficients were the same, the club with the highest «national association coefficient» (based on the previous results of all the teams of a national association) would be admitted; lastly, in case of equal national association coefficients, lots would be drawn.

On 25 June 1998, UEFA informed AEK of the criteria adopted by the UEFA Committee for Club Competitions and of the resulting non-admission of AEK to the UEFA Cup, while Slavia was authorized to compete. The Hellenic Football Association was called upon to enter a substitute for AEK, by designating the club which finished the domestic championship immediately below AEK. In the same letter, UEFA granted AEK a last opportunity to take part in the competition, if it were

to submit a statement confirming a change of control in compliance with the Contested Rule by 1 July 1998 (this was later extended to 20 July 1998).

On 12 June 1998, the parties executed an arbitration agreement, by which they agreed to submit the present dispute to the Court of Arbitration for Sport («CAS») in accordance with the Code of Sports-related Arbitration (the «Code»).

On 15 June 1998, AEK and Slavia filed with the CAS a request for arbitration together with several exhibits, primarily petitioning that the Contested Rule be declared void or annulled (*see infra*, para. 32). On the same day, AEK and Slavia also filed a request for interim relief, petitioning that during the proceedings UEFA be restrained from giving effect to the Contested Rule and, in particular, from excluding either Claimant from the 1998/99 UEFA Cup competition.

UEFA filed its reply to the Claimants' request for interim relief on 26 June 1998 and filed its answer to the request for arbitration, with some exhibits, on 22 July 1998.

On 15 July 1998, the President of the Ordinary Division of CAS held a hearing at the CAS offices in Lausanne, where the parties and their counsel answered questions of fact and law raised by the President and counsel presented oral arguments.

On 16 July 1998, the CAS issued a «Procedural Order on Application for Preliminary Relief», granting the following interim relief:

- «1. For the duration of this arbitration or for the duration of the 1998/99 season of the UEFA Cup, whichever is shorter, the Respondent shall not give effect to the decision taken by its Executive Committee on May 19, 1998 regarding the "Integrity of the UEFA Club Competitions: Independence of the Clubs";
2. As a result, the Respondent shall admit AEK Athens to the 1998/99 UEFA Cup Competition, in addition to Slavia Prague;
3. The costs of the present stage of the proceedings shall be settled in the final award or in any other final disposition of this arbitration».

As a result, AEK and Slavia were allowed to participate in the 1998/99 UEFA Cup (where they were eliminated after winning a few rounds of the competition and did not end up playing each other).

According to the grounds of the interim order, released the following day, the CAS based its decision primarily on the circumstance that UEFA violated its duties of good faith and procedural fairness insofar as it enacted the Contested Rule too late, when the Cup Regulations for the 1998/99 season – containing no restriction for multiple ownership – had already been adopted, and shortly before the start of the 1998/99 season, at a time when ENIC and its clubs could legitimately expect that no restriction was going to be adopted for the said season.

In the interim order the CAS left open for the final award the question whether the Contested Rule could be deemed lawful under competition law and civil law, stating that all findings of fact and legal

assessments were made on a *prima facie* basis, without prejudice to the CAS final award to be rendered after additional factual and legal investigation.

On 23 July 1998, the CAS issued a notice that the CAS Arbitration Panel for the present dispute (hereinafter the «Panel») was constituted in the following composition: Mr. Massimo Coccia as President, Dr. Christoph Vedder as arbitrator appointed by the Claimants and Mr. George Abela as arbitrator appointed by the Respondent.

On 4 September 1998, upon request of the Claimants, pursuant to Article R44.3 of the Code the Panel ordered the Respondent to produce the reports and minutes of the meetings of the UEFA Juridical Committee and of the UEFA Committee for Club Competitions related to the present case. UEFA produced such documents, later providing a few more internal documents upon request of the Claimants.

On 14 September 1998, the CAS issued an order of procedure, detailing the procedural guidelines for the conduct of the arbitration. The order of procedure was accepted and countersigned by both sides. Subsequently, in the course of the proceedings, the Panel supplemented the initial order of procedure with several other orders concerning procedural and evidentiary questions.

On 15 October 1998, the Claimants filed their statement of claim, together with eleven bundles of exhibits. UEFA's response, together with forty exhibits, was submitted to the CAS on 27 November 1998.

On 18 November 1998, the Claimants filed with the CAS a petition pursuant to Article R34 of the Code, challenging the appointment of Mr. George Abela as arbitrator, on the grounds that some circumstances gave rise to legitimate doubts over his independence *vis-à-vis* UEFA, and requesting his removal. On 25 November 1998, Mr. Abela communicated to the CAS that he deemed the Claimants' allegations to be totally unfounded and unjustified; however, because of the very fact that doubts had been expressed regarding his independence and impartiality, for the sake of the CAS he felt that he had to resign from his function as arbitrator in the present case.

On 3 December 1998, the Respondent communicated to the CAS that, in substitution of Mr. Abela, it appointed as arbitrator Dr. Dirk-Reiner Martens. Therefore, the Panel was reconstituted in the new formation comprising Mr. Coccia as President and Messrs. Vedder and Martens as arbitrators. No objection has been raised by either party with respect to the new formation of the Panel.

On 24 December 1998, the Claimants filed with the CAS their reply to UEFA's response. On 1 February 1999, the Respondent filed its rejoinder. Subsequently, on 26 and 28 February 1999, both sides submitted their lists of witnesses and expert witnesses to be summoned to the hearing.

On 12 March 1999, the Panel issued a procedural order detailing directions with respect to the hearing and to the witnesses and experts to be heard.

The hearing was held on 25 and 26 March 1999 at the World Trade Center in Lausanne. The Panel was present, assisted by the *ad hoc* clerk Mr. Stefano Bastianon, attorney-at-law in Busto Arsizio/IT,

and by Mr. Matthieu Reeb, attorney-at-law and counsel to the CAS. The Claimants were represented by Mr. Petros Stathis, General Manager of AEK, and Mr. Vladimir Leska, General Manager of Slavia Prague, assisted by his personal interpreter, and represented and assisted by the following attorneys: Mr. Michael Beloff QC and Mr. Tim Kerr, attorneys-at-law in London/UK (Gray's Inn), Mr. Stephen Kon, Ms. Lesley Farrel and Mr. Tom Usher, attorneys-at-law in London/UK (SJ Berwin), Mr. Jean-Louis Dupont, attorney-at-law in Brussels/BEL, Mr. Marco Niedermann and Mr. Roberto Dallafior, attorneys-at-law in Zurich/CH. The Respondent was represented by Mr. Marcus Studer, Deputy Secretary General of UEFA, and represented and assisted by Mr. Ivan Cherpillod, attorney-at-law in Lausanne/CH, and by Mr. Alasdair Bell, attorney-at-law in Brussels/BEL. With the agreement of all parties two directors of ENIC, Mr. Rasesh Thakkar and (after his testimony had been given) Mr. Daniel Levy, also attended the hearing.

During the two days of hearing the following witnesses and expert witnesses were heard: Mr. Gerald Boon (economist of Deloitte & Touche), Mr. Ivo Trijbits (legal counsel to the Dutch club AFC Ajax NV), Mr. Daniel Levy (managing director of ENIC), Sir John Smith (advisor on security issues to the English Football Association), Lord Kingsland QC (former Member of the European Parliament) and Prof. Paul Weiler (professor of law at Harvard Law School), all called by the Claimants; Mr. Gordon Taylor (chief executive of the Professional Footballers Association) and Prof. Gary Roberts (professor of law at Tulane Law School), called by the Respondent. Each witness and expert witness was invited by the Panel to introduce himself and to tell the truth subject, as to statements related to facts, to the sanctions of perjury in accordance with Article R44.2 of the Code and Articles 307 and 309 of the Swiss Penal Code; each witness and expert witness rendered his testimony and was then examined and cross-examined by the parties and questioned by the Panel.

The parties presented their opening and intermediate statements on 25 March 1999 and their final arguments on 26 March 1999, the Respondent having the floor last in accordance with Article R44.2 of the Code. At the end of the final arguments both sides confirmed their written legal petitions (*infra*, paras. 1 and 4), with counsel for the Claimants also petitioning that the interim stay of the Contested Rule be extended indefinitely and that the award be communicated to the parties on a Friday after the closing of the London stock exchange and rendered public on the following Monday. The parties did not raise with the Panel any objection in respect of their right to be heard and to be treated equally in the present arbitration proceedings.

On 26 March 1999, after the parties' final arguments, the Panel closed the hearing and reserved its final award.

## LAW

### Parties' legal petitions and basic positions

1. The Claimants presented in their request for arbitration of 15 June 1998 and confirmed in their statement of claim of 15 October 1998 the following legal petitions:

*«That it be declared that the resolution of the Executive Committee of the UEFA of 19 May 1998, as notified to the UEFA member associations on 26 May 1998, regarding the Integrity of the UEFA Club Competitions: Independence of the Clubs is void;*

***eventualiter:***

*that the resolution of the Executive Committee of the UEFA of 19 May 1998, as notified to the UEFA member associations on 26 May 1998, regarding the Integrity of the UEFA Club Competitions: Independence of the Clubs be annulled;*

***subeventualiter:***

*that the Defendant be ordered not to deny now and in the future the admission of the Clubs to the UEFA Club Competitions on the ground that they are under common control; with all costs and compensations to be charged to the Defendant».*

At the hearing the Claimants also petitioned that the stay of the Contested Rule ordered by the CAS on 16 July 1998 be extended indefinitely and that the award be notified to the parties on a Friday afternoon and rendered public on the following Monday. The latter petition was subsequently reiterated in writing, with no objection raised by the Respondent.

2. The Claimants argue that the Contested Rule is unlawful because it violates Swiss civil law, European Community (hereinafter «EC») competition law and Swiss competition law, general principles of law, and EC provisions on freedom of establishment and free movement of capital. The Claimants focus their grievances particularly on Paragraph B.3 of the Contested Rule, providing that «in the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition». In summary, they assert the unlawfulness of the Contested Rule on the following ten grounds:
  - (a) *infringement of Swiss civil law* (grounds 1, 2, 3 and 4 of the statement of claim): violation of the UEFA Statutes because of the argued creation of different categories of members; breach of the principle of equal treatment because of discrimination between clubs which are under common control and clubs which are not; disregard of the Claimants' right to be heard; unjustified violation of the Claimants' personality;
  - (b) *infringement of EC competition law* (grounds 5 and 7 of the statement of claim): contravention of Article 85 (now 81) of the EC Treaty, because of an agreement between undertakings which has the object and effect of restricting, distorting and preventing competition and limiting investment within the common market; contravention of Article 86 (now 82) of the EC Treaty, because of an abuse by



- UEFA of its dominant position within the market for the provision of European football and related markets;
- (c) *infringement of Swiss competition law* (grounds 6 and 8 of the statement of claim): contravention of Article 5 of the Swiss Federal Act on cartels, because of an agreement between undertakings significantly affecting competition; contravention of Article 7 of the Swiss Federal Act on cartels, because of an abuse of UEFA's dominant position;
  - (d) *infringement of EC law on freedom of movement* (ground 10 of the statement of claim): contravention of Articles 52 (now 43) and 73 B (now 56) of the EC Treaty, because of restrictions on freedom of establishment and on free movement of capitals;
  - (e) *infringement of general principles of law* (ground 9 of the statement of claim): abuse by UEFA of its regulatory power with the purpose of preserving its position as the dominant organizer of European football competitions.
3. Underlying all such grounds are the Claimants' basic allegations that UEFA's predominant purpose in adopting the Contested Rule has been to preserve its monopolistic control over European football competitions and that a code of ethics would be adequate enough to address the issue of conflict of interests in the event that two commonly owned clubs are to participate in the same UEFA competition.
4. The Respondent submitted both in its answer of 22 July 1998 and in its response of 27 November 1998 the following legal petition:
- «UEFA respectfully requests the Court of Arbitration for Sport to dismiss all the legal petitions submitted by the Claimants, with all costs and compensations to be charged to the Claimants».*
5. The Respondent asserts that each and every legal ground put forward by the Claimants is entirely without merit. In particular, the Respondent asserts that it enacted the Contested Rule with the sole purpose of protecting the integrity of European football competitions and avoiding conflicts of interests. The Respondent argues that a code of ethics would be inadequate to that purpose, whereas the Contested Rule is a balanced and proportionate way of addressing the question, as it deals only with the issue of common control – basing the definition of «control» on EC Directive no. 88/627 (the so-called «Transparency Directive») – rather than with investment in football clubs.

## Procedural issues

### *Jurisdiction of the CAS*

6. The CAS has jurisdiction over this dispute on the basis of the arbitration agreement executed by and between the parties on 12 June 1998. Neither side has contested the validity of such arbitration agreement nor raised any objection to the jurisdiction of the CAS over the present dispute.

7. In addition, the Panel notes that the CAS could also be deemed to have jurisdiction under Article 56 of the UEFA Statutes, according to which «CAS shall have exclusive jurisdiction to deal with all civil law disputes (of a pecuniary nature) relating to UEFA matters which arise *between UEFA and Member Associations, clubs, players or officials, and between themselves*» (emphasis added).

#### *Applicable law*

8. Pursuant to Article R45 of the Code, the dispute must be decided «*according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law*». The parties agreed at the hearing of 15 July 1998 and confirmed in their briefs that Swiss law governs all issues of association law arising in this arbitration, and that the Panel should apply EC competition law and Swiss competition law if the dispute falls within the scope of these laws.
9. The choice of Swiss law does not raise any questions. Even if the parties had not validly agreed on its application, Swiss civil law would be applicable anyway pursuant to Article R45 of the Code and to Article 59 of the UEFA Statutes, according to which UEFA Statutes are governed in all respects by Swiss law. As to Swiss competition law, an arbitration panel sitting in Switzerland is certainly bound to take into account any relevant Swiss mandatory rules in accordance with Article 18 of the Swiss private international law statute (*Loi fédérale sur le droit international privé* of 18 December 1987, or «LDIP»).
10. With regard to EC competition law, the Panel holds that, even if the parties had not validly agreed on its applicability to this case, it should be taken into account anyway. Indeed, in accordance with Article 19 of the LDIP, an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met:
  - (a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called *lois d'application immédiate*);
  - (b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force;
  - (c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.
11. The Panel is of the opinion that all such conditions are met and that, pursuant to Article 19 of LDIP, EC competition law has to be taken into account. Firstly, antitrust provisions are often quoted by scholars and judges as fundamental rules typically pertaining to the said category of mandatory rules. Then, the close connection with the case derives from the fact that EC competition law has direct effect in eighteen European countries – fifteen from the European Union and three from the European Economic Area – in whose jurisdiction one can find most of the strongest football clubs taking part in UEFA competitions and, in

particular, one of the Claimants (AEK). Lastly, the Swiss Cartel Law, as is the case with various national competition laws around Europe (well beyond the borders of the said eighteen countries), has been inspired by and modelled on EC competition law; accordingly, the interests and values protected by such EC provisions are shared and supported by the Swiss legal system (as well as by most European legal systems).

12. The Panel notes that the Claimants have argued *inter alia* that UEFA violated the provisions of the EC Treaty on the right of establishment and on free movement of capital, but the parties have not explicitly agreed on the applicability of such provisions to this case. However, for the same reasons outlined with respect to EC competition law (*supra*, paras. 10-11), the Panel holds that it must also take into account EC provisions on freedom of establishment and of movement of capital.

## Merits

### *Relevant circumstances concerning European football*

13. Prior to discussing the specific legal issues raised by the parties, the Panel wishes to describe and discuss certain circumstances and situations concerning European football which have to be taken into account with reference to all such legal issues. In particular, the Panel considers it useful to briefly describe the current structure and regulation of football in Europe and to address the issue of the so-called «integrity of the game».
  - a) Regulation and organization of football in Europe
14. In European football there are several private bodies performing regulatory and administrative functions, each of which has different institutional roles, constituencies and goals. Leaving aside the international football federation («FIFA»), which is certainly the body exercising the highest regulatory and supervisory authority worldwide, UEFA is the only regulator of football throughout Europe. UEFA performs its regulatory function with respect to both professional and amateur football, including youth football. For the time being, UEFA is also the only entity organizing pan-European competitions both for club teams and national representative teams. With particular regard to UEFA club competitions, each season the participating clubs are the few top-ranked clubs of each national league, which at the end of a season earn the right to play in the UEFA competitions of the subsequent season. As already mentioned, UEFA organizes the Champions' League, the Cup Winners' Cup (cancelled as of the 1999/2000 season) and the UEFA Cup, with the minor competition Intertoto Cup used also as a qualifier for the UEFA Cup. The competition format has traditionally been the knock-out system based on the aggregate result of one home-match and one away-match (played two weeks later), with away goals and penalty kicks as tie-breakers. Clubs (particularly those investing more) tend to dislike this system because a single unlucky match can be enough to terminate the whole international season, and because there are fewer high-level matches to play. Mainly for this

reason, UEFA has in recent years organized rounds of competition (particularly in the Champions' League) based on small groups of teams playing each other home and away in round-robin fashion, with the top clubs of each group qualifying for the next round. The trend seems to be towards increasing this competition format, reserving the knock-out system only for a few rounds of the competition.

15. Since UEFA is a confederation of fifty-one national football federations, it has below it many football associations and organizations which set rules for their constituent members, in particular clubs and individuals associated with them, and organize and/or oversee all national, regional and local competitions. The structure of European football is often described as a hierarchical pyramid (*see* the EC Commission's «consultation document» drafted by the Directorate General X and entitled *The European model of sport*, Brussels 1999, chapter one).
16. At national level, the primary regulators are the national federations. Each national federation has a wide constituency of regional and local federations, associations, clubs, leagues, and individuals such as players, coaches and referees. National federations are private bodies which pursue the mission – which in some countries is entrusted upon them by national legislation as a form of delegation of governmental powers (as is the case, *e.g.*, in France with Law no. 84-610 of 16 July 1984) – to promote and organize football at all levels and to care for the interests of the whole of the sport and all its members, whether they are involved in the amateur or in the professional game. National federations also organize and manage the national representative teams, selections of the best national players which compete against the other national representative teams in competitions such as the World Cup, the Olympic Games and the European Championship.
17. In the European countries where football is most developed, a very important role is also performed by professional «leagues» (*e.g.*, the «Premier League» in England, the «Liga Nacional de Fútbol Profesional» in Spain or the «Lega Nazionale Professionisti» in Italy). National professional leagues are bodies concerned only with professional football, as their members are only the clubs which participate in the most important national professional championships. They organize and manage yearly, under the jurisdiction of the respective national federation, the highest national professional championship. Such annual championship is traditionally organized in round-robin format, with each club playing against all the other clubs twice, once at home and once away; clubs are awarded points depending upon whether they win (three points), draw (one point) or lose matches (no points), and the club with the highest number of points each season is the champion (usually with no final playoff, differently from other sports). National professional leagues are indeed similar in many respects to trade associations. They exist primarily to protect the interests of their member clubs and to provide them with some services, for instance settling disputes between them and trying to maximize their commercial benefits (*e.g.*, selling collectively some of the television rights) and to minimize their costs (*e.g.*, negotiating with players' associations).

18. Throughout Europe a general trend can be detected towards an increasing independence and autonomy of leagues *vis-à-vis* the national federations; accordingly, tense confrontation between leagues and federations is nowadays not rare. However, thus far leagues are still associated within, and supervised by, the respective national federations – in several countries, this is even mandated by the law – with degrees of autonomy varying from country to country. Due to this system, national football leagues around Europe do not enjoy the absolute independence and autonomy which United States sports leagues enjoy. In addition to other major differences, European professional leagues are not «closed» leagues, and their membership varies slightly each season because at the end of the season some of the bottom-ranked clubs are relegated to the inferior national division and the highest ranked clubs from such division are promoted to the higher national division. This system of relegation and promotion applies more or less in the same way to all the other national and regional divisions and championships below the high-level ones. Consequently, it can happen in European football – as indeed it has done more than just a few times – that amateur or semi-amateur clubs, even from small towns, over the years earn their way up to professional championships and eventually transform into successful professional clubs. This system of promotion and relegation is generally regarded as «one of the key features of the European model of sport» (EC Commission, DG X, *The European model of sport*, Brussels 1999, para. 1.1.2).
  
19. At pan-European level, no transnational football leagues exist yet. Currently, there is only an association of the main national leagues in Europe, which does not organize any competitions and is basically only a forum for discussion and an instrument of coordination. Recently, a private commercial group («Media Partners») has attempted to create *ex novo* a European football league outside of the UEFA realm and has even notified the EC Commission of a number of draft agreements between Media Partners and eighteen founder clubs – comprising some of the most famous European clubs – concerning the establishment and the administration of two main pan-European football competitions, the «Super League» and the «Pro Cup», involving a total of 132 clubs from all territories covered by UEFA-affiliated national associations (*see Official Journal EC*, 13 March 1999, C 70/5). For the time being this attempt seems to have been aborted, *inter alia* probably because UEFA has modified the organization of its competitions in a way which is certainly pleasing to most important European clubs.
  
20. As to European football clubs, they are not all shaped in the same legal manner around Europe. Most professional clubs are incorporated as stock companies – and sometimes their shares are even listed on some stock exchanges (*e.g.* Manchester United and several other clubs in England, S.S. Lazio in Italy) –, but there are countries where some or all the clubs are still unincorporated associations with sometimes thousands of members who elect the association's board (*e.g.* F.C. Barcelona and Real Madrid C.F. in Spain or the German clubs).
  
21. The above outlined traditional structure of European football might change in the future. In particular, especially after the cited attempt of Media Partners, it might be envisaged that sooner or later there will be in some countries or at a pan-European level some closed (or semi-closed) leagues independent from national federations and from UEFA and modelled

on United States professional leagues. However, for the time being, the above outlined structure still prevails and it is very difficult to compare it to the sports structure in the United States. Not only are there in Europe no closed professional leagues such as the NBA or the NFL, but there are no collegiate competitions such as the NCAA either. As a result, the Panel maintains that although any analysis of United States sports law is very instructive – in this respect the Panel appreciates the parties’ efforts in presenting the views and testimony of renowned experts on this subject – it has limited precedential value for the present dispute and its significance must be weighed very carefully. For example, the Panel considers that to characterize UEFA as a «league» comparable to United States professional leagues, as has been done in some testimony, is factually and legally misplaced and, therefore, potentially misleading for an examination of the present dispute.

b) The «integrity of the game» question

22. Much of the written and oral debate in this case has centred around the question of the «integrity of the game». Both Claimants and Respondent have shown that they are seriously concerned with this question. On the one hand, the Respondent has repeated over and over that it has a specific duty to protect the integrity of the game and that this has been the only motive behind the Contested Rule. On the other hand, the Claimants have expressly stated that they and ENIC accept and espouse the need to preserve sporting integrity, and that they also accept that UEFA has a current responsibility to safeguard the integrity of football in its role as organizer and regulator of European football competition.
23. Several witnesses have stated that the highest standards are needed for the integrity of the game (Mr. Taylor), that the integrity of sports is crucial to the sports consumer (Professor Weiler), and that *«football can only continue to be successful if it is run according to the highest standards of conduct and integrity, both on and off the field»* (Sir John Smith).
24. As concern for the integrity of the game is indeed common ground between the parties, the question is then how «integrity» needs to be defined and characterized in the context of sports in general and football in particular. Part of the debate between the parties has focused on integrity in its typical meaning of honesty and uprightness, and the Claimants have argued, supported by some witnesses (in particular Sir John Smith) for the necessity of a «fit and proper» test in order to vet owners, directors and executives of football clubs before allowing them to hold such positions. The debate has also evidenced the connection between the notion of integrity in football and the need for authenticity and uncertainty of results from both a sporting and an economic angle. Some witnesses have stated that uncertainty of results is the most important objective of football regulators (Mr. Taylor) and the critical element for the business value of football (Mr. Boon).
25. The Panel notes, quite obviously, that honesty and uprightness are fundamental moral qualities that are required in every field of life and of business, and football is no exception. More specifically, however, the Panel is of the opinion that the notion of integrity as applied to football requires something more than mere honesty and uprightness, both from a

sporting and from a business point of view. The Panel considers that integrity, in football, is crucially related to the *authenticity of results*, and has a critical core which is that, in *the public's perception*, both single matches and entire championships must be a true test of the best possible athletic, technical, coaching and management skills of the opposing sides. Due to the high social significance of football in Europe, it is not enough that competing athletes, coaches or managers are in fact honest; the public must perceive that they try their best to win and, in particular, that clubs make management or coaching decisions based on the single objective of their club winning against any other club. This particular requirement is inherent in the nature of sports and, with specific regard to football, is enhanced by the notorious circumstance that European football clubs represent considerably more in emotional terms to fans – the ultimate consumers – than any other form of leisure or of business.

26. The Panel finds *inter alia* confirmation and support for the view that the crucial element of integrity in football is the *public's perception of the authenticity of results* in two documents exhibited by the Claimants, *viz.* the well researched and very insightful reports presented by Sir John Smith to the English Football Association on «Betting on professional football within the professional game» (1997) and on «Football, its values, finances and reputation» (1998). The Smith reports are particularly valuable evidence because they were not prepared specifically for this case. Both reports make quite clear that the most important requirement for football is not honesty in itself or authenticity of results in itself, but rather the public's perception of such honesty and such authenticity.

27. Here are a few excerpts from the Smith reports (with emphasis added):

*«public perception* dictates that players and others involved in the game should not benefit from their “insider” position»;

*«the public has a right to expect* that a participant in football will play for his team to win, or make management decisions based on the team winning, as their sole objective. Anything whatsoever that detracts from that prime purpose has to be positively discouraged»;

*«even if a result of such a bet is not that a player or official actually intends not to try to win the game, the public's perception* of the integrity of the game would be prejudiced in such a situation»;

*«the interest of fans in the game would quite rightly not continue at present levels if they had reason to believe* that the outcome of any matches was or may be controlled by factors other than personal efforts of those participating in the game, aimed at their team winning»;

*«football must preserve its great strength in business terms: the enormous hold which individual clubs have over the loyalty of their supporters. This makes the game attractive to advertisers, sponsors, television and so on. Maintaining that loyalty is not being sentimental; being responsive to spectator concerns is simply good business. That means, amongst other things, being able to reassure supporters* that the game is straight».

28. Having clarified what is meant by integrity of the game, the question is then whether multiple ownership of clubs in the context of the same competition has anything to do with

such integrity and, therefore, represents a legitimate concern for a sports regulator and organizer. In other words, can multiple ownership within the same football competition be publicly perceived as affecting the authenticity of sporting results? Can the public perceive a conflict of interest which might contaminate the competitive process when two commonly owned clubs play in the same sporting event?

29. The Claimants have addressed this question mostly from the angle of match-fixing, arguing that it is highly unlikely that a match could be fixed without being detected sooner or later and that, insofar as match-fixing is possible at all, it is also feasible – as has happened on some occasions in the past – with respect to matches between unrelated clubs. In particular, the Claimants have argued that match-fixing necessarily involves complicity by a significant number of people whom, if the truth were discovered, would be ruined and each of whom would, after the event, have a hold over the accomplices. The Claimants have also argued that it is in the interest of a common owner, especially if the common owner is a corporation listed on the stock exchange, that each club does as well as possible on both the economic and sporting level, and that the existing criminal and sporting penalties are sufficient to deal with the risk of match-fixing as well as the perceived risk thereof. The Claimants have supported such arguments with several written statements by players, referees and managers, all essentially asserting in a similar vein that it is almost impossible to fix a football match, that multi-club ownership does not entail any greater threat to sporting integrity than single ownership and that a pledge to respect a «code of ethics» would suffice. Mr. Boon has also testified that multi-club owners would place their entire business at risk if they sought to fix matches and, therefore, this cannot be part of their financial strategy or activity. The Respondent has, in turn, presented some written statements supporting its argument that common ownership is a threat to the integrity of competition and that self-control by multi-club owners through a code of ethics would not be an adequate response to such threat.
30. The Panel is not persuaded that the main problem lies in direct match-fixing (meaning by this the instructions and bribes given to some players so that they lose a match). Indeed, the Panel finds some merit in the Claimants' arguments that direct match-fixing in football is quite difficult (albeit far from impossible, as notorious past cases in France, Italy or other countries demonstrate), that an attempt at direct match-fixing has a fair chance of being detected sooner or later, that any such discovery would eventually harm the multi-club controlling company and that in principle the honesty rate of multi-club owners, directors and executives cannot be any worse than that of single club owners, directors and executives.
31. However, even assuming that no multi-club owner, director or executive will ever try to directly fix the result of a match between their clubs or will ever break the law, the Panel is of the opinion that the question of integrity, as defined, must still be examined, also in the broader context of a whole football season and of a whole football competition. In short, the Panel finds that the main problem lies in the aggregate of three issues that need further analysis: the allocation of resources by the common owner among its clubs, the



administration of the commonly owned clubs in view of a match between them, and the interest of third clubs.

32. The analysis of such issues relies on two assumptions. The first assumption, as already mentioned, is that multi-club owners, directors or executives do not try to directly fix a match and always act in compliance with any laws and with sporting regulations. The second underlying assumption is that the multi-club controlling company's executives are in constant contact with the controlled clubs' own executives and structures, as is normal within a group of companies; in fact, according to EC case law and practice all the companies within a group – parent companies, holding companies, subsidiaries, *etc.* – are considered as a single economic entity (*see e.g.* the EC Commission Notice «on the concept of undertakings concerned», in *Official Journal EC*, 2 March 1998, C 66/14, para. 19). The Panel has indeed been impressed by ENIC's description of its *bona fide* efforts at isolating the management of each of its controlled clubs from the controlling company's and from other clubs' structures. However, the analysis is not to be made with reference to ENIC but with reference to a hypothetical individual, company or group owning two or more football clubs and whose organization might be less careful than ENIC about isolating each controlled club's structure. After all, even ENIC's isolation policy does not seem so strict, as Mr. Boon reports that:

*«during the time for completion of this report, I have also noted that employees from ENIC's head office in London have travelled to Greece, Italy, the Czech Republic and Switzerland to impart their industry and cross-club experience to individual clubs controlled by ENIC».*

This has been confirmed by Mr. Patrick Comminos, General Manager of AEK, who has stated in his written testimony:

*«As general Manager, my contact with the owners of the club is on a daily basis, especially with whichever member of ENIC is in Athens at the time».*

Accordingly, the Panel is of the opinion that also the second underlying assumption is appropriate.

33. The first issue is the *allocation of resources by the common owner among its clubs*. Given that in UEFA competitions there is only one sporting winner and there are only a few business winners (the clubs which advance to the last rounds of the competition), and given that a huge amount of money is required in order to keep a football club at the top European level, it would appear to be a waste of resources for a common owner to invest in exactly the same way in two or more clubs participating in the same competition. This is particularly true if the commonly owned clubs are located in different countries (as is generally the case, since at national level there are often rules hindering multiple ownership). After the *Bosman* ruling (EC Court of Justice, Judgement of 15 December 1995, case C-415/93, in *E.C.R.* 1995, I-4921), competition for hiring the top European players is wholly transnational, whereas most of a club's revenues – television rights, game and season tickets, merchandising, advertising and sponsorship – still depend on the national and local markets because of consumer preferences and natural barriers. Therefore, although the costs of creating a team which will potentially be successful in a UEFA competition tend nowadays

to be comparable all over Europe – players’ remuneration being by far the single most important cost for professional clubs – a club’s revenues and rates of return on investments are quite different even with comparable successful sporting results. Revenues and rates of return for football clubs are much higher in a few countries, such as England, France, Germany, Italy and Spain. This explains why the best, and most costly, players always end up in those few countries and why clubs from those countries currently dominate UEFA competitions.

34. The data contained in the economic report presented by Mr. Boon provide ample support for such propositions. As to transnational competition for players and as to their remuneration, Mr. Boon’s research shows that: *«internationally renowned clubs in Europe are willing to compete for the services of leading football players to maintain their successful international position. They are also typically the clubs with the financial resources to do so. ... it costs a significant amount to buy a leading player out of his existing club contract and, typically, to offer the player a premium on his remuneration to entice him to move elsewhere. ... the rate of increase in players’ wages has been nothing short of spectacular in the last five years. In Italy, from 1995/96 to 1996/97 the increase was 24.1% and 35% in the English Premier League».*

Mr. Boon’s report shows also that *«there is an active cross-border European transfer market in which clubs compete for the top players. ... 31% of transfers between major European associations in 1996/97 were cross border».*

With regard to the enormous disparity of revenues between different countries, Mr. Boon reports that *«in 1996/97 the second largest English club (Newcastle) had a turnover of ... \$69.9 million and Juventus’ turnover in Serie A was \$74.1 million; whereas SK Slavia Prague (the number 2 Czech club) had an income of ... \$2.2 million and AEK (one of the top 3 Greek clubs) an income of ... \$4.9 million»* (figures in national currencies have been omitted).

With regard to sporting results deriving from this situation, Mr. Boon confirms the well-known fact that *«there is some polarisation of market power developing within the European market. That polarisation is manifest in that clubs from the larger (and relatively more prosperous) countries with bigger “budgets” for transfers and players’ wages have increasingly come to dominate European competition».*

35. Given the above situation, assuming the viewpoint of the shareholders of a corporation controlling two clubs of different nationality participating in the same UEFA competition, it would certainly be a more efficient and more productive allocation of the available resources (and thus an economically sounder conduct by directors and executives) to allocate them, and thus to allocate the best players, in such a way as to have a «first team», capable of competing at top European level and situated in the richer market, and a «second team» located in the less developed market and which would be useful for, *inter alia*, allowing younger players to gain experience and to be tested with a view to a possible transfer to the first team. The testimony of Mr. Trijbits has given some empirical evidence of this kind of attitude by top rated clubs which acquire interests in clubs of lower rank.

36. The Panel is of the opinion that such differentiated allocation of resources among the commonly owned clubs is in itself perfectly legitimate from an economic point of view, and given its economic soundness it might even be regarded as a duty of the directors *vis-à-vis* the shareholders of the controlling corporation. However, the fans/consumers of the «second club» – which, in order to be eligible for UEFA competitions, is necessarily one of the top clubs of its country, supported in its international matches by most of the football fans of that country – would inevitably perceive that management decisions are not based on the only objective of their club winning against anybody else.
37. Furthermore, even if the different clubs are located in equally profitable (or unprofitable) markets and there is no diverse treatment as a first team and a second team, the common parent company might nevertheless decide, as is usual in a group of companies, to divert resources from one controlled club to another in order to follow wholly legitimate business strategies, for example if the sale of one of the clubs is contemplated. Some examples of such diversion of resources have been provided by Mr. Taylor, who stated in his written testimony:

*«When we had common ownership in this country of Oxford United and Derby County by Robert Maxwell there was a transfer of Oxford United's leading players to Derby County at a sum that was less the normal market value and this was very much against the wishes of the then manager of Oxford, Mark Lawrenson. We also had problems regarding Peter Johnson, owner of Tranmere Rovers, moving to Everton and consequent problems with the transfer of monies and questions about the transfer of the goalkeeper from Tranmere to Everton. Similar problems occurred with common ownership by Anton Johnson of Rotherham United and Southern United and there were allegations of asset stripping».*

In any event, the Panel is of the opinion that in situations of common ownership, even if a diversion of resources does not really happen, the fans of either club would always be inclined to doubt whether any transfer of players or other management move is decided only in the interest of the club they support rather than in the interest of the other club controlled by the same owner.

38. The second issue is the *administration of commonly owned clubs before a match between them*. It has already been described how shareholders, and thus executives, of the common parent company might have a legitimate economic interest in seeing a given controlled club prevail over another because of the better financial rewards which can be reaped from the success of the first one. In line with the initial assumption, the Panel considers that multi-club owners or executives might favour one club over another without any need to violate the law or to resort to risky attempts of direct match-fixing. In this respect, if a coach (or maybe a club physician) is encouraged or forced to ensure that the best team available is not fielded, it is unclear whether this could meet the definition of match-fixing. However, since there are sporting rules prescribing that clubs always field the best team available – albeit such rules are usually deemed impossible to apply and enforce – and risks (due to the involvement of coaches or physicians) perhaps close to those of direct match-fixing, the Panel does not wish to take into account this hypothetical circumstance in the present analysis.

39. Executives might have various ways of affecting or conditioning the performance of their teams in a given match, or set of matches, without even getting close to violating laws or sporting regulations and without even speaking to players or coaches. A first way might be connected with performance-related bonuses, which are wholly legitimate under any law. As has been evidenced at the hearing, bonuses linked to results in single matches or in entire championships are always a fair portion of players' (and coaches') remuneration, and ENIC clubs are no exception to this practice (Mr. Levy's testimony). In Mr. Boon's written report it is stated that one of the relevant costs associated with a club playing in Europe is «player bonuses for playing and winning UEFA matches». Mr. Boon also testified that all club owners and executives would, understandably, like a larger percentage of the total player remuneration to relate to performance than the percentage which usually applies (10% to 20%). The Panel observes that the widespread practice of bonuses demonstrates that professional players – no differently from other professionals (one can think of contingent fees) – are quite sensitive to incentives. Accordingly, it would be easily possible and perfectly legal for multi-club executives, by adjusting bonuses, to highly motivate the players of one team with suitable incentives and not at all (or much less) the players of the other team.
40. A second way might be connected with players' transfers. Up to a certain point in the football season (nowadays, very late in the season) it is always possible to obtain new players or to let players leave. It is quite easy to induce players to move from a club to another through a wage hike or the opportunity to play in a winning team. Therefore, at any moment before a match between the commonly owned clubs, team rosters could easily change because of management and business needs rather than coaching decisions. One can find in the sporting press plenty of examples of players given away or hired by club owners and executives without the prior consent, and sometimes even without the prior knowledge, of the coaching staff.
41. A third relevant way of influencing the outcome of a match between commonly owned clubs might be connected with «insider information». One team could have, through common executives, access to special knowledge or information about the other team which could give the first team an unfair advantage. There is a relevant difference between widely available information (such as tapes of the other team's official matches or any news which has appeared in the press) and confidential information obtained from a person within the opponent club's structure (*e.g.* with regard to unpublicized injuries, training sessions, planned line-up, match tactics and any other peculiar situation concerning the other team).
42. Another, more trivial, way of conditioning team performances could even be connected with the day-to-day administration of a team in view of a match, particularly of an away match. There are plenty of choices usually made by club executives – *e.g.* with regard to travel, lodging, training, medical care and the like – which may condition either positively or negatively the attitude and performance of professional football players.
43. The third issue concerns *the interest of third clubs*. Whenever competitions have qualification rounds based on groups of teams playing each other home and away in round-robin format, the interest of unrelated third clubs ending up in a qualification group together with two

commonly owned clubs is quite evident. Football history provides unfortunately various instances of matches – even in the World Cup under the eyes of hundreds of millions of television viewers – where both teams needed a draw to the detriment of a third team and in fact obtained such a draw without much effort and without anybody explicitly admitting any agreement afterwards (in fact, probably true agreements were never made, common interest being enough for an unspoken understanding, an «*entente cordiale*»). It is true, this can happen with single owned clubs as well as with commonly owned clubs, but the multi-club owner or executive has additional ways of facilitating an (already easy) unspoken understanding between the teams, for example setting bonuses for drawing higher than, or even equal to, bonuses for winning the match. A third club's interest might also be affected when, before playing the last match or matches of a round-robin group, one of the two commonly owned clubs has already virtually qualified or been eliminated and the other is still struggling; in this case the multi-club owner or executive might be tempted to induce (by the described lawful means) the first club to favour the other club in the last match or matches.

44. As mentioned (*supra*, para. 14), due also to the preferences of the most influential clubs, the current trend in the organization of UEFA competitions (particularly the Champions' League) is more and more towards qualification rounds in round-robin format and, conversely, away from competition rounds played in knock-out format. Such an organizational trend renders this issue particularly delicate, because it increases the need to protect third competitors. Needless to say, even if in fact the outcome of a game between two commonly owned clubs is absolutely genuine, a disadvantaged third club and its fans will inevitably tend to perceive the outcome as unfair.
45. The analysis of the three above issues shows that, even assuming that multi-club owners, directors or executives always act in compliance with the law and do not try to directly fix any match, there are situations when the economic interests of the multi-club owner or parent company are at odds with sporting needs in terms of public perception of the authenticity of results. It may be desirable that multi-club directors and executives safeguard sporting values and act counter to the parent company's wishes and economic interests. However, what about the legitimate economic interests of the shareholders? What about the investors in the stock exchange? Would the shareholders and investors be prepared to accept from a director or an executive the «sporting uncertainty» justification for not having done his/her best, without violating any laws, to promote their economic interests? The Panel is of the opinion that in such a situation there is an inescapable pressure for legitimate (or sometimes «grey-area») behaviour which is in the interest of the controlling company and in the interest of some of the controlled clubs, but not in the interest of *all* the controlled clubs and their fans, or not in the interest of third clubs or football fans in general. As a result, the Panel holds that a problem of *conflict of interest* does exist in multi-club ownership situations.
46. Several sporting bodies and some State legislators have indeed issued rules in order to deal with this question. For example, among European sports bodies there are rules dealing with multi-club ownership in the English Premier League, the English Football League, the Scottish Football Association, and the Spanish football and basketball professional leagues.

In Spain a limit to multi-club ownership in the same competition is prescribed by law: Article 23 of the 1990 Sports Act (*«Ley 10/1990, de 15 de octubre, del Deporte»* as subsequently amended) currently forbids any kind of cross-ownership between Spanish professional clubs and limits the possible direct or indirect shareholding or voting rights in more than one club participating in the same competition to 5%. In Spain, the issue appears to be of particular public awareness because of the case of a well-known entrepreneur who has been suspected and found to hold indirectly, through various companies or figure-heads, shares in various professional football clubs, some of them participating in the same league division. In particular, the Spanish press raised some serious suspicions with regard to the outcome of certain matches between clubs allegedly under common control. Rules prohibiting investment in more than one professional club can also be found in renowned United States sports leagues, such as the National Basketball Association («NBA»), the National Football League («NFL»), the National Hockey League («NHL»), and in baseball the American League and the National League (forming together the Major League Baseball or «MLB») and the minor leagues associated with the National Association of Professional Baseball Leagues («NAPBL»). This attitude by the most important American sports leagues seems to be shared by the United States Court of Appeals for the Second Circuit, which has stated that *«no single owner could engage in professional football for profit without at least one other competing team. **Separate owners for each team are desirable in order to convince the public of the honesty of the competition**»* (Judgement of 27 January 1982, *NASL v. NFL*, 670 F.2d 1249, at 1251, emphasis added).

47. The Panel notes that there is evidence enough showing that a certain number of sports regulators, and some national legislators or judges, perceive that multi-club ownership within the same sporting competition implies a conflict of interest. Even Mr. Karel Van Miert, EC Commissioner for competition policy, has stated before the European Parliament, in reply to written and oral questions posed by some Parliament Members, that *«clearly, if clubs with the same owner can take part in the same competitions, whether national or international, **doubts may arise as to whether the outcome is really undecided in advance**»* (answers given by Mr. Van Miert on behalf of the Commission to parliamentary questions nos. E-3980/97, 0538/98, P-2361/98, emphasis added).

In his testimony, Professor Weiler characterized this conflict of interest issue as an «illusion» and counsel for the Claimants picked up and utilized such locution in the course of the final oral argument. The Panel is of the opinion that, even assuming (but not conceding) that there is no true conflict of interest, it must be acknowledged that «clearly ... doubts may arise» (as put by Mr. Van Miert). The mere fact that some knowledgeable authorities like sports regulators, national legislators or judges, and European commissioners are under such «illusion» proves that the general public – the consumers – might also easily fall under an analogous «illusion». After all, even Professor Weiler himself, a couple of years before studying in depth the issue of multi-club ownership in order to be an expert witness before this Panel, wrote that *«from the point of view of the League as a whole, there are also significant potential advantages from assigning control and responsibility for individual teams to an identifiable owner. On the playing field or court, **this reinforces the impression among fans that their favored team is fully committed to winning all its games.** ... With respect to business decisions made off the field, separate*

*ownership and control of individual teams may be more likely to enhance the team's appeal and extract the revenues available in its local market» (WEILER, Establishment of a European League, in FIBA International Legal Symposium (June 1997), Bilbao 1999, 77, at 87-88).*

Therefore, the perception of an inherent conflict of interest in multi-club ownership within the same championship or competition seems wholly reasonable.

48. As a result, the Panel finds that, when commonly controlled clubs participate in the same competition, the *«public's perception will be that there is a conflict of interest potentially affecting the authenticity of results»*. This reasonable public perception, in the light of the above characterization of the integrity question within football (*see supra*, paras. 25-27), is enough to justify some concern, also in view of the fact that many football results are subject to betting and are inserted into football pools all over Europe. This finding in itself, obviously, does not render the Contested Rule admissible under the different principles and rules of law which still have to be analyzed. At this stage of its findings, the Panel merely concludes that ownership of multiple clubs competing in the same competition represents a justified concern for a sports regulator and organizer.

*Swiss civil law*

49. The Claimants argue that the Contested Rule is unlawful under Swiss civil law because of the procedure by which it was adopted and for reasons of substance. With respect to procedural grounds, the Claimants assert that in adopting and enforcing the Contested Rule the Respondent (1) violated the UEFA Statutes by creating different categories of members, and (2) failed to observe fair procedures, disregarding in particular the clubs' right to a legal hearing. As to substantive grounds, the Claimants assert that the Respondent (3) infringed the principle of equal treatment by discriminating between clubs which are under common control and clubs which are not, and (4) violated without justification the personality of the clubs. The Respondent rejects all such claims.

a) Compliance with UEFA Statutes

50. Article 75 CC provides that a resolution taken by an organ of an association which contravenes the law or the association statutes can be judicially challenged by any member of the association who has not approved it.

51. The Claimants argue that they should be considered as «indirect members» of UEFA because they are members of the respective national associations (*i.e.* federations) which, in turn, are members of UEFA. Therefore, they claim that UEFA violated its own Statutes insofar as the Executive Committee created different categories of clubs – clubs under common control *vis-à-vis* clubs which are not – and thus different categories of indirect members, without the power to do so (as the creation of different categories of members would require an amendment to the Statutes, which can be done only by the UEFA

Congress). In response, UEFA points out that the national federations rather than the clubs are its members and that, in any event, it did not create different membership categories but it merely amended the conditions of admission to UEFA club competitions in order to eliminate conflict of interest situations.

52. The Panel is not persuaded that clubs could be considered «indirect members» of UEFA. Art. 65.1 CC provides that the general assembly of a Swiss association is competent to decide on the admission of its members. If clubs had a right to be considered (indirect) members of UEFA because they are affiliated to their national federation, they evidently would acquire such status through a decision of such national federation, that is a body which surely is not the competent general assembly – the UEFA Congress – and this would be hardly compatible with Article 65.1 CC. Moreover, Article 5.1 of the UEFA Statutes, entitled «Membership», establishes that «membership of UEFA is open only to national football associations situated in the continent of Europe who are responsible for the organization and implementation of football-related matters in their particular territory»; clearly clubs do not meet these requirements. Clubs are not ignored by the Statutes, as they are mentioned in several provisions (Articles 1, 7, 23, 45, 46, 49, 54, 55 and 56) but without any hint of them being considered indirect members. The UEFA Statutes attribute voting rights only to national federations, and Article 75 CC refers to members which have voting rights within the association whose resolution is challenged. Clubs are affiliated to and may have membership and voting rights within their national federations, where they can elect the federation’s board and president, who represents the national federation and thus all the national clubs within UEFA. Within the national federations there are indeed different categories of clubs – *e.g.* female and male clubs, amateur and professional clubs – but this depends only on provisions included in the statutes of the national federations.
53. In any event, even assuming that the clubs could be regarded as indirect members of UEFA, the Panel does not see in the Contested Rule any creation of different categories of member clubs but rather the establishment of conditions of participation in UEFA competitions. Among such conditions are also, for example, stadium safety requirements (Articles 3 and 8 of the 1998/99 Regulation of the UEFA Cup and the related booklet; *see supra*, para. 8). Applying the Claimants’ rationale, this would imply the creation of different categories of clubs, those with an adequate stadium and those without. In other words, any condition of admission to a competition could be interpreted as a creation of categories of clubs. The Panel considers that there is a substantial difference between «club categories» and «conditions of participation». On the one hand, the notion of category implies a club’s formal and steady status, which is prerequisite for any kind of competition (national or international) in which that club takes part, and which is modifiable only through given formal procedures (*e.g.*, the transformation of an amateur club into a professional one, or *vice versa*). On the other hand, the notion of «conditions of participation» implies more volatile requirements which are checked when, and only when, a club enters a given competition, and which are often specific to that competition (*e.g.*, in order to compete in some national championships, clubs must provide financial guarantees which are different in type and amount from country to country; at the same time, in order to compete in, say, the Greek



championship it is absolutely irrelevant that the owner of a participating club controls other clubs abroad).

54. Article 46.1 of the UEFA Statutes provides that the «*Executive Committee shall draw up regulations governing the conditions of participation in and the staging of UEFA competitions*». As the UEFA Statutes confer to the Executive Committee the power to enact rules concerning conditions of participation in a UEFA competition, the Panel holds that in adopting the Contested Rule the UEFA Executive Committee did not act *ultra vires*, and thus UEFA did not violate its own Statutes.
- b) Right to a legal hearing and to fair procedures
55. The Claimants argue that, under Article 75 CC, members of an association have the right to be heard when resolutions are passed which affect them to a significant extent. Therefore, the Claimants assert that, being indirect members of UEFA, they were entitled to a legal hearing before the adoption of the Contested Rule, and that UEFA therefore infringed the principle *audiatur et altera pars*. More generally, the Claimants assert that association members have a right to fair procedures, and that *inter alia* the Respondent adopted the Contested Rule too shortly before the start of the new season. The Respondent replies by insisting that the clubs are not indirect members of UEFA and by asserting that it acted strictly in accordance with its statutory regulations and that AEK had enough time to adjust to the Contested Rule.
56. The Panel notes that the Claimants base this ground, like the previous one, on the assumption that clubs are «indirect» members of UEFA, because they are affiliated to their respective national federations which in turn are members of UEFA. For the reasons already stated, the Panel is not persuaded by this construction. The Panel finds the argument even less persuasive if such characterization of the clubs as indirect members implies, as the Claimants argue, the necessary consequence that *every indirect member* should be heard by UEFA before passing a resolution which could affect such indirect member. This would mean that, if a resolution affects amateur clubs, UEFA should consult with tens (perhaps even hundreds) of thousands of clubs. As all players, coaches and referees are also affiliated to their national federations – millions of individuals throughout Europe –, they could also claim to be indirect members and every one of them could request that he/she be heard by UEFA. Even if one was to limit the right to be heard only to clubs potentially interested in UEFA competitions – *i.e.* all clubs competing in the highest championship of every UEFA member federation – there would still be hundreds of clubs to be consulted. For an international federation, this would amount to a procedural nightmare and would paralyze any possibility of enacting regulations. The Panel maintains that the consequence is so absurd that the reasoning is fallacious.
57. In any event, even assuming that for some purposes clubs could be considered as indirect members of UEFA, the Panel is of the opinion that «indirect» members could not be wholly equated with «direct» members. Therefore, clubs could not claim anyway the right to be

heard when general resolutions are adopted by UEFA. It is certainly opportune that UEFA consults with at least some of the clubs, or possibly with some of the national leagues, before adopting rules concerning conditions of admission to its competitions, but in the Panel's view this cannot be construed as a legal obligation under Swiss association law.

58. With regard to the right to be heard, the Panel wishes to stress that the CAS has always protected the principle *audiatur et altera pars* in connection with any proceedings, measures or disciplinary actions taken by an international federation *vis-à-vis* a national federation, a club or an athlete (*see* CAS 91/53 *G. v. FEI*, award of 15 January 1992, in M. REEB [ed.], *Digest of CAS Awards 1986-1998*, Berne 1998, 87, paras. 11-12; CAS 94/129 *USA Shooting & Q. v. UIT*, award of 23 May 1995, *ibidem*, 203, paras. 58-59; CAS OG 96/005, award of 1 August 1996, *ibidem*, 400, paras. 7-9). However, there is a very important difference between the adoption by a federation of an *ad hoc* administrative or disciplinary decision directly and individually addressed to designated associations, teams or athletes and the adoption of a general regulation directed at laying down rules of conduct generally applicable to all current or future situations of the kind described in the regulation. It is the same difference that one can find in every legal system between an administrative measure or a penalty decided by an executive or judicial body concerned with a limited and identified number of designees and a general act of a normative character adopted by the parliament or the government for general application to categories of persons envisaged both in the abstract and as a whole. The Panel remarks that there is an evident analogy between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities, and that similar principles should govern their actions. Therefore, the Panel finds that, unless there are specific rules to the contrary, only in the event of administrative measures or penalties adopted by a sports-governing body with regard to a limited and identified number of designees could there be a right to a legal hearing. For a regulator or legislator, it appears to be advisable and good practice to acquire as much information as possible and to hear the views of potentially affected people before issuing general regulations – one can think of, *e.g.*, parliamentary hearings with experts or interest groups – but it is not a legal requirement. As a United States court has stated, requiring an international sports federation «*to provide for hearings to any party potentially affected adversely by its rule-making authority could quite conceivably subject the [international federation] to a quagmire of administrative red tape which would effectively preclude it from acting at all to promote the game*» (*Gunter Harz Sports v. USTA*, 1981, 511 F. Supp. 1103, at 1122).
59. Furthermore, in any event, the Panel observes that ENIC – clearly being the most interested party and evidently representing also the Claimants – was in fact heard by UEFA at a meeting held on 24 February 1998 (*supra*, para 6). In a letter from Mr. Hersov of ENIC (enclosing the proposed *Code of Ethics*) sent on the following day to Mr. Studer of UEFA, it is possible to read *inter alia*:

«...*We appreciated your and Marcel's open and frank discussion with us, and the mutual recognition of UEFA and ENIC's interests, objectives and concerns. From UEFA's perspective, the sanctity of the game and the various European competitions are paramount. You are also under some pressure to be seen to be responding responsibly to members concerns, and we appreciate and recognize this pressure. ... We feel that the proposed rule change banning teams with common ownership from competing*

*in the same competition would be extremely damaging to ENIC. Its implementation would be very harmful to ENIC and it would materially impact the clubs which we currently own ...»* (emphasis added).

Hence, at the meeting of 24 February 1998 UEFA did raise the issue of a rule such as the Contested Rule being contemplated and the Claimants in fact had a possibility, through their common parent company ENIC, of expressing their opinion to UEFA and of making very clear their dissatisfaction with the envisaged new rule on multi-club ownership and the potential damage deriving therefrom. For all the above reasons, the Panel holds that the Respondent did not infringe the principle *audiatur et altera pars* and did not violate any right to be heard in adopting the Contested Rule.

60. With regard to the more general requirement of respecting fair procedures, however, the Panel considers that this is a principle which must always be followed by a Swiss association even *vis-à-vis* non-members of the association if such non-members may be affected by the decision adopted. In this respect, the Panel notes that the President of the Ordinary Division of the CAS based its interim order of 16-17 July 1998 on the circumstance that UEFA violated the principle of procedural fairness. The Panel agrees with the President's view that UEFA adopted the Contested Rule too late, when the Cup Regulations for the 1998/99 season, containing no restriction for multiple ownership, had already been issued. In the CAS interim order it was observed *inter alia*:

*«By adopting the Regulation to be effective at the start of the new season, UEFA added an extra requirement for admission to the UEFA Cup after the conditions for participation had been finally settled and communicated to all members. It did so at a time when AEK already knew that it had met the requirements for selection of its national association. Furthermore, it chose a timing that made it materially impossible for the clubs and their owner to adjust to the new admission requirement. ...*

*The doctrine of venire contra factum proprium ... provides that, where the conduct of one party has led to the legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party ...*

*By referring to this doctrine, CAS is not implying that UEFA is barred from changing its Cup Regulations for the future (provided, of course, the change is lawful on its merits). However, it may not do so without allowing the clubs sufficient time to adapt their operations to the new rules, here specifically to change their control structure accordingly».*

61. The Panel essentially agrees with the foregoing remarks by the President of the Ordinary Division of the CAS and with the ensuing conclusion that UEFA violated its duties of procedural fairness with respect to the 1998/99 season. Indeed, a sports-governing organization such as an international federation must comply with certain basic principles of procedural fairness *vis-à-vis* the clubs or the athletes, even if clubs and athletes are not members of the international federation (*see* the Swiss Supreme Court decision in the *Grossen* case, in ATF 121 III 350; *see also infra*). The Panel does not find a hurried change in participation requirements shortly before the beginning of the new season, after such requirements have been publicly announced and the clubs entitled to compete have already been designated, admissible. Therefore, the Panel approves and ratifies the CAS Procedural

Order of 16 July 1998, which has granted interim relief consisting in the suspension of the application of the Contested Rule «*for the duration of this arbitration or for the duration of the 1998/99 season of the UEFA Cup, whichever is shorter*».

62. The Panel observes that the above conclusion does not require that the Contested Rule be annulled on procedural grounds, given that the lawfulness of the Contested Rule must be evaluated on its merits with respect to all future football seasons. In the Panel's view, if the Contested Rule would be found to violate any of the substantive rules and principles of Swiss and/or EC law invoked by the Claimants, no amount of procedural fairness could save it; conversely, if the Contested Rule would not be found to infringe such rules and principles, a minor lack of procedural protection could not render it unlawful *per se*. Therefore, while approving the interim stay of the Contested Rule, the Panel holds that UEFA's procedural unfairness concerning the timing of the new rule's entry into force is of a transitory nature and, as a result, it is not such as to render the Contested Rule unlawful on its merits with respect to all future football seasons. The Claimants' request to annul the Contested Rule on this procedural ground is thus rejected. However, as will be seen *infra*, the said procedural defect will have some consequences with respect to the temporal effects of this award.
- c) Principle of equal treatment
63. The Claimants remind that Article 75 CC also protects members of a Swiss association against resolutions which infringe the principle of equal treatment of the association's members and, therefore, argue that the Contested Rule violates the corresponding rights of the Claimants. In particular, the Claimants assert that UEFA formed different categories of members and violated the principle of relative equality because it established membership distinctions – clubs commonly controlled *vis-à-vis* the other clubs – in an arbitrary manner. The Claimants argue that there are no substantial objective grounds which UEFA could invoke to justify the unequal treatment provided by the Contested Rule because the Contested Rule is neither necessary, nor appropriate and, in addition, fails the test of proportionality insofar as it is a disproportionate means of achieving the objective of protecting the integrity of UEFA competitions. In reply, the Respondent argues that the principle of equal treatment does not prevent differentiation between objectively different situations, that the common control of clubs is an objectively relevant factor, and that in any event the Contested Rule is a proportionate response to the need to protect the integrity of the game.
64. The Panel notes that this argument is also based on the assumption that clubs are indirect members of UEFA, as under Article 75 CC only association members can judicially challenge a resolution infringing their right to equal treatment. The Panel has already disavowed such construction of the clubs' status within UEFA and here refers to the views previously stated in this respect (*see supra*, paras. 52 and 56).

65. The Panel has also already expressed the opinion that, even assuming that the clubs could be regarded as indirect members of UEFA, the Contested Rule did not create different categories of clubs but rather established an additional condition of participation in UEFA competitions (*see supra*, para. 53). The Panel does not find any discrimination or unequal treatment in establishing conditions of participation which are applicable to all clubs. It seems to the Panel that there is no discrimination in denying admission to a club whose owner is objectively in a conflict of interest situation; likewise, *e.g.*, there is no discrimination in denying admission to a club whose stadium is objectively below the required safety standards. In both cases, if the shareholding structure or the safety conditions are modified, the club is admitted to the UEFA competition. Therefore, the Contested Rule does not target or single out specific clubs as such but simply sets forth objective requirements for all clubs willing to participate in UEFA competitions.
66. As a result, the Panel holds that the Contested Rule does not violate the principle of equal treatment. Since the proportionality test is supposed to be applied only in order to verify whether an unequal treatment is justified, it is not necessary to rule on the proportionality issue in connection with this ground. In any event, the Panel observes that the discussion on proportionality developed under Article 81 (*ex* 85) of the EC Treaty (*infra*, paras. 131-136) could be applied in its entirety to this ground as well.

d) Personality of the clubs

67. The Claimants argue that the Contested Rule is not compatible with Article 28 CC, which reads as follows:

*«1. Celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe. 2. Une atteinte est illicite, à moins qu'elle ne soit justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public, ou par la loi»* («1. A person who is unlawfully injured in his personality may bring proceedings for protection against any party to such injury. 2. Such injury is unlawful unless it is justified by consent of the injured person, by an overriding private or public interest, or by the law»).

The Claimants assert that Article 28 CC applies both to individuals and to corporate legal entities, and that the development of both the sporting and economic personality of commonly owned clubs would be impaired as a consequence of the non-admission to a UEFA competition. The Respondent argues that Article 28 CC has no relevance at all because it is applicable to different types of situations, and that in any event UEFA pursued overriding interests in enacting the Contested Rule.

68. The Panel is not persuaded that Article 28 CC could be applied to the case at stake. The notion of «personality» (or of «personhood») is to be characterized by reference to the fundamental attributes which every person, and in some measure every legal entity such as an association or a corporation, has a right to see protected against external intrusion and interference. It is difficult to find definitions in the abstract as there is an indefinite number of liberties, varying from time to time and from country to country, which can be

encompassed within the concept of personality rights. Examples are core rights related to privacy, name and personal identity, physical integrity, image, reputation, marriage, family life, sexual life and the like.

69. Swiss case law has sometimes stretched the notion of personality rights in order to protect a wider number of rights, such as the right to be economically active and even the freedom of performing sporting activities. The Claimants argue that the present dispute can be compared to the *Gasser* case, concerning the two-year exclusion of an athlete from any kind of competition due to a doping offence. In the *Gasser* case, the judge considered as a personality right the athlete's freedom of action and freedom of physical movement and, therefore, «*the freedom of performing sporting activities and of participating in a competition between athletes of the same level*» (Office of Judge III, Berne, Decision of 22 December 1987, in *SJZ*, 1988, 84 at 87). However, the Panel finds the *Gasser* case quite different from, and thus of no precedential value for, the present dispute. Indeed, the Contested Rule is a general regulation establishing a condition of participation applicable to all clubs (*see supra*, paras. 53 and 58) and not, as in the *Gasser* case, a disciplinary measure individually addressed to a designated athlete. Accordingly, the Contested Rule as such cannot be considered an exclusionary sanction within the meaning of the *Gasser* ruling. Moreover, the Contested Rule sets forth a condition for access to a single competition rather than an absolute exclusion from all sporting activities. The Panel considers that, while an unfairly adopted long doping ban might harm the whole sporting career of an athlete, and thus his/her personality, a club's non-participation in a UEFA competition would involve some loss of income but, since the club would still take part in other important football competitions such as the national championship and the national cup (which are competitions appreciated by fans and economically rewarding, as will be seen *infra* at para. 131), its «personality» would not be affected. In any event, even a restriction of a personality right could be justified by an «overriding private or public interest» (Article 28.2 CC), and the Panel is of the opinion that the public's perception of a conflict of interest potentially affecting the authenticity of results (*see supra*, para. 48) would constitute such an «overriding interest».
70. The Claimants have also made reference to Swiss judgements limiting an association's right to exclude a member, pursuant to Article 72.2 CC, in situations where the exclusion would injure the personality of the member concerned. Swiss courts have applied this doctrine to associations which hold monopolistic positions, such as professional associations or sports federations. However, apart from the illustrated difficulty of considering the Claimants as (indirect) members of UEFA (*see supra*, paras. 52 and 56), the Panel observes that non-admission to a competition cannot be equated to the loss of membership due to expulsion from an association and, therefore, cannot be considered as an injury to personality. In any event, even if one were to admit that the effects of the Contested Rule could be compared to an actual exclusion from membership, according to Swiss case law this could always be justified if there is «good cause» (Swiss Federal Court, Decision of 14 March 1997, in *SCP* 123 III, 193). The Panel is of the opinion that the public's perception of a conflict of interest potentially affecting the authenticity of results (*see supra*, para. 48) would constitute «good cause». In conclusion, the Panel holds that the Contested Rule does not violate Article 28 CC.

*European Community competition law*

a) Introductory remarks

71. Article 81.1 (*ex* 85.1) of the EC Treaty prohibits *«as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market»*.

Under Article 81.2 (*ex* 85.2) *«any agreements or decisions prohibited pursuant to this Article shall be automatically void»*.

Under Article 82 (*ex* 86) of the EC Treaty *«any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States»*.

72. According to the EC Commission's «Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty» (in *Official Journal EC*, 13 February 1993, C 39/6), before ascertaining whether there is an infringement of the prohibitions laid down in Article 85.1 (now 81.1) or 86 (now 82), national courts (and thus arbitrators) *«should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgement, even if they are not formally bound by them»* (*ibidem*, para. 20).

73. The Panel is not aware of any decision, opinion or other official statement issued by the Commission or other administrative authority with regard to the Contested Rule. However, as already mentioned (*supra*, para. 47), there have been a few replies by the Commission under Article 197 (*ex* 140) of the EC Treaty to questions specifically devoted to the Contested Rule put to it by some Members of the European Parliament (questions nos. E-3980/97, 0538/98, P-2361/98). The wording of all such replies is similar or identical. In the answer given on 3 September 1998 (*Official Journal EC*, 1999, C 50/143), the EC Commissioner responsible for competition policy Mr. Van Miert, answering on behalf of the Commission, has stated as follows:

*«The Commission is aware that the Union of European football associations (UEFA) has recently adopted rules that regulate the participation in European competitions of clubs belonging to the same owner. It seems at first sight that these rules have a sporting nature and that they aim to preserve uncertainty of results, an objective which the Court of Justice has recognised as legitimate in its judgement of 15 December 1995 in the Bosman case. Clearly, if clubs with the same owner can take part in the same competitions, whether national or international, doubts may arise as to whether the outcome is really undecided in advance. Nevertheless, it is necessary to determine whether these UEFA rules are limited to what is strictly necessary to attain the objective of ensuring the uncertainty as to results or whether there exist less restrictive means to achieve it. Provided that such rules remain in proportion to the sporting objective pursued, they would not be covered by the competition rules laid down in the EC Treaty. At this stage, the Commission does not possess all the*

*necessary information to assess the compatibility of the rules with Articles 85 and 86 of the EC Treaty. Whether UEFA has or not consulted other bodies is not relevant for this assessment».*

74. The Respondent has attributed great weight to this statement, while the Claimants have underlined that it has no legal force whatsoever and that anyway it provides no answer to the question of whether the Contested Rule is compatible with the EC Treaty. The Panel is not sure whether an answer given by the Commission in the European Parliament can be regarded as a «decision, opinion or other official statement» within the meaning of the above-mentioned Commission Notice. Probably, the Commission did not have in mind answers to parliamentary questions when it drafted the Notice, and its reference to *official* statements would imply a less informal statement than a parliamentary one. In any event, since Mr. Van Miert's answer is quite concise and given without the Commission *«possess[ing] all the necessary information to assess the compatibility of the rules with Articles 85 and 86 of the EC Treaty»*, and since any statement issued in the Parliament inevitably has a political rather than a legal nuance, the Panel is of the opinion that it should not base this award on Mr. Van Miert's answer.
75. The Panel also notes that the EC Commission has recently issued a more general statement with regard to the application of competition rules to sport. The Commission has publicly noted as follows: *«Sport comprises two levels of activity: on the one hand the sporting activity strictly speaking, which fulfils a social, integrating and cultural role that must be preserved and to which in theory the competition rules of the EC Treaty do not apply. On the other hand a series of economic activities generated by the sporting activity, to which the competition rules of the EC Treaty apply, albeit taking into account the specific requirements of this sector. The interdependence and indeed the overlap between these two levels render the application of competition rules more complex. Sport also has features, in particular the interdependence of competitors and the need to guarantee the uncertainty of results of competitions, which could justify that sporting organizations implement a specific framework, in particular on the markets for the production and the sale of sports events. However, these specific features do not warrant an automatic exemption from the EU competition rules of any economic activities generated by sport, due in particular to the increasing economic weight of such activities»* (EC Commission, Press Release no. IP/99/133, 24 February 1999).
76. The Panel shares the EC Commission's position that the application of competition rules to sports regulations is a particularly complex task because of the peculiarities of sport and because of the inescapable link between sporting and economic aspects. Therefore, all the relevant elements of competition law have to be carefully weighed in this award together with the peculiar sporting elements, in order to ascertain whether the Contested Rule violates Articles 81 (*ex* 85) and 82 (*ex* 86) of the EC Treaty or not.
- b) Position of the parties
77. With respect to Article 81 (*ex* 85) of the EC Treaty, the Claimants assert, firstly, that the Contested Rule is a decision by an association of undertakings, and/or an agreement between undertakings, falling within the scope of such provision. Then, they argue that the



Contested Rule has the effect of both actually and potentially affecting competition to an appreciable extent in the football market, and in various ancillary football services markets, by preventing or restricting investments by multi-club owners in European clubs, by changing the nature, intensity and patterns of competition between commonly controlled clubs and the others, and by enhancing the economic imbalance between football clubs. They also assert that the Contested Rule affects the pattern of trade between Member States. They also argue that no «sporting exception» could be applied to this issue, that the Contested Rule is unnecessary and disproportionate to the professed objective, and that less restrictive alternatives exist. For these reasons, the Claimants contend that the Contested Rule is incompatible with Article 81.1 and, as no exemption has been given by the EC Commission under Article 81.3, it is automatically void pursuant to Article 81.2. The Respondent counter-argues that the Contested Rule is not caught by Article 81, or by any other provision of the EC Treaty, because it is a rule of sporting interest only, which is proportionate to the legitimate objective of preventing situations of conflict of interest and, thus, of promoting and ensuring genuine competition between the clubs playing in pan-European competitions.

78. With respect to Article 82 (*ex* 86), the Claimants argue that UEFA is the only body empowered to organize European competitions and, consequently, holds a dominant position in the European professional football market and the ancillary football services markets. Then, they assert that the Contested Rule constitutes an abuse by UEFA of its dominant position contrary to Article 82 because, without any objective justification, it restricts competition, it is unnecessary and disproportionate, and it unfairly discriminates between clubs with different ownership structures. The Respondent replies by denying that it is in a dominant position, and by asserting that the adoption of a rule in order to preserve the integrity of club competitions could not amount to an abuse.

c) The «sporting exception»

79. The Respondent argues that the Contested Rule is not caught at all by EC law, because it is a rule of a merely sporting character purporting to protect the integrity of the game by preventing any conflict of interest within UEFA club competitions. The Respondent refers to what has come to be termed as the «sporting exception», after the EC Court of Justice stated in the *Walrave* and *Donà* cases that «*the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*» (Judgements of 12 December 1974, case 36/74, *Walrave*, in *E.C.R.* 1974, 1405, para. 4; 14 July 1976, case 13/76, *Donà*, in *E.C.R.* 1976, 1333, para. 12), that EC law «*does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity*» (*Walrave*, para. 8), and that EC law does not «*prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries*» (*Donà*, para. 14).

In both cases, the Court also added that the «restriction on the scope of the provisions in question must however remain limited to its proper objective» (*Walrave*, para. 9; *Donà*, para. 15).

80. In the more recent *Bosman* case, the Court of Justice referred to the *Walrave* and *Donà* precedents in order to reiterate that «sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty» (Judgement of 15 December 1995, case C-415/93, *Bosman*, in E.C.R. 1995, I-4921, para. 73), and that «the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of the sporting activity from the scope of the Treaty» (*ibidem*, para. 76).
81. The Claimants acknowledge that some matters concerned with the rules of the game would fall within the so-called sporting exception, mentioning as examples «a ban on drugs, the size of the pitch or the ball, or the methods of selection of national teams». However, the Claimants deny that the Contested Rule might fall within such an exception because it is economic in its language, its subject matter and its effects. In the final oral argument, counsel for the Claimants vividly described the Contested Rule as «impregnated» with economic elements.
82. The Panel observes that it is quite difficult to deduce the extent of the «sporting exception» from the mentioned case law of the Court of Justice. It is clear that a sporting exception of some kind does exist, in the sense that some sporting rules or practices are somewhat capable of, as the Court puts it, «restricting the scope» of EC provisions. In the light of the Court's jurisprudence, it seems that a sporting rule should pass the following tests in order not to be caught by EC law: (a) it must concern a question of sporting interest having nothing to do with economic activity, (b) it must be justified on non-economic grounds, (c) it must be related to the particular nature or context of certain competitions, and (d) it must remain limited to its proper objective.
83. With regard to test (a), the Contested Rule certainly concerns a question of great sporting interest, such as the integrity of the game within the already illustrated meaning of the public perception of the authenticity of sporting results (*see supra*, para. 24 *et seq.*). However, the Contested Rule also has a lot to do with economic activity. Indeed, the Contested Rule addresses the question of ownership of clubs taking part in UEFA competitions, that is the economic status of clubs which certainly perform economic activities (*see infra*, para. 88). Therefore, the requirement of test (a) is not met, and the Panel holds that the Contested Rule is not covered by the «sporting exception». As a consequence, tests (b), (c) and (d) are not relevant in this context, and the Panel need not discuss them.
84. In the light also of the recent opinions of Advocate General Cosmas in the pending *Delière* case (opinion delivered on 18 May 1999, joint cases C-51/96 and C-191/97) and of Advocate General Alber in the pending *Lehtonen* case (opinion delivered on 22 June 1999, case C-176/96), the Panel wonders whether, applying the Court of Justice tests, it is really

possible to distinguish between sporting questions and economic ones and to find sporting rules clearly falling within the «sporting exception» (besides those expressly indicated by the Court, concerning national teams). For instance, among the examples indicated by the Claimants, the reference to anti-doping rules might be misplaced, because to prevent a professional athlete – *i.e.* an individual who is a worker or a provider of services – from performing his/her professional activity undoubtedly has a lot to do with the economic aspects of sports. The same applies to the size of sporting balls, which is certainly of great concern to the various firms producing them. In conclusion, the Panel is not convinced that existing EC case law provides a workable «sporting exception» and it must, therefore, proceed with a full analysis of the present dispute under Articles 81 (*ex* 85) and 82 (*ex* 86) of the EC Treaty.

d) Undertakings and association of undertakings

85. Article 81.1 (*ex* 85.1) of the EC Treaty prohibits any cooperation or coordination between independent undertakings which may affect trade between Member States and which has the object or the effect of preventing, restricting or distorting competition. Such forbidden cooperation or coordination between undertakings may be accomplished through agreements, decisions by associations of undertakings or concerted practices. Article 82 (*ex* 86) of the EC Treaty prohibits any abuse of a dominant position by one or more undertakings which may affect trade between Member States. Both provisions, in order to be applied, require that the Panel ascertain whether the Respondent can be regarded as an undertaking and/or an association of undertakings.
86. The notion of undertaking is not defined in the EC Treaty. The EC Court of Justice has stated that such notion includes «*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*» (Judgement of 23 April 1991, case C-41/90, *Höfnér*, in *E.C.R.* 1991, I-1979, para. 21). The fact that a given entity is a «non-profit» entity is irrelevant, provided that it does perform some economic activity.
87. As illustrated above, UEFA is a private association exerting regulatory authority in European football and organizing pan-European competitions. A good part of UEFA's activities is of a purely sporting nature, particularly when it adopts measures as a mere regulator of sporting matters. However, UEFA also carries out activities of an economic nature, *e.g.* with regard to advertising contracts and to contracts relating to television broadcasting rights (*see* EC Commission decision of 27 October 1992, *1990 World Cup*, in *Official Journal EC*, 12 November 1992, L 326/31, para. 47). Therefore, with respect to the economic activities in which it is involved, UEFA can be characterized as an undertaking within the meaning of EC competition law, as construed by the Court of Justice. The fifty-one national federations affiliated to UEFA also carry out economic activities at national level, notably by exploiting their logos, managing their national teams and selling television rights; with respect to those activities, they are also undertakings within the meaning of EC competition law. Therefore, the Panel holds that UEFA, with respect to the economic

activities in which it is engaged and in which national federations are engaged, is at the same time an undertaking and an association of undertakings.

88. The Panel wonders whether UEFA should also be regarded, as argued by the Claimants, as an «association of associations of undertakings» – within the meaning of the EC Commission decisions of 15 December 1982, *BNIC*, and of 7 December 1984, *Milchförderungsfonds*, in which Article 81.1 (*ex* 85.1) was applied to resolutions issued by trade associations having as their members other trade associations –, that is whether UEFA should be regarded not only as an association of (so to say) «federation undertakings» but also, through the federations, as an association of «club undertakings». In fact, if UEFA was found not to be an association of «club undertakings», its resolutions concerning the way club competitions are organized could not be considered as instruments of horizontal coordination of the clubs' competitive behaviour and would not be caught by Article 81.1 (*ex* 85.1) of the EC Treaty. In other words, with respect to UEFA rules which govern club competitions – *e.g.* establishing conditions of participation, disqualifying clubs or players from the competition, setting forth players' transfer rules, designating referees, fixing schedules, and the like – UEFA could be considered merely as a regulator above the clubs rather than a sort of clubs' trade association; accordingly, the Contested Rule would not be considered as the product of a horizontal collusion between the clubs and would not be caught by Article 81.1 (*ex* 85.1).
89. In order to ascertain whether UEFA should be regarded as an association of associations of undertakings or not, it is necessary to assess whether national football federations affiliated to UEFA are to be considered as associations of undertakings or not. There is no doubt that professional football clubs engage in economic activities and, consequently, are undertakings. In particular, they engage in economic activities such as the sale of entrance tickets for home matches, the sale of broadcasting rights, the exploitation of logos and the conclusion of sponsorship and advertising contracts. Numerous minor clubs, which are formally non-profit making, also engage in some of those economic activities – although on a much lower scale – and are also to be regarded as undertakings (for example, clubs taking part in championships pertaining to the third or fourth national divisions). In all national federations, there is also a very large number of truly amateur clubs (including youth clubs), which are run by unpaid volunteers, perform purely sporting activities and do not engage in any economic activity (the EC Commission has recently defined such clubs as «grassroots clubs» in the already quoted document *The European model of sport*, Brussels, 1999). Accordingly, these grassroots clubs should not be regarded as undertakings (*see* Judgement of 17 December 1993, joined cases C-159/91 and C-160/91, para. 18, where the Court of Justice held that an entity fulfilling a social function and entirely non-profit making does not perform an economic activity and thus is not an undertaking within the meaning of *ex* Article 85). The line between non-amateur clubs (which are undertakings) and amateur or grassroots clubs (which are not) should obviously be drawn at different levels from country to country, depending on the national economic development of football. What is common within all fifty-one European federations is the circumstance that the number of amateur or grassroots clubs is largely preponderant over that of non-amateur clubs.

90. Advocate General Lenz stated in his *Bosman* opinion that national football federations «are to be regarded as associations of undertakings within the meaning of Article 85. The fact that in addition to the professional clubs, a large number of amateur clubs also belong to those associations makes no difference» (Opinion delivered on 20 September 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 256).

Therefore, according to the argument of Advocate General Lenz, UEFA is an association of associations of undertakings, acting as a instrument of professional clubs' cooperation. Advocate General Lenz did not provide any further discussion on this issue. As is well known, in the *Bosman* case the Court of Justice declined to rule on competition law issues (Judgement of 15 December 1995, *ibidem*, para. 138), and the previous sports cases decided by the Court did not involve competition rules either (Judgement of 12 December 1974, case 36/74, *Walrave*, in *E.C.R.* 1974, 1405; Judgement of 14 July 1976, case 13/76, *Donà*, in *E.C.R.* 1976, 1333; Judgement of 15 October 1987, 222/86, *Heylens*, in *E.C.R.* 1987, 4097). Therefore, no specific guidance can be found on this question in the European Court jurisprudence related to sport.

91. The Panel is not entirely persuaded by the assertion of Advocate General Lenz that it «makes no difference» that national federations encompass a large number of amateur or grassroots clubs. In fact, the amateur or grassroots clubs, truly not engaged in economic activities, may condition the will and the acts of national federations more than professional and semi-professional clubs. Due to the democratic voting and electoral systems prevailing within national federations, the majority of votes tend to be controlled by amateur or grassroots clubs, and federations' executive organs – the President and the Board – often tend to be the expression of such majority. In some national federations even athletes and coaches have some electoral standing. This deficit of representativeness *vis-à-vis* professional clubs is the main reason why such clubs have created national «leagues» as their own truly representative bodies and why there are often conflicts between leagues and federations (*see supra*, paras. 17-18). Through the leagues, which are their true trade associations, professional clubs tend to manage their championships by themselves, retaining all the related revenues (television rights, advertising, *etc.*), and in several countries have progressively acquired a noticeable degree of autonomy from federations (*e.g.* the Premier League in England or the «Lega Nazionale Professionisti» in Italy).
92. In other words, the executives of national federations formally represent *all* the clubs of their respective countries but their constituency is mostly composed of amateur or grassroots clubs. Also within UEFA, representatives of national federations should be regarded less as delegates of the clubs engaged in economic activities than as delegates of amateur or grassroots clubs. It should also be mentioned that federation posts are honorary, and individuals elected to such posts are not bound by instructions or orders coming from the electors. Obviously, professional clubs have their ways of influencing federations and federation executives much more than their mere electoral weight would suggest, but it would still seem inaccurate *sic et simpliciter* to regard national federations as associations of undertakings and, automatically, national federations' regulations as decisions by associations of undertakings within the meaning of Article 81.1. It should not be overlooked

that decisions by associations of undertakings are caught by Article 81.1 in order to prevent circumvention of the prohibition of restrictive agreements and concerted practices. Decisions by associations of undertakings are typically a medium for the coordination and cooperation of undertakings of a given sector. The Panel observes that national leagues (where they exist) rather than federations currently seem to be the actual medium for the coordination of professional clubs. Therefore, national leagues seem to be the true associations of «club undertakings», league executives seem to be the true delegates of such undertakings, and the acts and conduct of leagues seem to truly reflect the will of such undertakings. National leagues are not direct members of UEFA and, as mentioned (*supra*, para. 19), the most important of them have recently constituted their own independent association in order to have their interests truly represented at pan-European level.

93. The Panel notes that in the *BNIC/Clair* case, the Court of Justice held that BNIC – the French cognac industry board – was in fact an association of undertakings because its measures were negotiated and adopted by individuals who were (formally appointed by the competent Minister but in fact) designated by the undertakings or associations of undertakings concerned and had to be considered as their representatives (Judgment of 30 January 1985, case 123/83, *BNIC/Clair*, in *E.C.R.* 1985, 391, para. 19). In *Reiff*, the Court of Justice held that the individuals composing a German tariff commission for road freight, appointed by the Minister upon the proposal of the undertakings or associations of undertakings of the interested sector, could not be deemed as representatives of the industry because they were not bound by instructions or orders coming from those undertakings or associations; therefore, the Court concluded that the tariff commission was not an association of undertakings and that its decisions were not caught by Article 85 (now 81) of the EC Treaty (Judgment of 17 November 1993, case C-185/91, *Reiff*, in *E.C.R.* 1993, I-5801, para. 19).
  
94. In the light of this case law and in the light of the circumstances described above (*supra*, paras. 91-92), the Panel is quite doubtful as to whether UEFA can be truly characterized as an association of associations of undertakings and as to whether members of the UEFA Executive Committee or of the UEFA Congress can be seen as actually representing the «club undertakings». At the very least, before reaching any such conclusions, it would be necessary to examine in detail the process leading to the appointment or election of individuals to national federation posts and to the various UEFA bodies, to look into the links of those individuals with professional clubs, and to investigate case by case whether a UEFA measure is in fact the expression of an agreement by or with the professional clubs or whether it strengthens already existing agreements between these clubs. Neither the Claimants nor the Respondent have supplied any evidence which could help the Panel in any such analysis. Therefore, the Panel must content itself with the stated conclusion (*supra*, para. 87) that UEFA, with respect to the economic activities in which it is involved and in which national federations are involved, is surely an undertaking and an association of «federation undertakings», leaving the question open as to whether UEFA is also an association of «club undertakings» through which clubs coordinate their economic behaviour. In any event, despite underlying doubts on this issue, given that UEFA essentially advanced no arguments to counter the Claimants' assertion that UEFA is an

association of associations of undertakings, the Panel will assume for the purposes of the ensuing discussion of competition law that UEFA is in fact an association of «club undertakings» whose decisions and rules concerning club competitions constitute a medium of horizontal cooperation between the competing clubs (as asserted by Advocate General Lenz in his *Bosman* opinion; see *supra*, para. 90). As a result, in order to proceed with its analysis, the Panel assumes that the Contested Rule is a decision by an association of associations of undertakings and, as such, falls within the scope of Article 81.1 (*ex* 85.1).

e) Market definition

95. The Panel notes that, in order to examine whether the Contested Rule has the object or the effect of appreciably restricting competition (Article 81) or constitutes an abuse of dominant position (Article 82), it is necessary to identify and define the relevant market in both its product and geographic dimensions.
96. As to *product market* definition, the Panel observes that, according to EC law and practice, essentially «*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*» (EC Commission Notice «on the definition of relevant market for the purposes of Community competition law», in *Official Journal EC*, 9 December 1997, C 372/5, para. 7).
97. The Claimants, referring to the economic report prepared by Mr. Boon upon their request, allege that the relevant product market is a «European football market». According to the Claimants, such market would comprise the supply of all football matches played in Europe and a variety of related «ancillary football services markets», such as the market for capital investment in football clubs, the players market, the media rights market, the sponsorship and advertising market and the merchandising market. In his written report, Mr. Boon includes within the boundaries of this general «European football market» all UEFA «matches played out before a paying public across Europe and in the wider world». At the hearing, the Panel asked Mr. Boon to better identify the product, the demand side (the consumers) and the supply side (the suppliers) in the alleged «European football market». Mr. Boon answered that the product is constituted by all matches played in UEFA club competitions, the consumers are all the football fans and supporters, and the suppliers are the clubs and the players together. The notion that clubs and players supply matches together on the market is clearly unfounded in terms of competition law (and inconsistent with Mr. Boon's several references in his report to a players' market where clubs are on the demand side and players on the supply side), and the Panel can thus discard it immediately without further discussion.
98. The Panel finds that the Claimants' definition of the product market is not a viable one in terms of competition law. The notion of a general European football market is too ample, and the other related markets are too heterogeneous to be included therein. Given that the definition of a market should be determined primarily by interchangeability (or

substitutability) from the consumers' viewpoint, it is implausible to regard all European football matches as interchangeable. Certainly, in terms of stadium attendance most of the matches are not interchangeable because of geographic constraints and of consumer preferences, notably constituted by the supporters' allegiance to a given team. Indeed, virtually every club playing in a UEFA competition can be deemed to hold a sort of «captive market» with regard to live attendance of its home matches. Even in terms of television audience, a UEFA Cup or Champions' League match between a Swiss and a German team would hardly be considered by British viewers as a substitute – possibly with the only exception of the final match of the competition or some other unusual circumstances (*e.g.* the presence of several renowned British players in the match), and even in such cases it would be a poor substitute – for a match involving a British team (*see* Monopolies and Mergers Commission, *British Sky Broadcasting Group plc and Manchester United plc. A report on the proposed merger*, London, 12 March 1999, hereinafter «MMC Report», paras. 2.16-2.24). Furthermore, if the products of the European football market are the European matches, most of the various other markets mentioned by the Claimants are certainly related in some way or another to the supply of such football matches, but they cannot be «comprised» within that market. A few examples suffice: the sale of merchandise can and does take place regardless of European matches; contracts for advertising on panels within a given stadium can be concluded regardless of any connection with football matches (*e.g.* in view of a series of rock concerts or of non-football sporting events) or regardless of any connection with *European* football matches; some of the mentioned products or services are not offered to the final consumers (in particular sponsorship contracts, free-to-air broadcasting rights and capital investment in clubs not listed on the stock exchange).

99. The Panel observes that in fact there appears to be no single «European football market» comprising various ancillary markets. Rather, there are several «football markets» in which professional football clubs operate, such as those referred to by the Claimants, but they are all separate markets for the purposes of competition law. Support for such proposition can be found in the already quoted recent report by the British Monopolies and Mergers Commission (now transformed into the Competition Commission) concerning the proposed acquisition of the football club Manchester United by the broadcasting company BskyB, where it is evidenced how Manchester United operates in several separate markets such as the supply of football matches, television rights to football matches, advertising and sponsorship, retailing of merchandise, and various services such as catering and hospitality associated with its stadium (MMC Report, para. 2.16).
  
100. Most of such football markets are clearly segmented in both their product and geographic dimensions. With regard to the television broadcasting market, there appears to be a growing consensus among competition authorities that pay (including pay-per-view) television and free-to-air television are separate product markets (*see* MMC Report, paras. 2.36 and 2.39; Office of Fair Trading, *The Director General's review of BskyB's position in the wholesale pay TV market*, London, December 1996, paras. 2.3 and 2.6; «Autorità garante della concorrenza e del mercato», that is the Italian competition authority, Decision no. 6999 of 26 March 1999, *Stream/Telepiù*, in *Bollettino* 12/1999, para. 9). Also from the geographic point of view, although sports broadcasting is becoming more and more international and cross-



border, competition authorities and courts throughout Europe tend to maintain that broadcasting markets are mostly national, even if some of the broadcasting companies are multi-national and some of the events are covered worldwide (*see e.g.* the Decision of 11 December 1997 by the «*Bundesgerichtshof*», that is the highest German court in civil matters, upholding the previous decisions of the German competition authority «*Bundeskartellamt*» and of the appellate court «*Kammergericht*» in a case concerning television rights to European matches). As mentioned (*supra*, para. 98), another example of extreme geographic segmentation is to be found in the market for gate revenues (including both season tickets and match tickets). The sale of a club's merchandise tends also to be geographically very defined, with the only possible exception of a few top European clubs.

101. Having found that separate football markets exist, rather than a single and comprehensive European football market, the Panel must establish the relevant product market within which to assess whether the Contested Rule restricts competition or not. It is undisputed that the Claimants' basic grievance in this case concerns UEFA's interference with their wish to keep owning (and even further acquiring) various football clubs capable of competing in UEFA competitions. Indeed, the Claimants repeatedly stressed in their written and oral submissions that the Contested Rule would restrict investments in European football clubs' stocks. Accordingly, the Panel finds that the market more directly related to, and potentially affected by, the Contested Rule appears to be a market which can be defined as the «*market for ownership interests in football clubs capable of taking part in UEFA competitions*». A market for ownership interests in professional clubs has been identified as the relevant market in some United States antitrust cases, particularly in cases related to league rules banning cross-ownership of clubs of other professional sports leagues or subjecting to authorization the sale of a club. *See e.g. NASL v. NFL*, 505 F.Supp. 659 (S.D.N.Y. 1980), *reversed* 670 F.2d 1249 (2d Cir. 1982); *Sullivan v. NFL*, 34 F.3d 91 (1st Cir. 1994); *Piazza v. MLB*, 831 F.Supp. 420 (1993). The Panel finds also, in the light of the content of the Contested Rule and on the basis of the available evidence, that the Contested Rule appears to be only indirectly related, if at all, to the various other markets suggested by the Claimants, such as the market for players, the sponsorship market, the merchandising market, the media rights market and the market for gate revenues. Therefore, the effects on these markets will be considered only on a subsidiary basis to the said principal relevant market, concerning ownership interests in European professional football clubs.
  
102. The Panel considers that the relevant market, as defined, would include on the supply side – that is, the potential sellers of ownership interests – all the owners of European football clubs which can potentially qualify for a UEFA competition. Mr. Boon has illustrated how an investment in clubs which can qualify for UEFA competitions (referring to the main UEFA competitions, the Champions' League and the UEFA Cup) is much more attractive than an investment in other football clubs because «*from a financial perspective, access to European club competition is disproportionately important to club success*». Therefore, according to this economic analysis, clubs which cannot hope to qualify for one of the main UEFA competitions should not be viewed as substitutes by investors interested in football clubs. In principle, only clubs competing in the top division of one of the fifty-one European national federations can hope to qualify (the only exception being the rare occurrence of a club from

a lower division winning the national cup). According to the Boon report, there are currently 737 clubs playing in the top divisions of the fifty-one UEFA countries. While the number of such clubs is basically the same every year, their identity varies slightly every football season because of the promotion/relegation system which has already been described (*see supra*, para. 18). Of those 737 clubs, however, probably less than a half – perhaps 350 clubs – have a realistic chance of qualifying for one of the two main UEFA competitions, given that less than 200 slots are available. It should also be considered that the number of clubs having a realistic chance of passing the first rounds is even smaller: as reported by Mr. Boon, over the five year period 1993/94-1997/98 only 66 clubs have achieved a place in the quarter final of one of the three main UEFA competitions.

103. The Panel observes that, because of the peculiarities of the football sector, investment in football clubs does not appear to be interchangeable with investments in other businesses, or even in other leisure businesses. The publicity and notoriety given by the ownership of a football club, besides the inherent excitement and gratification of running such a popular and emotional business, have always rendered such activity particularly attractive in terms of so-called VIP status and of high profile relationships with politicians and local communities. Indeed, ownership of a football club has often proved to be quite helpful, and sometimes expedient, to other business or political activities. Nowadays, because of the enormous increase in the amounts paid to clubs for television broadcasting rights, the profitability of professional clubs is also becoming interesting (*see MMC Report*, para. 3.79 *et seq.*). In particular, ownership of European professional football clubs appears to be an attractive strategic fit for media groups, given that football is a key media asset with further growth potential (*see MMC Report*, paras. 2.136-2.139 and 3.103). In economic terms, the circumstance that club ownership involves significant additional aspects to the mere profitability of a club means that the individual or corporate owner places on its club a significant instrumental and consumption value in addition to its possible investment value. This is not to be found in other business activities, which, therefore, are not interchangeable with the ownership of a football club. Moreover, given the largely leading position of football in European sports, clubs of other sports (*e.g.* a professional basketball club) can be deemed as potential substitutes only in few and very defined locations where such other sports enjoy popular success. Looking at Europe as a whole, other sports do not appear to offer a suitable alternative to the acquisition and ownership of football clubs.
  
104. In the light of the above, on the demand side (that is, the potential buyers of ownership interests) the market would include any individual or corporation potentially interested in an investment opportunity in a football club which could qualify for a UEFA competition. In this respect, the Claimants assert that availability of capital for investment in clubs is limited, that multi-club ownership is a rational economic investment strategy and, thus, multi-club owners are a key source of capital for football clubs within UEFA's jurisdiction. The Panel finds this argument unconvincing. As has already been said, ownership of football clubs has always been particularly attractive for reasons that go beyond mere economic considerations. Changes in clubs' ownership are notoriously quite common, and the Claimants have provided no substantial evidence proving that owners willing to sell a club of UEFA level encounter particular problems in finding suitable buyers. In fact, there is

even some empirical evidence that in some markets football clubs have been able to attract substantial capital investment from new sources, not from the historic owners of the clubs, despite the presence of a rule somewhat analogous to, or even stricter than, the Contested Rule (*see infra*, para. 120).

105. The Panel remarks that the possible profitability of a football club and its attractiveness to investors depends much more on its specific characteristics, particularly its location and its «brand», than on the identity of the potential buyers. The Boon report mentions that multi-club owners enjoy economies of scale and synergies such as sharing of information and expertise, single sourcing of supplies and centralized services. However, the extent to which football clubs located in different countries could share resources appears to be quite limited, particularly if clubs must be kept isolated from each other for sporting reasons as ENIC affirms it is doing (*see supra*, para. 32). Moreover, most of such economies of scale – such as headquarters costs, in-house expertise and common purchase of services of various kinds (*e.g.* computer consultancy) – would also be available to clubs belonging (as most often is the case) to entrepreneurs or groups involved in other non-football businesses. As to media rights, given the current negative attitude of most competition authorities and judges throughout Europe concerning the collective sale of television broadcasting rights (*see e.g.* the notorious Decision of 11 December 1997 by the *Bundesgerichtshof*, *supra* at para. 100), multi-club owners would conceivably be barred from collectively selling the rights to their clubs' matches and, therefore, no economies of scale could be enjoyed in this area. In any event, given the said separation of national television markets (*supra*, para. 100), the joint sale of broadcasting rights to matches of clubs located in different countries would appear not to afford a particular negotiating advantage.
106. The Panel observes that several of the benefits mentioned by the Claimants, which clubs allegedly attain when they are controlled by multi-club owners are, in fact, benefits that any clubs would derive from qualified and efficient management, regardless of the ownership structure. In this respect, the Panel is impressed by the improvements allegedly brought by ENIC to the management of its clubs, but it is not prepared to accept the proposition that multi-club owners are better owners than single club owners. In the Panel's view, it is changes in management rather than in ownership that affect the way football clubs are run. Moreover, the Panel remarks that, given the cost structure of football clubs, the savings due to the supposed economies of scale would be negligible compared to the current costs for players' (or even coaches') remuneration (*see supra*, paras. 32-33). In other terms, economies of scale do not yield what mostly matters in order to keep clubs successful on and off the field: good players and coaches. An instance of this can be given by the sporting results of the Italian club Vicenza; notwithstanding the supposed economies of scale and efficient management related to its being controlled by ENIC, at the end of the 1998/99 season Vicenza has been relegated to the Italian second division. Furthermore, the Panel finds the Claimants' argument (that there is a scarcity of potential buyers of clubs) particularly unconvincing in the light of the circumstance that the price for obtaining control of a club able to qualify for UEFA competitions – although not one of the top European clubs – appears to be affordable by a large number of corporate or individual entrepreneurs. For instance, in order to obtain control of the Claimants – clubs at the top of their countries and

able to achieve the quarter final of a UEFA competition – ENIC paid approximately £ 2.5 million for AEK and £ 2.2 million for Slavia, which are prices comparable to those of rather small enterprises in various European business sectors. As a result, the Panel concludes that there are countless potential buyers of ownership interests in football clubs which could qualify for a UEFA competition.

107. As to *geographic market* definition, the Panel observes that, according to EC law and practice, essentially «*a relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*» (EC Commission Notice «on the definition of relevant market for the purposes of Community competition law», in *Official Journal EC*, 9 December 1997, C 372/5, para. 8).
108. The evidence provided by the Claimants shows how the geographic dimension of the market for ownership interests in football clubs potentially taking part in UEFA competition is pan-European. There are no impediments for clubs in attracting potential investors from all over Europe and, conversely, almost no obstacles for a potential investor in buying an ownership interest in any given club around Europe. The actual investments by ENIC confirm this pan-European dimension. Therefore, the Panel concludes that the relevant geographic market extends to Europe as a whole, or more precisely to the territories of the fifty-one European federations affiliated to UEFA (which in reality, for historical reasons, encompasses federations that do not correspond to States, such as Scotland or Wales, and goes beyond geographical Europe, insofar as it includes Israel). As mentioned, other football markets tend to be geographically more segmented (*see supra*, para. 99).
- f) Compatibility with Article 81 (*ex* 85) of the EC Treaty
109. For an agreement between undertakings or a decision by an association of undertakings to be caught by Article 81.1, it must have the «object or effect» of restricting competition (as is customary in EC case law and practice, reference is here made only to «restriction» of competition as the general term encompassing also prevention and distortion). Since the «object» and the «effect» are not cumulative but alternative requirements, as suggested by the conjunction «or» (*see* Court of Justice, Judgement of 30 June 1966, case 56/65, *Société Technique Minière*, in *E.C.R.* 1966, 235, at 249), the Panel needs first to consider the *object* of the Contested Rule, *i.e.* its purpose in the context in which it is to be applied. Then, if the purpose of the Contested Rule does not appear to be anti-competitive, the Panel needs to take into consideration its actual *effect* on the relevant market. Should the Contested Rule have either the object or the effect of hindering competition, the Panel would then be required by EC case law to assess the Contested Rule in its economic context in order to decide whether it affects competition and trade between Member States to an *appreciable* extent (*see e.g.* Court of Justice, Judgement of 9 July 1969, case 5/69, *Völk*, in *E.C.R.* 1969,

295, para. 3; Judgement of 8 February 1971, case 22/71, *Béguelin*, in *E.C.R.* 1971, 949, para. 16).

110. As to the *object* of the Contested Rule, the Claimants assert that UEFA's predominant purpose has been to preserve its monopoly control over European football competitions rather than to preserve the integrity of the game. The Claimants' argue that support for this assertion can be found in the UEFA internal memorandum of 25 February 1998, drafted by Mr. Marcel Benz after the meeting with ENIC representatives of the previous day, and in the rules of the UEFA Statutes providing for the monopoly power of UEFA over European competitions. In the UEFA internal memorandum, under the heading «possible problems, questions and risks», it is possible to read *inter alia*:

*«Does the ENIC group form the basis for a European league ... Couldn't a media mogul take advantage of ENIC's groundwork and create a European league with the ENIC clubs? Couldn't other investors (e.g. IMG) pursue the same strategy and buy up clubs on a large scale? ... Isn't it a risk for UEFA in the media sector if TV stations own the rights of clubs in the domestic competition? Won't central marketing by UEFA be infringed upon sooner or later? The search for UEFA Champions League sponsors could also become harder, as sponsors would also get a similar market presence throughout Europe with ENIC».*

111. The Respondent replies by asserting that, besides the endeavour to prevent a clear conflict of interest situation and thus to ensure that competition is genuine, there was no ulterior motive for the adoption of the Contested Rule. The Respondent finds support in the same UEFA internal memorandum of 25 February 1999, where questions are raised on *«how UEFA could guarantee sporting competition if two clubs of the ENIC group met in the same UEFA competition. Who would win? Would ENIC or its management decide, or would the winners be decided on the pitch, in a purely sporting encounter, as desired by UEFA and its public? ... UEFA must take all legal measures possible to guarantee clean competition. ... The interests of clean competition in sport are at stake».*

112. The Panel notes that both the title and the text of the Contested Rule appear *prima facie* to support the Respondent's assertion that the Contested Rule is only designed to ensure that competition is genuine. The title reads «Integrity of the UEFA Club Competitions: Independence of the Clubs», while Paragraph A declares the object of the Contested Rule as follows:

*«It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition».*

Moreover, the Panel points out that the Contested Rule is not limited to banning multi-club ownership within the same competition but also forbids any other type of structure or behaviour which could potentially enable a club (or a related person) to influence a competitor in the same competition (*see* Paragraphs B.1 and B.2 of the Contested Rule).

113. The Panel considers that the Claimants had the burden of rebutting such *prima facie* evidence by proving that the true object of the Contested Rule was an anti-competitive one. The

Panel finds that the Claimants have not satisfied this burden of proof, given that the only plausible evidence relied upon is the UEFA internal memorandum of 25 February 1998, which is at best ambiguous. Apart from the fact that it was drafted by an individual who is not a member of the body which adopted the rule, the memorandum appears to contain meeting notes rather than statements of policy and questions rather than answers. As a matter of fact, the memorandum lends support to contradictory arguments; therefore, it is of little avail for the rebuttal of the said *prima facie* evidence. As to the provisions of the UEFA Statutes mentioned by the Claimants, they simply confirm the notorious circumstance that UEFA is the institutional and regulatory authority over European football, as normally happens with all international sports federations: in no way do such provisions prove or disprove a particular object of the Contested Rule. The Panel finds, therefore, that in enacting the Contested Rule UEFA did purport to prevent the conflict of interest inherent in commonly owned clubs taking part in the same competition and to ensure a genuine athletic event with truly uncertain results. As a result, the Panel holds that the object of the Contested Rule is not to restrict competition within the meaning of Article 81.1 of the EC Treaty.

114. As to the *effect* of the Contested Rule, the Claimants assert that it appreciably restricts competition by preventing or restricting investment by multiple owners in European clubs, by changing the nature, intensity and pattern of competition between commonly controlled clubs and those having other ownership structures, and by enhancing the economic imbalance between football clubs leading to an increase in the market dominance of a few clubs over the majority of smaller and medium-sized clubs. On the other hand, the Respondent asserts that the Contested Rule has an overwhelmingly pro-competitive purpose and effect, namely to preserve the integrity of sporting competition between football clubs.
115. According to EC case law, in order to ascertain whether competition is in fact restricted to an appreciable extent, the Panel must essentially look at the competition which would occur on the relevant market *in the absence* of the Contested Rule (*see* Court of Justice, Judgement of 30 June 1966, case 56/65, *Société Technique Minière*, in E.C.R. 1966, 235, at 250; Judgement of 11 July 1985, case 42/84, *Remia*, in E.C.R. 1985, 2545, para. 18).
116. The Panel observes that the Contested Rule undoubtedly discourages to some extent any current owner of a club potentially capable of qualifying for UEFA competitions from buying ownership interests in another club having the same capability. In the absence of the Contested Rule, not only would there not be such discouragement but, according to the Boon report, multi-club control could be expected to expand. Assuming that Mr. Boon's conjecture is correct, single club owners would probably perceive that multi-club owners retain market advantages from their expanded dimension and might decide that the best way to improve their own position would be also to acquire additional clubs. With an expansion of multi-club ownership throughout Europe the total number of club owners, and thus the total number of undertakings on the market, would evidently decrease, even though the number of clubs realistically aspiring to a slot in a UEFA competition would probably remain the same because the number of talented players cannot be increased at will. As

mentioned (*supra*, para. 102), probably no more than 350 clubs can each year realistically aspire to a UEFA slot, of which substantially less than one hundred could realistically hope to pass the first rounds and achieve a satisfactory number of matches and sufficient television exposure. In economic terms, within the relevant market there would be a reduction of the number of actors on the supply side *vis-à-vis* an unvarying large number of actors on the demand side (*see supra*, para 104). In other words, there could be a process of concentration of club ownership into fewer hands, given that there is a sporting barrier to any sudden entry into the market. As is well known, an entry into the market is hindered by the circumstance that in the European sporting system a new club must go through the pyramidal structure of national championships for several years before attaining a top professional level (*see supra*, paras. 15 and 18). As nobody can suddenly create a new football club and apply to directly enter into a top national championship or a UEFA competition (as happens for instance when United States professional leagues expand and add new franchises), a viable entry into the market is possible only through the purchase of an already existing club playing at good level in one of the fifty-one European top divisions.

117. The Panel observes that, from an economic point of view, the said decrease in the number of club owners could be expected either not to have any effect on prices of ownership interests in clubs – because club owners willing to sell their club would still be quite numerous, and because price is determined not only by supply and demand but also by the mentioned instrumental and consumption value placed by owners on clubs (*see supra*, para. 103) – or to bring about an increase in prices once the decrease in owners becomes noticeable. If, stretching the argument to extremes, the said concentration trend led to there being only a few owners of clubs capable of qualifying for UEFA competitions, the market for ownership interests in such clubs would be characterized by an oligopoly – presenting inherent incentives for cartel behaviour – with which any interested buyer would have to deal. Even on other football markets mentioned by the Claimants, where clubs are on the supply side – gate revenues, media rights, merchandising –, the reduction of club owners and the potentially resulting oligopoly could eventually bring about increases in prices to the detriment of consumers (*e.g.* increase in prices of match tickets or of pay television subscriptions). The Panel finds such an oligopoly scenario to be probably too extreme. The fact that when the Contested Rule was enacted the total number of European clubs controlled by multi-club owners was very low – only 12 clubs, according to the Boon report – seems to demonstrate, first, that a rush towards multi-club ownership would be unlikely (at least in the short term) and, second, that the postulated concentration process would in any event need several years to develop. However, even without admitting all the way the oligopoly scenario, it must be acknowledged that in the absence of the Contested Rule the number of undertakings on the market would sooner or later decline while the effects on prices, although scarcely noticeable in the short term, would in due course tend to show an increase.
118. As a result of the foregoing analysis, the Panel finds that, in the absence of the Contested Rule, competition on the relevant market and on other football markets would initially probably remain unaffected and, when affected, it would be restricted. In the light of this *a contrario* test, the Panel finds that the actual effect of the Contested Rule is to place some

limitation on mergers between European high level football clubs, and thus to increase the number of undertakings on the relevant market and on other football markets; accordingly, the Contested Rule preserves or even enhances economic competition between club owners and economic and sporting competition between clubs. The Panel notes that, according to the Court of Justice, clauses restraining competitors' freedom which are indirectly conducive to increasing the number of undertakings on the relevant market must be deemed as pro-competitive (Judgement of 11 July 1985, case 42/84, *Remia*, in *E.C.R.* 1985, 2545, last sentence of para. 19).

119. The Panel observes, consequently, that either the Contested Rule does not affect the relevant market at all or, if it does, it exerts a beneficial influence upon competition, insofar as it tends to prevent a potential increase in prices for ownership interests in professional football clubs (and to prevent potential price increases in other football markets as well), and thus it tends to encourage investment in football clubs. As a result, the Panel finds that the Contested Rule, by discouraging merger and acquisition transactions between existing owners of clubs aspiring to participate in UEFA competitions, and conversely by encouraging investments in such football clubs by the many potential newcomers, appears to have the effect of preserving competition between club owners and between football clubs rather than appreciably restricting competition on the relevant market or on other football markets.
120. Empirical support for the proposition that the Contested Rule not only does not prevent or restrict investment in football clubs, but even favors it, can be found in the British market. There the Premier League has a rule not allowing any person or corporate entity, except with the prior written consent of the Board (which thus far has never been granted), to «*directly or indirectly hold or acquire any interest in more than 10 per cent of the issued share capital of a Club while he or any associate is a director of, or directly or indirectly holds any interest in the share capital of, any other Club*».

Despite a rule substantially stricter than the Contested Rule – 10% rather than a controlling interest – British clubs, as reported by Mr. Boon, have successfully attracted capital investment in recent years and a substantial proportion of such capital investment has been from new corporate investors, not from the historic owners of the clubs.

121. The Claimants also allege that the Contested Rule has the effects of altering the nature, intensity and pattern of competition between commonly controlled clubs and other clubs, and of enhancing the economic imbalance between football clubs, leading to an increase in the market dominance of a few big clubs over the majority of smaller and medium sized clubs. In other words, the Claimants argue that the Contested Rule favours the rich and strong clubs over the weak and poor ones. The Claimants base this argument on the assumption that multi-club owners would tend to own only small and medium clubs and to invest more in countries where football is economically less developed, and thus would mitigate the process of polarization of market power between the bigger clubs in the larger football countries and other clubs. The Claimants' evidence in support of this argument is basically the pattern of ENIC's own investments.



122. The Panel finds that the said assumption is unsupported by meaningful evidence and fails to discern the logic of the argument. Certainly, ENIC has thus far followed the strategy of acquiring medium-sized clubs; however, if such an investment strategy is convenient, nothing will prevent owners of big clubs from acquiring medium-sized clubs as well. As mentioned, it appears to be a reasonable strategy to control clubs of different sporting levels, and some big clubs are indeed doing it: Mr. Boon has mentioned the well known media magnate group controlling AC Milan which also owns Monza (a smaller Italian club not playing in the top Italian division) and Mr. Trijbits has testified with regard to the attitude of top Dutch clubs (*see supra*, para. 35). Therefore, in the absence of the Contested Rule, not only would the polarization of market power between bigger and smaller clubs continue but, in the light of the previous findings, it would probably even be enhanced. After all, polarization of market power is what usually happens in any business sector when mergers and acquisitions are completely left to market dynamics and dominant companies are free to acquire smaller competitors (which is why regulators enact rules such as the EC Merger Regulation no. 4064/89). Moreover, the problem with this scenario is that, while in other types of business it is economically desirable for consumers that marginal and less efficient undertakings disappear from the market, in the sports business consumer welfare requires that numerous clubs remain on the market and achieve the highest possible economic and sporting balance between them. The Panel is of the view that to provide incentives for actual or potential club owners to invest their resources in only one high level club, as the Contested Rule tends to do, is conducive to an economic and sporting balance, rather than an imbalance, between football clubs. Therefore, from this point of view as well, the Panel finds the Contested Rule to be beneficial to competition in football markets.
123. Furthermore, in terms of consumer welfare, the quality of the entertainment provided to European football fans – with reference to both live attendance and television audience – does not appear to be appreciably affected by the Contested Rule. The only conceivable effect of the Contested Rule is that a club which has qualified for a UEFA competition would be replaced by the club from the same country which, in the previous season’s national championship, ranked immediately below the excluded club. Obviously, the replaced club would suffer a harm and its committed supporters would resent the replacement, but at the same time the substitute club and its committed supporters would enjoy a benefit exactly corresponding to the injury of the replaced club. The Panel observes in this respect that in principle competition law protects competition and the market as a whole, not individual competitors. Accordingly, in order to establish an injury to consumer welfare – *i.e.* that fans with a general interest in football are harmed – evidence should be provided that the substitute team would be less skilled and entertaining than the excluded one. This has not been proven by the Claimants and, in any event, it appears quite hard to prove, given that the quality and talent of the players and coach of two closely ranked teams are essentially analogous, and given that participation in UEFA competitions occurs one season later, when the coach or several players might have moved elsewhere and, in fact, the substitute team might well be more talented and entertaining than the replaced one. Therefore, the Panel finds that the Contested Rule does not appear to appreciably affect the quality of the sporting product offered to consumers.

g) Objective necessity of regulating multi-club ownership and proportionality of the Contested Rule

124. The foregoing findings appear to suffice for rejecting the contention that the Contested Rule appreciably restricts competition, and thus appear to suffice for excluding it from the scope of the prohibition set forth by Article 81 (*ex* 85) of the EC Treaty. However, in order to further support those findings, the Panel deems it opportune to verify whether the limitation on multi-club ownership can also be regarded as an essential feature in order to ensure the proper functioning of a professional football competition. In this regard, the Panel notes that the EC Court of Justice has held in several judgements that restraints on competitors' conduct do not amount to restrictions on competition within the meaning of Article 81.1 (*ex* 85.1), provided that such restraints do not exceed what is necessary for the attainment of legitimate aims and remain proportionate to such aims (*see e.g.* Judgement of 11 July 1985, case 161/84, *Remia*, in *E.C.R.* 1985, 2545; Judgement of 28 January 1986, case 161/84, *Pronuptia*, in *E.C.R.* 1986, 353; Judgement of 19 April 1988, case 27/87, *Erauw*, in *E.C.R.* 1988, 1919; Judgement of 15 December 1994, case C-250/92, *DLG*, in *E.C.R.* 1994, I-5641; Judgement of 12 December 1995, case C-399/93, *Oude Luttikhuis*, in *E.C.R.* 1995, I-4515).
125. The Claimants assert that the means employed by UEFA are disproportionate to the objective of protecting the integrity of European football competitions and have submitted for consideration a variety of «less restrictive alternatives». In particular, the Claimants argue that criminal penalties provided by the various State laws, in addition to UEFA disciplinary powers, are sufficient to deal severely with match-fixing in any case where such wrongdoing is proved. In addition, according to the Claimants, a more proportionate approach could include the adoption by UEFA and by all clubs participating in UEFA competitions of a code of ethics, and more particularly of a draft document prepared by ENIC and by the Claimants entitled «Proposed measures to guarantee sporting integrity in European football competition organised by UEFA». The Claimants have also suggested that the Contested Rule could include a clause for a case by case examination of multi-club ownership in order to appraise particular circumstances, and have proposed a «fit and proper» test for every club owner as a condition for participation in UEFA competitions or even as a requirement for the purchase of a club. They have also proposed that UEFA enact rules limiting the number of clubs which the same owner can control, or that an independent trust be established to which control of commonly owned clubs could be transferred for the duration of UEFA competitions. Moreover, in order to avoid problems with bonuses and transfers, inevitably connected with multi-club ownership (*see supra*, paras. 39-40), suggestions were also advanced that UEFA enact schemes, either general or special to commonly owned clubs, limiting bonuses and transfers of players.
126. The Respondent replies by asserting that the Contested Rule corresponds to the minimum degree of regulation necessary to protect the integrity of football competition and is, therefore, fully compatible with the law. The Respondent argues that the Contested Rule does not prohibit multi-club ownership, but simply prevents commonly controlled clubs

from participating in the same UEFA club competition, and that any investor may acquire a shareholding of up to 50% in any two or more European football clubs participating in UEFA competitions without ever being affected by the Contested Rule. In this respect, the Respondent mentions the stricter regulations which may be found in the United Kingdom, such as the rules of the Premier League, the Football League and the Scottish Football Association, or in the United States, such as the rules of the NBA, the NFL, the NHL and the MLB. The Respondent also argues that preventive measures are necessary in order to avoid conflicts of interest, and cites in this respect the principles applicable to lawyers and arbitrators. The Respondent also criticizes the draft regulation submitted by the Claimants for proposing rules which already exist (such as the obligations to play always to win and to field the best available team, and the disciplinary proceedings for anyone suspected of match-fixing), or rules which are impractical and unrealistic to enforce (such as the obligation for any multi-club owner to ensure the autonomy of each club's coaching and playing staff and the limitation of contacts between the clubs in the event that they play against each other, or the obligation to include in any club at least one minority shareholder capable of exercising minority shareholder's rights), or measures hard to assess and which would probably be challenged in court (such as the exclusion from competition of clubs whose owner is not a fit and proper person).

127. The Panel has already analyzed the «integrity question» and has found that, when commonly controlled clubs participate in the same competition, the consumers would reasonably perceive this situation as a conflict of interest potentially affecting the authenticity of results (*supra*, paras. 22-48). Accordingly, the Panel has concluded that multiple ownership of clubs in the context of the same competition is a justified cause for concern by a sports regulator and organizer such as UEFA (*supra*, para. 48). The Panel has also already found that the intention of the Contested Rule is to prevent the conflict of interest inherent in commonly controlled clubs participating in the same UEFA competition and to preserve the genuineness of results (*supra*, para. 113). In this respect, the Panel is persuaded that this is a legitimate goal to pursue, and finds evident support for this proposition in the *Bosman* ruling, where the EC Court stated that the aim «of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results ... must be accepted as legitimate» (Judgement of 15 December 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 106).
128. The Panel observes that organizing sports leagues and competitions needs a certain amount of coordination and horizontal restraints between clubs in order to supply the «product» to the consumers. As was remarked by a leading United States antitrust scholar (and later federal judge) «some activities can only be carried out jointly. Perhaps the leading example is league sports» (R.H. BORK, *The antitrust paradox. A policy at war with itself*, 2<sup>nd</sup> edition, New York 1993, 278). Indeed, each professional club competing in a league or in a competition has an evident interest in combining sporting and economic rivalry with sporting and economic cooperation. In the words of the Supreme Court of the United States, sport is «an industry in which horizontal restraints on competition are essential if the product is to be available at all. ... What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such

*matters as the side of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. ... And the integrity of the "product" cannot be preserved except by mutual agreement»* (Judgement of 27 June 1984, *NCAA v. Board of Regents of the University of Oklahoma*, in 468 U.S. 85, 101-102).

Advocate General Lenz basically espoused such line of reasoning when he stated that *«the field of professional football is substantially different from other markets in that the clubs are mutually dependent on each other»* and that *«certain restrictions may be necessary to ensure the proper functioning of the sector»* (Opinion delivered on 20 September 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 270).

129. The Panel is of the opinion that among the «myriad of rules» needed in order to organize a football competition, rules bound to protect public confidence in the authenticity of results appear to be of the utmost importance. The need to preserve the reputation and quality of the football product may bring about restraints on individual club owners' freedom. In this respect, the Panel sees an analogy with restraints which the Court of Justice has regarded as inherent in, and thus necessary for, franchising systems (Judgement of 28 January 1986, case 161/84, *Pronuptia*, in *E.C.R.* 1986, 353, para. 15 *et seq.*).
  
130. Given that the Panel has found that in multi-club ownership situations a problem of conflict of interest objectively exists (*supra*, para. 45), and that this has been found to affect the public perception of the authenticity of results (*supra*, para. 48), the Panel is persuaded that a rule concerning multi-club ownership is objectively necessary in order to provide the consumers with a credible sporting contest. The question is whether the Contested Rule is proportionate to the legitimate objective pursued or whether UEFA should have adopted a less restrictive means to achieve it. With regard to the principle of the «less restrictive alternative», however, the Panel is of the opinion that this does not necessarily mean that it is necessary to test the Contested Rule against any conceivable alternative. Judges should not substitute for legislators, and the former should always allow the latter to retain a certain margin of appreciation. In other words, «the principle of proportionality cannot be applied mechanically» and «the less restrictive alternative test is not an end in itself but simply facilitates the judicial enquiry» (T. TRIDIMAS, *The principle of proportionality in Community law: from the rule of law to market integration*, in *The Irish Jurist* 1996, 83, at 93-94). Such position is supported by some significant Court of Justice case law (*see e.g.* Judgement of 10 May 1995, case C-384/93, *Alpine Investment*, in *E.C.R.* 1995, I-1141, paras. 51-54).
  
131. With regard to proportionality, the Panel observes that the Contested Rule has been narrowly drawn to proscribe only the participation in the same UEFA competition of commonly controlled clubs and does not prohibit multi-club ownership as such. The Contested Rule does not proscribe the participation of commonly controlled clubs in two different UEFA competitions and does not prevent the acquisition of shares – up to 49% of the voting rights – in a large number of clubs participating in the same competition. As the scope of the Contested Rule is strictly limited to participation in the same UEFA competition, a multi-club owner can control clubs in several countries and obtain a good

return on the investments even if only one of its clubs is allowed to take part in a given UEFA competition. In this respect, the already quoted MMC Report contains some evidence – referred to the British market, but arguably representative of other national markets – suggesting that the top national championship (in England the Premier League) and the national cup (in England the FA Cup) are the football competitions most preferred by consumers and most economically rewarding, because of their unique combination of volume and popularity of matches (MMC Report, para. 2.22). Indeed, in response to a 1996 British survey, 71% of pay-television subscribers who watched football said that the Premier League was very important to them and 68% said the same of the FA Cup; only 50% said the same of UEFA matches involving British clubs (*ibidem*). Moreover, the number of UEFA matches played by a club (even achieving the final) is substantially fewer than the number of national championship and national cup matches. Accordingly, European football clubs still derive most of their revenues from national championship and cup matches; for example, about 75% of Manchester United’s profits come from Premier League matches (*ibidem*, para. 2.125). In the light of the foregoing data and remarks, and of the circumstance that participation in national competitions is not affected at all, the Panel finds that the Contested Rule appears *prima facie* to be limited to its proper objective and not to be disproportionate or unreasonable. This *prima facie* conclusion needs now to be examined in the light of the less restrictive alternative test.

132. Before proceeding with the less restrictive alternative test, the Panel remarks that, as a normative technique, rules which are applied *a priori* differ from rules which are applied *a posteriori*. Rules that are applied *a priori* tend to prevent undesirable *situations* which might prove difficult or useless to deal with afterwards, rather than imposing a penalty on someone guilty of something. On the other hand, rules that are applied *a posteriori* are bound to react to specific *behaviours*. For example, under EC law and several national laws, rules on mergers are applied *a priori*, whereas rules on abuses of dominant position are applied *a posteriori*. Merger operations are checked before they actually take place, and are blocked if the outcome of the merger would be the establishment of a dominant position because of the possible negative consequences on the market and not because the individuals owning or managing the merging undertakings are particularly untrustworthy and the company after the merger is expected to abuse of its dominant position. Among the myriad of possible examples, another obvious example of rules applied *a priori* can be found in provisions of company law restraining cross-ownership of shares (*see* Article 24a of the Second Council Directive of 13 December 1976, no. 77/91/EEC, in *Official Journal EC*, 31 January 1977, L 26/1, as subsequently amended by Council Directive of 23 November 1992, no. 92/101/EEC, in *Official Journal EC*, 28 November 1992, L 347/64). One can think also of all the rules providing for incompatibility between a given position and another (say, between membership of a company’s board of directors and membership of the same company’s board of auditors). All such *a priori* rules are applied on a preventive basis, with no appraisal of any specific wrongdoing and no moral judgement on the individuals or companies concerned. On the other hand, rules setting forth obligations and corresponding penalties or sanctions, such as criminal or disciplinary rules, can be applied only after someone has been found guilty of having violated an obligation. In summary, *a priori* and *a posteriori* rules respond to different legal purposes and are legally complementary rather than

alternative. Therefore, the Panel finds that the Contested Rule, which is clearly to be applied *a priori*, can be supplemented but cannot be substituted by any sporting rules establishing disciplinary sanctions or any State laws forbidding match-fixing. Therefore, such disciplinary and criminal rules cannot be «less restrictive alternatives» insofar as they are not truly «alternative» to the Contested Rule.

133. As to the other alternative means proposed by the Claimants, the Panel is not persuaded that they are viable or that they really can be considered as less restrictive. The Claimants have particularly relied on a draft document headed «*Proposed measures to guarantee sporting integrity in European football competition organised by UEFA*» (hereinafter «the Claimants' Proposal»). According to the Claimants' Proposal, *inter alia*, UEFA would be required in consultation with the relevant national association to control the ownership structure of every club wishing to participate in a UEFA competition and would be «*entitled to take appropriate steps in cases where it considers that a particular individual or legal entity is not a fit and proper person to be or become an owner of a club*», and could «*after giving that person or legal entity a reasonable opportunity to make representations, decide that the club or clubs owned or to be owned by him or it may, subject to giving one season's notice, become ineligible to participate in European competitions*».

At the hearing, the Claimants also proposed to extend this fit and proper test to clubs' directors and executives. Since one season's notice should be granted, the Claimants' Proposal would imply that every summer the UEFA offices should check the ownership structures of all the clubs (established in about fifty different legal systems) which can potentially qualify for the UEFA competitions of the following season – as said, in all the European top national divisions there are 737 clubs, of which perhaps 350 have a realistic chance of qualifying for UEFA competitions (*see supra*, para. 102) – and, after a legal hearing, pass moral judgements on the owners', directors' and executives' adequacy to run a football club. The Panel finds that, from a substantive point of view, it would be very difficult to come up with some objective requirements in order to fairly carry out a fit and proper test and, from a procedural point of view, the administrative costs involved and the legal risks of being sued for economic and moral damages after publicly declaring in front of the whole of Europe that someone is not a fit and proper person are practically incalculable (in this respect, as UEFA is a private body, no comparison can be made with fit and proper tests carried out by public authorities prior to granting bookmaking licences, because such public authorities are essentially immune from being sued for declaring that someone is not «fit and proper»). The Panel notes that the Court of Justice has stated, with reference to the fashion sector, that if it is too difficult to establish objective quality requirements and it is too expensive to control compliance with such requirements, some preventive restraints are acceptable and do not violate Article 81.1 (*ex* 85.1) of the EC Treaty (Judgement of 28 January 1986, case 161/84, *Pronuptia*, in *E.C.R.* 1986, 353, para. 21). Analogously, the Panel finds that the Claimants' Proposal would be very difficult and way too expensive to administer and cannot be regarded as a viable alternative to the Contested Rule. Moreover, hardly could a UEFA rule requiring an inherently intrusive ethical examination of clubs' owners, directors and executives be characterized as a «less restrictive» alternative.

134. The Claimants have also mentioned approvingly some of the rules adopted by national leagues with reference to multi-club ownership – in the United Kingdom: Section J.4.2 of the FA Premier League Rules, Paragraph 84.1 of the Football League Regulations, and Paragraph 13 of the Articles of Association of the Scottish Football Association; in the United States: Article 3 of the NBA Articles of Association, and Article 3, Section 3.11 of the MLB National League Constitution – because they have provision for derogation and for individual cases to be considered on their own merits. The Panel, however, upon reading such rules finds that they are in principle *more* restrictive than the Contested Rule, insofar as they forbid a holding of more than 10% of the shares of another club (the Premier League), or a holding of or dealing in *any* shares or securities of more than one club (Football League, Scottish Football Association), or a holding of *any* financial interest in more than one club (NBA, MLB National League). Admittedly, most of these rules provide for the possibility of trying to obtain the prior approval of the respective sports governing body. However, apart from the fact that in practice no such approval has ever been granted, it seems to the Panel that such possibility for derogation in individual cases is strictly linked to the extremely rigorous rules in force within those leagues. Support for this interpretation can be found in the NBA rules, which clearly distinguish between the mere holding of financial interests, where application for derogation is possible, and *control* of more than one club, which is absolutely forbidden with no provision for derogation. The Panel finds that control of more than one club taking part in the same football competition is so inherently conducive to a conflict of interest, and to the related public suspicions, that there is no scope for the examination of individual cases. In addition, any legal regime based on *ad hoc* authorizations would cause unpredictability and uncertainty, and every denial of authorization would in all likelihood bring about expensive litigation, such as the present one. In this respect, the Panel is of the opinion that, for the good of sports and of consumers, it is advisable that sports leagues and federations try to shape their regulations in such a way that organization and administration of sports are not permanently conditioned by the risk of being sued.
135. The Claimants have then proposed other miscellaneous measures as alternatives to the Contested Rule, but the Panel finds that they are not suitable options. One proposed measure is the enactment of rules limiting the number of clubs that the same owner can control but, as has been seen, even two commonly controlled clubs suffice to give rise to conflict of interest problems. Other proposals try to address the issue by requiring that multi-club owners divest their ownership interests in all but one of the owned clubs solely for the period of the UEFA competition. This would be done through the establishment of an independent trust to which control of commonly owned clubs could be transferred for the duration of UEFA competitions or through the appointment of an independent nominee who would exercise the owner's voting rights in its sole discretion. The Panel finds that this solution would be not only complex to administer but also quite intrusive upon the clubs' structure and management; in any event, the true problem would be that the interim suspension of control or voting rights does not modify the substantial ownership of a club, and thus does not exclude the underlying continuance of a conflict of interest. Lastly, the proposed regulations restricting bonuses and transfers of players in view of a game between two commonly owned clubs would only take care of some aspects of the conflict of interest but, in particular, would not avoid the objective problems related to the allocation of

resources by the multi-club owner among its clubs (*supra*, para. 33 *et seq.*) and to the interest of third clubs (*supra*, para. 43).

136. In conclusion, the Panel finds that the Contested Rule is an essential feature for the organization of a professional football competition and is not more extensive than necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and thus the uncertainty, of results in UEFA competitions. The Panel finds the Contested Rule to be proportionate to such legitimate objective and finds that no viable and realistic less restrictive alternatives exist. As a result, also in the light of the previous findings that the Contested Rule does not appear to have the object or effect of restricting competition, the Panel holds that the Contested Rule does not violate Article 81 (*ex 85*) of the EC Treaty.

h) Compatibility with Article 82 (*ex 86*) of the EC Treaty

137. The Claimants assert that UEFA is the only body empowered to organize European competitions and, consequently, holds a dominant position in the various European football markets. According to the Claimants, UEFA enjoys a position of economic strength which enables it to behave to an appreciable extent independently of the other undertakings which operate in the relevant markets, including the football clubs which participate in European competitions, and ultimately independently of supporters and spectators. The Claimants also assert that UEFA and its member associations, which normally enjoy monopoly power in their respective countries, enjoy joint dominance by virtue of their economic and legal links. The Claimants argue that the adoption of the Contested Rule constitutes an abuse of UEFA's dominant position contrary to Article 82 (*ex 86*) of the EC Treaty because the Contested Rule restricts competition, is unnecessary and disproportionate, unfairly discriminates between commonly controlled clubs and other clubs, and is not objectively justified. In order to support their contention that UEFA's conduct amounts to an abuse, the Claimants expressly rely on essentially the same arguments already advanced in connection with Article 81 (*ex 85*) of the EC Treaty.

138. The Respondent replies by denying that UEFA is in a dominant position within the meaning of Article 82 (*ex 86*), and in particular by denying that UEFA is able to behave independently of the clubs. The Respondent remarks that adopting a rule to preserve the integrity of the UEFA club competitions cannot amount to an abuse of a dominant position. The Respondent also asserts that the allegations concerning proportionality, discrimination and anti-competitive behaviour contain nothing new, and thus relies on the arguments advanced with reference to previous grounds.

139. The Panel notes that currently UEFA is the only pan-European regulator and administrator of football in general. However, it is not enough to state that a federation enjoys a monopolistic role in regulating and administering its sport, because this is inherent in the current European sports structure and «is recognized to be the most efficient way of organising sport» (EC Commission, *The European model of sport*, Brussels 1999, para. 3.2; *see*



*also* CAS 96/166 *K. v. FEI*, preliminary award of 18 November 1997, in *Digest of CAS Awards 1986-1998*, *op. cit.*, p. 371, para. 38). The Panel observes that in order to establish whether an undertaking has a dominant position, it is necessary to evaluate such dominance not in the abstract but in relation to one or more specific relevant markets. In this respect, UEFA's activities as an undertaking are developed as the sole – thus far – organizer of pan-European football competitions, retaining the related revenues from the sale of television rights for Champions' League matches and for the final match of the UEFA Cup and from the Champions' League group of sponsors. UEFA also cooperates with local undertakings (national federations or other entities) in organizing the final matches of its competitions. Revenues derived from UEFA's organization of pan-European competitions are apportioned among UEFA, including therein member national associations, and the participating clubs. In substance, UEFA can exert a dominant market power in the market for the organization of pan-European football matches and competitions.

140. In order to find an abuse of dominant position, the Panel needs to find that UEFA is seeking to overcome rival competitors through its dominant market power. In this respect, the Panel observes that if UEFA were found to exploit its market power in order, for example, to obstruct the establishment of another entity organizing pan-European football matches, this should certainly be analyzed with particular attention being paid to Article 82 (*ex* 86) of the EC Treaty. A case of this kind was faced by the Italian competition authority, which held that the Italian sailing federation violated Article 3 of the Italian competition statute – essentially identical to Article 82 of the EC Treaty – insofar as it used its dominant position to obstruct and boycott in various ways an independent organizer of sailing regattas with the purpose of profiting more from the organization of its own regattas (*see Autorità garante della concorrenza e del mercato*, Decision no. 788 of 18 November 1992, *AICI/FIV*, in *Bollettino* 22/1992). However, these theoretical and actual examples appear to bear no analogy to the enactment of the Contested Rule. The Claimants are not trying to organize pan-European competitions, nor are they selling television rights to existing pan-European competitions organized in competition with UEFA (as Media Partners would have done if the planned new pan-European football competitions, the Super League and the Pro Cup, had in fact been created outside of UEFA; *see supra*, para. 19).
141. The Panel has already identified the relevant product market as the market for ownership interests in football clubs capable of taking part in UEFA competitions (*see supra*, para. 100). The Panel observes that UEFA does not own any football club, nor can it buy or run one. Accordingly, UEFA is not present at all on this market and cannot be held to enjoy a dominant position. With respect to the relevant market it appears that UEFA may act, and has acted, only as a mere regulator. The Panel also observes that the national federations are not on the relevant market either; therefore, UEFA and its member associations do not enjoy a joint dominant position on such market. The Panel finds that, as a United States court has recognized, «*if a regulation is adopted by an independent sanctioning organization with no financial stake in the outcome, a court will have maximum assurance that the regulation is to protect fair competition within the sport*», (*M&H Tire v. Hoosiers*, 733 F.2d 973, 1st Cir. 1984, at 982-983).

142. The Claimants have pointed out that, according to EC case law, in certain circumstances an undertaking dominant on one market can commit an abuse on a neighbouring market (*see* Court of Justice, Judgement of 6 March 1974, cases 6-7/73, *Commercial Solvents*, in *E.C.R.* 1974, 223; *AKZO*, Judgement of 3 July 1991, case C-62/86, in *E.C.R.* 1994, I-3439; Court of First Instance, Judgement of 1 April 1993, case T-65/89, *British Gypsum*, in *E.C.R.* 1993, II-392; Judgement of 6 October 1994, case T-83/91, *Tetra Pak II*, in *E.C.R.* 1994, II-762).
143. The Panel remarks, however, that in all such EC precedents the dominant undertakings were active on both the market of dominance and the neighbouring non-dominated market. Accordingly, in order to find an abuse of dominant position on a market other than the market of dominance it must be proven that, through the abusive conduct, the dominant undertaking – or the group of dominant undertakings in the event of joint dominance – tends to extend its presence also on the other market or tends to strengthen its dominant position on the market of dominance (or at least tends to undermine the competitors’ competitiveness). In the present case, UEFA (or any national federation) is obviously not going to enter, let alone extend its presence, in the market for ownership interests in football clubs. Furthermore, the Claimants have not provided adequate evidence that UEFA, in adopting the Contested Rule, has tried to strengthen its monopolistic position on the market for the organization of pan-European football matches and competitions (nor have Claimants provided any evidence that there is conduct of this kind attributable to the national federations collectively). Besides such lack of evidence, the Panel fails to see any logical link between the rule on multi-club ownership and the alleged attempt or intent to hinder the entry into the market of a new competitor (which could be the group that has planned to establish a «Super League» or some other entity or individual who might try to create a football league in Europe modelled on United States leagues). The opposite would seem more logical, insofar as the Contested Rule tends to alienate multi-club owners and thus might eventually tend to facilitate their secession from UEFA in order to join alternative pan-European competitions or leagues (*see also supra*, paras. 110-113).
144. In any event, with regard to the various abuses alleged by the Claimants, the Panel observes that it has already dealt with them in connection with other grounds. The Panel has found above that the Contested Rule does not restrict competition (*see supra*, paras. 114-123), that it is necessary and proportionate to the objective pursued (*see supra*, paras. 125-136), that it does not unfairly discriminate between commonly controlled clubs and other clubs (*see supra*, para. 65), and that it is objectively justified (*see supra*, para. 130).
145. In conclusion, the Panel holds that the adoption by UEFA of the Contested Rule has not constituted an abuse of an individual or a collective dominant position within the meaning of Article 82 (*ex* 86) of the EC Treaty.

*Swiss competition law: articles 5 and 7 of the Federal Act on Cartels*

146. Article 5.1 of the «*Loi fédérale sur les cartels et autres restrictions à la concurrence*» of 6 October 1995 (*i.e.* the Swiss Federal Act on Cartels and Other Restraints of Competition, hereinafter «Swiss Cartel Act») reads as follows:

*«Les accords qui affectent de manière notable la concurrence sur le marché de certains biens ou services et qui ne sont pas justifiés par des motifs d'efficacité économique, ainsi que tous ceux qui conduisent à la suppression d'une concurrence efficace, sont illicites»* («All agreements which significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful»).

It is a provision which essentially corresponds to Article 81 (*ex* 85) of the EC Treaty (*supra*, para. 71).

147. Article 7.1 of the Swiss Cartel Act reads as follows:

*«Les pratiques d'entreprises ayant une position dominante sont réputées illicites lorsque celles-ci abusent de leur position et entravent ainsi l'accès d'autres entreprises à la concurrence ou son exercice, ou désavantagent les partenaires commerciaux»* («Practices of undertakings having a dominant position are deemed unlawful when such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market or when they injure trading partners»).

This provision essentially corresponds to Article 82 (*ex* 86) of the EC Treaty (*supra*, para. 71).

148. With respect to the relevance of the Swiss Cartel Act, the Claimants have remarked that the Contested Rule affects trade within Switzerland in that Swiss football clubs are eligible to compete in, and do compete in, UEFA competitions; moreover, the Swiss club FC Basel is currently controlled by ENIC. The Respondent has not objected to the possible relevance of the Swiss Cartel Act in the present dispute. Both the Claimants and the Respondent have essentially relied on the analysis developed with reference to Article 81 (*ex* 85) and 82 (*ex* 86) of the EC Treaty. The only alleged difference with EC law is that, according to the Claimants, there is no «sporting exception» in Switzerland but only a very narrow exemption (to be interpreted quite rigorously) for the «rules of the game» *vis-à-vis* the «rules of law», which cannot be applied in the present case. The Respondent agrees with the Claimants that the Contested Rule cannot be considered as a «rule of the game» under Swiss law, but contends that Swiss competition law is not more restrictive than EC competition law and, therefore, limitations which are introduced with the sole aim of guaranteeing or enhancing sporting quality of competitions can be justified by a sort of sporting exception.
149. With regard to the «sporting exception», the Panel notes that it has already excluded that it can serve the purpose of exempting the Contested Rule from the application of competition rules (*supra*, para. 83). Consequently, the Panel need not rule on whether such an exception exists under Swiss competition law or not. Furthermore, the Panel observes that, in the light

of the textual similarities and the conceptual correspondence of Swiss competition law to EC competition law, the above findings concerning Articles 81 (*supra*, paras. 109-136) and 82 of the EC Treaty (*supra*, paras. 137-145) are applicable *mutatis mutandis* to Articles 5 and 7 of the Swiss Cartel Act. With particular regard to Article 5, the Panel remarks that the envisaged oligopoly scenario (*supra*, para. 117) is much more likely within a small market such as Switzerland, where there are not many teams aspiring to participate in UEFA competitions; indeed, there are only twelve clubs in the Swiss first division. Therefore, the described pro-competitive effect of the Contested Rule is even amplified within the Swiss market. As a result, the Panel holds that, within the Swiss market, the Contested Rule does not significantly restrict competition within the meaning of Article 5 of the Swiss Cartel Act, nor does it constitute an abuse of dominant position within the meaning of Article 7 of the Swiss Cartel Act.

*European community law on the right of establishment and on free movement of capital*

150. Article 43 (*ex* 52) of the EC Treaty prohibits «restrictions on the freedom of establishment of nationals of a member State in the territory of another Member State». Under Article 56 (*ex* 73 B) all restrictions on movement of capital and on payments within the Community and between the Member States and third countries are prohibited. Both provisions are directly effective and can therefore be applied by national tribunals or arbitration courts.
151. The Claimants assert that the essence of the Contested Rule is to restrict the possibility of multi-club owners setting up subsidiaries in more than one EC Member State, in violation of Article 43 (*ex* 52) of the EC Treaty. The Claimants also assert that the Contested Rule restricts capital movements within the meaning of Article 56 (*ex* 73 B) of the EC Treaty. The Respondent replies that the Contested Rule, even if caught by such EC provisions, would not infringe them because it is a proportionate means to achieve a legitimate objective.
152. The Panel observes that the Contested Rule does not entail any discrimination based on a person's (or corporation's) nationality; therefore, under EC law jargon, it can be characterized as an «equally applicable measure». As a result, even assuming that the Contested Rule somewhat restricts the right of establishment or the free movement of capital, EC case law envisages the existence of justifications on grounds of reasonableness and public interest, provided that the requirements of necessity and proportionality are met (*see supra*, para. 130).
153. As the Panel has already noted, the Court of Justice has stated that «*in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results ... must be accepted as legitimate*» (Judgement of 15 December 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 106).

Therefore, the aim of the Contested Rule of preserving the authenticity and uncertainty of results – by preventing the conflict of interest inherent in commonly owned clubs participating in the same football competition – is certainly to be considered in principle as a legitimate justification, as long as the aim is pursued through necessary and proportionate means.

154. The Panel has already found that the Contested Rule meets the requirements of objective necessity and of proportionality (*see supra*, paras. 125-136). Consequently, the Panel holds that the Contested Rule does not infringe Article 43 (*ex 52*) and Article 56 (*ex 73 B*) of the EC Treaty.

*General principle of law*

155. The Claimants assert that it is a general principle of law that a quasi-public body exercising regulatory powers, such as an international federation, must not abuse its powers. The Claimants argue that in adopting the Contested Rule UEFA has abused its powers because it has tried to protect its monopoly power over the organization of pan-European football competitions. The Respondent rejects this allegation.

156. The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» (*«ordre public»*) provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such *lex ludica*. For example, in the CAS award *FIN/FINA* the Panel held that it could intervene in the sanction imposed by the international swimming federation (FINA)

*«if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary, or if the sanctions provided by the rules can be deemed excessive or unfair on their face»* (CAS 96/157 *FIN v. FINA*, award of 23 April 1997, in *Digest of CAS Awards 1986-1998, op. cit.*, p. 358, para. 22; *see also* CAS OG 96/006 *M. v. AIBA*, award of 1 August 1996, *ibidem*, p. 415, para. 13).

157. The Panel, on the basis of previous remarks, finds that UEFA did not adopt the Contested Rule with the purpose of protecting its monopoly power over the organization of pan-

European football competitions (*see supra*, paras. 110-113 and 143), and finds that the Contested Rule is not arbitrary nor unreasonable (*see supra*, paras. 48 and 125-136). Therefore, with regard to the substantive content of the Contested Rule, the Panel holds that UEFA did not abuse its regulatory power and did not violate any general principle of law.

158. The Panel observes, however, that under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations (*see CAS OG 96/001 US Swimming v. FINA*, award of 22 July 1996, in *Digest of CAS Awards 1986-1998, op. cit.*, p. 381, para. 15; *CAS 96/153 Watt v. ACF*, award of 22 July 1996, *ibidem*, p. 341, para. 10). The Panel has already found that UEFA violated its duty of procedural fairness because it adopted the Contested Rule too late, when the Cup Regulations for the 1998/99 season, containing no restriction for multiple ownership, had already been issued and communicated to the interested football clubs (*see supra*, para. 61). The Panel has also already remarked that such procedural defect by itself does not warrant the permanent annulment of the Contested Rule (*see supra*, para. 62). Therefore, as is going to be seen (*infra*, paras. 159-163), the said lack of procedural fairness will have some consequences only in connection with the temporal effects of this award.

### Temporal effects of this award

159. The Panel, approving the CAS interim order of 16 July 1998, has held that UEFA violated its duties of procedural fairness with respect to the 1998/99 season, insofar as it modified the participation requirements for the UEFA Cup at an exceedingly late stage, after such requirements had been publicly announced and the clubs entitled to compete had already been designated (*see supra*, paras. 60-62 and 158). This procedural defect caused the above-mentioned interim suspension of the Contested Rule, freezing the situation as it was before the enactment of the Contested Rule.
160. These proceedings then required more than one whole year to fully develop and come to an end with this award. The interim order appropriately remarked: «*At this preliminary stage, CAS is further of the opinion that the outcome of the Claimants' action is uncertain*» (CAS Procedural Order of 16-17 July 1998, para. 69). The number and complexity of the issues involved and the wide-ranging nature of the dispute have all along given the proceedings a state of uncertainty as to the outcome of the present case. With the release of the present award the CAS ends such state of uncertainty. However, the 1999/2000 football season has already begun and an immediate application of the Contested Rule for this season might involve for some clubs a sudden loss of their eligibility to participate in UEFA competitions (eligibility obtained on the basis of their results in 1998/99 national championships, at a time when the Contested Rule was not in force because of the interim order and there was uncertainty as to the outcome of this case).
161. Moreover, in their written briefs and oral arguments, the Claimants have drawn the Panel's attention to the harmful consequences which might ensue for them and for ENIC from an

award rejecting their petitions. The interim order already stated (*see* CAS Procedural Order of 16-17 July 1998, para. 54) that an adjustment to the Contested Rule should not be arranged hurriedly, and commonly controlled clubs and their owners should have some time to determine their course of action, also taking into account possible legal questions (*e.g.* if shares are to be sold, minority shareholders may be entitled to exercise preemptive rights within given deadlines). There is an obvious need for a reasonable period of time before entry into force, or else the implementation of the Contested Rule may turn out to be excessively detrimental to commonly controlled clubs and their owners.

162. The Panel considers that an immediate application of the effects of the award could be unreasonably harmful to commonly owned clubs which during the recently terminated 1998/99 season have qualified for one of the 1999/2000 UEFA competitions. Such clubs, if any, would find themselves in the same situation as they were in when the CAS rightly stayed the implementation of the Contested Rule. If UEFA had announced in the Summer of 1998 that the Contested Rule was going to be implemented at the beginning of the 1999/2000 football season, no club could have later claimed to have legitimate expectations with respect to the treatment of multi-club ownership. In other words, without a ruling on the temporal effects of this award, the Panel would not give sufficient weight to the procedural defect which occurred in the adoption of the Contested Rule.
  
163. In conclusion, paramount considerations of fairness and legal certainty, needed in any legal system, militate against allowing UEFA to implement immediately the Contested Rule in the 1999/2000 football season which has already begun. Accordingly, the Panel partially upholds the Claimants' petition to extend the stay of the Contested Rule, and deems it appropriate to extend such stay until the end of the current 1999/2000 football season; for the remaining part, the petition for an indefinite extension of the stay is rejected. As a result, the Panel holds that the Contested Rule can be implemented by UEFA starting from the 2000/2001 football season.

### **The Court of Arbitration for Sport:**

1. Rejects the petitions by AEK Athens and Slavia Prague to declare void or to annul the resolution adopted by UEFA on 19 May 1998 on the «Integrity of the UEFA Club Competitions: Independence of the Clubs».
  
2. Partially upholding the petition by AEK Athens and Slavia Prague to extend indefinitely the interim stay ordered by the CAS on 16 July 1998, orders the extension of the stay until the end of the 1999/2000 football season and, accordingly, orders UEFA not to deny admission to or exclude clubs from the 1999/2000 UEFA club competitions on the ground that they are under common control; consequently, UEFA is permitted to implement its resolution of 19 May 1998 starting from the 2000/2001 football season.
  
3. Rejects all other petitions lodged by AEK Athens and Slavia Prague.