Arbitrations CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD & CAS 2008/A/1584 Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD, award of 15 July 2008

Panel: Prof. Ulrich Haas (Germany), President; Mr Efraim Barak (Israel); Mr Olivier Carrard (Switzerland)

Football
Eligibility of a club to participate in a competition
Standing to sue/to be sued
Delimitation of directly affected parties from indirectly affected parties
Application of criminal principles to the disciplinary jurisdiction of sports associations
Application of the principle of non-retroactivity
Application of other principles which are part of the protective standards in the interest of the person affected
Power of review of the decision issued by the national association

1. **Where a third party is affected because he is a competitor of the addressee of the measure/decision taken by the association – unless otherwise provided by the association's rules and regulations –, the third party does not have a right of appeal. Effects that ensue only from competition are only indirect consequences of the association's decision/measure. If, however, the association disposes in its measure/decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal.**

2. **The criminal principles are the expression of a weighing up of the state's interests (in criminal prosecution) and a citizen's right to freedom. However, under Swiss law the right of associations to impose sanctions or disciplinary measures on athletes and clubs is not the exercise of a power delegated by the State, rather it is the expression of the freedom of associations and federations. The analogous application of criminal principles to limit the powers of sports organizations is therefore only a possibility if the principle in question is an expression of a fundamental value system that penetrates all areas of the law. Even if a principle of criminal law is the expression of this fundamental value system (across all areas of the law), it does not follow that the principle applies without exception and irrefutably in the relationship between a sports association and the athlete/club.**

3. **The principle of non-retroactivity is a fundamental legal principle, which does – basically – apply to measures taken by associations having the character of a sanction. However, it does not follow from this that the principle applies without limitation. In particular, it does not apply to a rule which governs the requirements for being admitted to a competition.**

4. **When a measure against a person/entity has the character of a sanction, the non-application of the criminal law prohibition of retroactivity does not place the affected person/entity in an unprotected position because it is perfectly possible that other legal principles, which are part of the "droits de protection", apply. In this regard one must think of the principle of legality, the principle of proportionality, the principle of equal treatment and also the principle of *"nulla poena sine culpa"*.**

5. **Art. 1.04 of the UCL-Regulations does not produce any automatism whereby if a national association has sentenced a club for match-fixing, UEFA is automatically bound by this finding. Rather UEFA must make its decision autonomously and independently on the basis of all of the factual circumstances available to it. To this extent decisions by the national associations form only one of the factual circumstances – even if it is perhaps a substantial one – which UEFA must take into consideration and evaluate when making its decision.**

Sport Lisboa e Benfica Futebol SAD ("Benfica" or "the First Appellant") and Vitória Sport Clube de Guimarães ("Vitória" or the "Second Appellant") are professional football clubs that participated in the Portuguese National League in the 2007/2008 season. The First Appellant finished the season in fourth place and the Second Appellant finished in third place.

Union of European Football Associations (UEFA or the "First Respondent") is the sports governing body for football in Europe. It is established in Switzerland in the form of an association and governed by Art. 60 *et seq.* of the Swiss Civil Code. FC Porto Futebol SAD ("Porto" or the "Second Respondent" is a professional football club that participated in the Portuguese National League in the 2007/2008 season and finished in first place. Benfica, Vitória and Porto are all members of the Portuguese Football Federation (PFF) which in turn is a member of UEFA.

UEFA is the promoter of the UEFA Champions League (CL). The CL is the most important competition for European football clubs in Europe. Only the best teams in Europe are admitted on the basis of their sporting results in their respective national league championship of the previous season. The CL for the 2008/2009 season is governed by the Regulations of the UEFA Champions League 2008/2009 (the "UCL-Regulations") which were adopted in March 2008 and came into force on 1 May 2008. Art. 1.04 of the UCL-Regulations stipulates the admission criteria for participating in the CL and reads – *inter alia* – as follows:

> *"To be eligible to participate in the competition, a club must fulfil the following criteria:*
>
> *a) it must have qualified for the competition on sporting merit;*

b) it must have obtained a licence issued by the national association concerned in accordance with the applicable national club licensing regulations as accredited by UEFA in accordance with the UEFA club licensing manual (version 2.0);

c) it must agree to comply with the rules aimed at ensuring the integrity of the competition as defined in Art. 2;

d) it must not be or have been involved in any activity aimed at arranging or influencing the outcome of a match at national or international level;

e) it must confirm in writing that the club itself, as well as its players and officials, agree to respect the statutes, regulations, directives and decisions of UEFA;

f) it must confirm in writing that the club itself, as well as its players and officials, agree to recognise the jurisdiction of the Court of Arbitration for Sport in Lausanne as defined in the relevant provisions of the UEFA Statutes;

g) it must fill in the official entry form, which must reach the UEFA administration by 2 June 2008 together with all other documents which the UEFA administration deems necessary for ascertaining compliance with the admission criteria".

Furthermore, Art. 1.07 of the UCL-Regulations states that a

> *"… club which is not admitted to the competition shall be replaced by the next-placed club in the top domestic league championship of the same national association provided it fulfils the admission criteria. In this case the access list for the UEFA Club Competitions (Annex Ia) will be adjusted accordingly".*

In April 2004 the criminal procedure called "Apito Dourado" (Golden Whistle) which dealt with the bribery of referees and their assistants was made public in Portugal. As a result of the investigations by the Public Prosecutor in this criminal procedure allegations of corruption were raised against the Second Respondent relating to the 2003/2004 season, which led the Disciplinary Committee of the Portuguese League of Professional Football (the "DC PLPF") to initiate two disciplinary procedures (no. 41-07/08 and no. 42-07/08) against Porto and its officials on 28 March 2008.

While the criminal charges against Porto and its officials were eventually dropped by the Oporto Court of Preliminary Criminal Proceedings on 30 June 2008 the DC PLPF came to the conclusion that the chairman of the board of directors of Porto, P. (the "Chairman of the Second Respondent"), was guilty of two attempts of bribing referees relating to two matches, namely Porto v. Futebol Estrela da Amadora, which took place on 24 January 2004 and Spor Clube Beira-Mara v. Porto which was held on 18 April 2004. Consequently, the DC PLPF sanctioned the Chairman of the Second Respondent by suspending him for 2 years from any activity as a (sporting) manager and by fining him EUR 10,000. In the same context DC PLPF ordered that the Second Respondent suffer a deduction of six points in the 2007/2008 football season and ordered it to pay a fine of EUR 150,000.

The Chairman of the Second Respondent filed an appeal against both decisions of the DC PLPF (no. 41-07/08 and no. 42-07/08) with the Council of Justice of the PFF (the "CJ PFF"). However,

the Second Respondent did not file any appeal against the decision of the DC PLPF, but instead accepted the deduction of points and paid the fine. The deduction of points did not affect the championship because – despite the deduction of points – Porto still had a lead of 20 points over the second-placed club, Sporting Clube de Portugal.

According to reports published in various media regarding the decisions passed by the DC PLPF the First Respondent contacted the PFF on 14 May 2008 in order to investigate the matter. On 15 May 2008 the PFF informed UEFA about the content of the decisions taken by the DC PLPF. Furthermore, the letter reads as follows:

> *"We also inform you that FC Porto did not lodge an appeal against the decisions of the League Disciplinary Committee and, so, the decisions passed against FC Porto are final and binding, as the appeals deadline has already elapsed. Only [P.], president of FC Porto, lodged an appeal against the League's Disciplinary Committee decision".*

On 23 May 2008 the UEFA General Secretary referred the matter to the UEFA judicial bodies in order to analyze whether the Second Respondent fulfilled the admission criteria of the UCL-Regulations. On 29 May 2008 the UEFA Disciplinary Inspector requested that the Second Respondent be refused admission to the CL. On 2 June 2008 the PFF sent a fax to the UEFA Disciplinary Services indicating that the admission of the appeals lodged by the Chairman of the Second Respondent would also benefit Porto. The letter states:

> *"By information dated 2.6.2008 given by the Board of Appeal's rapporteur of the case number 41, we inform you that that body notified FC Porto, Futebol SAD, on 27.05.2008, that they may respond to the appeal of President of FC Porto, SAD, if they wish to do so. He also informed us that in accordance with article 402, paragraph 2 A of the Code of Criminal Procedure, this appeal, in case granted, may benefit FC Porto, Futebol SAD".*

On 3 June the Second Respondent filed its submissions and on 4 June the UEFA Control and Disciplinary Body (the "UEFA CDB") decided that the Second Respondent would not be permitted to participate in the CL. The decision states – *inter alia* – the following:

> *"In the instant case, FC Porto was found guilty by the Disciplinary Committee of the Portuguese League of two attempts to bribe referees at competition matches … It is beyond doubt that the wording of Article 1.04 letter (d) of the UCL Regulations 2008/09 comprises such attempted acts".*

By letter dated 6 June 2008 the Second Respondent appealed against the decision of the UEFA CDB to the UEFA Appeals Body (the "UEFA AB") under Art. 52 of the Disciplinary Regulations (the "DR"). On 9 June 2008 the Legal Counsel to the UEFA Disciplinary Services asked the First Appellant to inform UEFA by 10 June 2008 whether it wanted to participate in the appeal proceedings. The letter reads – *inter alia* – as follows:

> *"… under Article 1.07 of the UCL Regulations, a club which is not admitted to the competitions shall be replaced by the next best-placed club in the top domestic league championship of the same national association, provided it fulfils the admission criteria. In the instant case, your club has finished fourth of the Portuguese Championship. Given that FC Porto has appealed on 8 June 2008 the decision of the Control &*

Disciplinary Body, your club is directly concerned by the issue of the proceedings in accordance with Article 28(2) of the Disciplinary Regulations, given that Benfica could participate in the 3rd qualification round of the UEFA Champions League 2008/09. In the light of the above, we invite you to inform us by 10 June 2008 12:00 hours (C.E.T.) whether Benfica S.L. wishes to participate in the appeal proceedings FC Porto v/ UEFA in the quality of a party".

Legal Counsel to UEFA sent an (almost) identically worded letter to the Second Appellant by letter of the same date. On 9 June 2008 the Second Appellant and on 10 June 2008 the First Appellant informed the Legal Counsel to the UEFA Disciplinary Services that they wanted to participate in the said procedure. By letter dated 10 June Legal Counsel to the UEFA Disciplinary Services invited the Appellants to lodge their written submissions in the proceedings with UEFA by 12:00 on 11 June 2008. Both Appellants filed their statements and took part in the hearing that was held on 13 June 2008. On the same date the UEFA AB issued its decision, the operative part of which reads – *inter alia* – as follows:

"Now, therefore the appeals body decides:

1. *The identical requests of the Disciplinary Inspector and of FC Porto is not complied with.*
2. *The decision of the control and disciplinary body dated 4 June 2008 is lifted and the case is referred back to that body for reassessment under the sense of the considerations.*
3. *(…).*
4. *Notice of the decision shall be served*
   - *a) on the appellant club;*
   - *b) on the control and disciplinary body, together with the whole file of the proceedings;*
   - *c) (…);*
   - *d) On SL;*
   - *e) On V. Guimarães;*
   - *f) (…);*
   - *g) (…)."*

There are essentially two considerations at the core of the decision by the UEFA AB; namely a procedural and a substantive aspect. As regards the procedural aspect the decision states the following:

"It must also be stated that the control and disciplinary body has not given the possibility to the other directly concerned Parties to express their arguments pursuant to the provisions set forth in art. 28 of the Disciplinary Regulations and in article 1.07 of the UCL Regulation.

The right to be heard is a guarantee of a formal nature, and its infringement must cause the annulment of the attacked decision, irrespective of the success chances on the main cause. The right to be heard comprehends, in particular, the right of the concerned party to offer pertinent evidence, the right to take knowledge of the proceedings, the right to obtain the follow-up of the offer of the pertinent evidences, the right to take part in the

administration of the essential evidences or, at least, the right to express its arguments on the outcome whenever such outcome can influence the decision to be returned.

(…)

Under such conditions, the infringement of the right assisting SL Benfica and V. Guimarães to be heard cannot be healed within the ambit of an appeal proceeding, as this same court has already admitted in other cases. The principle of equality of treatment, more exactly in this case, the quality of expedients, obliges that this issue is simply and totally lifted and referred back to the notified authority, pursuant to the terms set forth in article 65 of the Disciplinary Regulation. … This solution has also the advantage of giving the parties the possibility to use the UEFA ordinary legal means.

(…)

Taking into account the outcome of the proceedings, the costs of the proceedings are of UEFA's responsibility and the right to appeal is returned to the appellant club (article 63(1) and (2) of the Diciplinary Regulation)".

As regards the substantive lawfulness of the decision by the UEFA CDB the UEFA AB states the following:

"Today's debates have in fact permitted to clearly establish that the decisions recognising FC Porto guilty of attempts of bribery are neither final unappealable decisions nor enforceable decisions, although the club has not lodged an appeal in regard to same. It is, in fact, sufficient, that the president of the club, condemned in the first instance for the same facts as those brought against FC Porto, lodges an appeal against the decisions for the club to take advantage of it. It was therefore with no reason that the control and disciplinary body has determined as definitive the guilt of FC Porto, refusing its admission to the Champions League 2008/09.

(…)

Obviously, the decision to be rendered by the Portuguese competent authorities in regards to the appeal lodged by the president of FC Porto shall not be known before the start of the Champions League 2008/09. … Under such conditions, in order to avoid that FC Porto suffers damages not capable of being redressed, in case FC Porto is not found guilty of its implication in the bribery's attempts, it is absolutely justified to admit FC Porto to the CL 2008/09, if, however the club meets all other demanded conditions. As of the moment when the judgment of the Portuguese appeals authorities becomes known, and if the referred to authorities shall return a decision within a reasonable period of time, the control and disciplinary body shall be liable to state on the main cause".

The decision by the UEFA AB was served on the Appellants on 16 June 2008.

On 4 July 2008 the CJ PFF rejected both appeals lodged by the Chairman of the Second Respondent. The decision was preceded by a turbulent meeting. Although the precise course of events of the meeting is not completely clear, it can be reconstructed from the minutes of the meeting as follows: According to said minutes, the President of the CJ PFF closed the meeting after a disagreement arose about the bias of one of the members of the CJ PFF. After closing the meeting he then left the venue for the meeting together with his Vice-President. The remaining members of the CJ PFF then decided – inter alia – that all of the measures and decisions that had been made in

the meeting of 4 July 2008 up until then were null and void, that a disciplinary action would be instituted against the President of the CJ PFF and that he was temporarily suspended from office. Finally, the remaining members also decided that the appeal by the Chairman of the Second Respondent was dismissed. In this connection, the minutes of the meeting merely state:

> *"As far as appeal cases nos. 41 to 43 – season 2007/2008, after the draft judgement was brought forth for voting, it was resolved, by a majority of 4 votes in favour and one vote against, from Mr Mendes da Silva, not to ratify the appeal, thus confirming the judgement under appeal. Mir Mendes da Silva made an explanation of vote".*

Due to this turbulent meeting on 4 July 2008 the President of the PFF, Gilberto Madail, announced in a press statement on 7 July 2008 that he would have the events of the meeting of the CJ PFF of 4 July 2008 investigated by an independent expert. Prof. Doutor Diego Freitas do Amaral was instructed to perform this task. The latter is a recognized expert in Portugal in the field of administrative law and is a former foreign minister of Portugal.

On 8 July 2008 the President of the CJ PFF requested the competent administrative court to declare the decisions made by the remaining members of his Council on 4 July 2008 to be null and void. On the same day the Chairman of the Second Respondent also filed an appeal with the competent administrative court against the decision by the CJ PFF.

By letter dated 26 June 2008, the Appellants filed their Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the UEFA AB. In their Statement of Appeal the Appellants requested that the CAS deal with the matter in an expedited manner.

By letter dated 4 July 2008, the Appellants filed their Appeal Brief with the CAS.

On 10 July 2008, on request by the Appellants, the Panel sent a letter to the Chairman of the Second Respondent asking him to provide the CAS Court Office with a copy of the appeal filed by him with the CJ PFF. By letter dated the same day the Panel also invited the Second Respondent to produce a copy of the appeal filed by its Chairman with the CJ PFF. The copies were received by the CAS Court Office at the hearing and handed over to the Appellants.

By letter dated 11 July 2008 the First Respondent and the Second Respondent filed their Answer Brief.

By letter dated 11 July 2008 the CAS Court Office was informed by the Appellants that the CJ PFF had in the meantime issued a decision in the appeal lodged by the Chairman of the Second Respondent.

A hearing was held on 14 July 2008 at the premises of the CAS.

LAW

CAS Jurisdiction

1. Whether, and the extent to which, the Panel is competent to decide the present dispute is governed by Art. R47 of the Code. The provision stipulates three pre-requisites (cf. CAS 2004/A/748, no. 83), namely:

   - there must be a "decision" of a federation, association or another sports-related body,
   - "the (internal) legal remedies available" must have been exhausted prior to appealing to the CAS, and
   - the parties must have agreed to the competence of the CAS.

A. Decision by a federation

2. The Panel is of the opinion that the UEFA AB made a decision for the purposes of Art. R47 of the Code on 13 June 2008. For, the term must be interpreted broadly so as not to curtail the relief available to the persons affected. In the present case, the fact that the UEFA AB itself calls its "judicial act" a decision supports the argument that it qualifies as a "decision". Thus, the "judicial act" bears the heading "UEFA Appeals Body Decision". Furthermore, the "judicial act" has the "typical" structural features of a decision, namely recitals, a statement of facts, a legal assessment and an operative part, which in the present case is even introduced with the words, *"now, therefore, the appeals body decides"*.

3. In its written pleadings the Second Respondent refers to the fact that the CAS has consistently held that for an act to qualify as a "decision" for the purposes of Art. R47 of the Code, one must refer not to formal criteria, but to substantive criteria. Thus, for example, it is stated in the decision CAS 2004/A/659, no. 36 (confirmed in CAS 2004/A/748, no. 90; CAS 2005/A/899, no. 63) that, *"(…) the form of the communication has no relevance to determine whether there exists a decision or not (…)"*. However, said decisions cannot automatically be applied to the present case because the facts involved were different. Those cases concerned the fact that a sports organization cannot prevent a judicial act from being reviewed by the CAS simply by couching it in different terms as regards its form, i.e. calling it an ordinary letter or notice, not a decision. For such cases the CAS has decided that – regardless of the form chosen – there is an (appealable) decision if the measure *"materially affects the legal situations of the addressee and the other concerned persons"* (CAS 2004/A/748, no. 91; CAS 2005/A/899, no. 61).

B. Exhaustion of legal remedies

4. Art. R47 of the Code requires that there is no further legal remedy available against the decision in question, in other words that the legal remedies against the decision are exhausted. Whether this is the case in the present case is disputed between the parties. However, the Panel is of the opinion that this prerequisite is also fulfilled.

5. At first glance, the internal legal recourse appears not to be exhausted because the UEFA AB referred the case back to the UEFA CDB and so the matter is still pending before a judicial organ of UEFA (and is consequently not final). However, this formal viewpoint leads to an unlawful curtailment of the Appellants' legal protection.

6. The DR allow a matter to be referred back to the UEFA CDB only subject to limited conditions. In this regard Art. 65 DR reads, *"In the case of a fundamental mistrial, the Appeals Body can lift the contested decision, and refer the case back to the Control and Disciplinary Board"*. It is not clear what the (fundamental) irregularities were, which led the UEFA AB to refer the case back to the UEFA CDB. Although the decision states that at the time the UEFA CDB breached the Appellants' right to be heard, this hardly justifies a referral back because firstly the UEFA AB has full power to take cognizance, just like the UEFA CDB, with the consequence that procedural irregularities in the initial instance can easily be cured before the UEFA AB. Secondly, due to the urgency of the matter in the present case, the UEFA CDB is by no means in a better position to grant the Appellants a fair hearing. This is demonstrated by the fact that – despite the urgency of the matter – the UEFA CDB did not consider it necessary to set a date for a new oral hearing or to request the parties to submit appropriate written pleadings until 14 July 2008 (the day of the oral hearing before this Panel). This is all the more surprising in that, in its decision, the UEFA AB expressly stipulated that, *"as of the moment when the judgement of the Portuguese appeals authorities becomes known (…) the control and disciplinary body shall be liable to state on the main cause"*. However, the decision by the CJ PFF has been available since 4 July 2008. Not only is it obvious that UEFA is aware of this decision by the CJ PFF, but it can also no doubt be assumed that UEFA learned of the decision via the PFF considerably earlier than the Panel did.

7. The truth is that the UEFA AB was not concerned with safeguarding the Appellants' right to a fair hearing. Rather, by referring the case back to the UEFA CDB, it wanted to bring about final facts in view of the urgency of the matter. This follows from the decision by the UEFA AB of 13 June 2008. For, had the priority been to grant an adequate fair hearing then the decision ought to have been brief. Instead, however, the UEFA AB long-windedly sets out that, on the basis of the present factual situation, it does not consider that Porto had any involvement aimed at arranging or influencing a match within the meaning of Art. 1.04 of the UCL-Regulations. However, since the factual situation before the UEFA CDB is no different from the factual situation before the UEFA AB, the question is posed as to why the matter is referred back to the UEFA CDB despite the fact that the matter is ready to be decided. This

applies all the more in that, even in the case of a decision by the UEFA AB which brings proceedings to a close, UEFA would not have been prevented from resuming the proceedings when the decision by the CJ PFF was later issued. For, Art. 66bis DR stipulates that, *"upon request, the disciplinary body shall reopen proceedings if a party claims to have new and substantial facts of evidence that they were unable to bring forward before the decision became final"*. According to Art. 28(1) DR UEFA is also a party to the proceedings.

8. The fact that UEFA considered the point of substantive law contained in the decision (of 13 June 2008), not the procedural principle of a fair hearing, to be the priority is also made clear by UEFA's conduct in these proceedings. For, at no point before the oral hearing did UEFA object that the association's internal legal remedies had not yet been exhausted. Furthermore, in its Answer Brief, the only reason it saw for referring the case back to the UEFA CDB was that the current factual basis did not justify the allegation of illicit conduct for the purposes of Art. 1.04 of the UCL-Regulations.

9. If, however, the substantive content of the decision by the UEFA AB is clearly a matter of priority then the legal protection of the persons affected may not be curtailed by the way in which the substantive content is formally couched. If the conduct of the UEFA AB is assessed as a whole, it is tantamount to a denial of justice in relation to the Appellants (in this regard see also CAS 2005/A/899, no. 62). Due to the fact that the matter "should remain within UEFA" – as stated by the First Respondent in the oral hearing – (external) legal protection by the CAS is made impossible and the (association's) internal legal protection is protracted and delayed. However, under these conditions it is not reasonable to expect the Appellants to (once again) go through the association's internal legal process. For, only if the association's internal instances are willing and in a position to grant effective legal protection do the Appellants have to accept a restriction in their right to have recourse to the courts (or arbitral tribunals). Furthermore, the continuation of the internal appeal proceedings appear to be pure nitpicking in the present case, for in the oral hearing the First Respondent stated, when asked by the Panel, that even after a decision has been pronounced by the CJ PFF it would still assume that there was no final and binding decision concerning the involvement of the Chairman of the Second Respondent in any activity aiming at influencing or arranging the outcome of matches.

C. Consent to arbitrate

10. Art. R47 of the Code stipulates various possibilities of how the parties can agree to arbitration proceedings before the CAS. Firstly, this can happen by the statutes and regulations of the RFF – to which the parties have submitted – containing an arbitration clause. Secondly, however, the parties can also conclude a specific arbitration agreement. In the present case the consent to arbitrate ensues from Art. 29.01 of the UCL-Regulations in conjunction with Art. 62(1) of the UEFA Statutes. Art. 29.01 of the UCL-Regulations states, *"In case of litigation resulting from or in relation to these regulations, the provisions regarding the Court of Arbitration for Sport*

(CAS) laid down in the UEFA Statutes apply". Art. 62(1) of the UEFA Statutes reads, *"Any decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration"*. In addition the Panel points out that neither in the submissions made by the parties to the CAS nor in the oral hearing did any party submit that there was no consent between the parties to submit the matter at hand to arbitration.

D. Summary

11. To sum up therefore, the Panel is of the view that it is competent pursuant to Art. R47 of the Code to decide the dispute between the parties in the present case.

Mission of the Panel

12. The mission of the Panel follows, in principle, from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Whether and to what extent the mission of the Panel is curtailed by Art. 62(6) of the UEFA Statutes can be left unanswered here, for neither party has claimed that the Appellants have submitted new facts or evidence in the present case, which could already have been asserted in the proceedings before the UEFA AB. Furthermore, Art. R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Timeliness of the Appeals

13. The Appellants filed their appeals in time. According to Art. R49 of the Code the time limit for filing an appeal with CAS is 21 days, unless the regulations of the sports federation or association concerned provides another time limit. In the present case Art. 62(3) of the UEFA Statutes provides that the time limit for filing an appeal with CAS is 10 days. The period begins to run upon receipt of the decision in question. In the present case the decision in question was served on the Appellants on 16 June 2008. The time limit therefore expires on 26 June 2008 with the consequence that the Appellants, with their letter of the same date, filed their appeal in time (still).

Applicable Law

14. Art. R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-

related body which issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the present case, the parties all assume that the present dispute is subject primarily to the Regulations of UEFA, in particular the UEFA Statutes, the DR and the UCL-Regulations. Furthermore, the parties assume in their written pleadings that Swiss law applies subsidiarily to the matter in dispute. Whether and to what extent the legal principles developed by the past case law of the CAS apply in addition in the present case is questionable. While the Appellants and the Second Respondent obviously all assume this in their written pleadings, there is no consent to this effect by the First Respondent. However, there is no need to answer this question at this point.

Standing to sue/appeal

15. The Appellant's standing to file an appeal with the CAS against the decision in question by the UEFA AB is disputed by the Second Respondent and (recently also) by the First Respondent. In this connection the Respondents refer to Art. 62(2) sentence 1 of the UEFA Statutes. Said provision reads as follows: *"Only parties directly affected by a decision may appeal to the CAS"*.

16. The right under Art. 62(2) of the UEFA Statutes to bring decisions by the UEFA organs before the CAS is largely equivalent to the right to appeal in the association's internal proceedings; for in the proceedings before the UEFA organs for the administration of justice the term "party" is defined as follows in Art. 28 DR:

> *"1The parties comprise*
> *a) UEFA,*
> *b) the accused or the individual/body directly concerned,*
> *c) the individual/body entitled to protest and the opponent tot the protest"*.

17. The Panel assumes that someone who is "directly affected" by a decision by UEFA for the purposes of Art. 62(2) of the UEFA Statutes is also "directly concerned" (for the purposes of Art. 28 DR). There is therefore no need to separately review whether it was right to grant the Appellants the standing of a party in the proceedings before the UEFA AB. Rather, because of the almost identical wording of the provisions (Art. 62(2) of the UEFA Statutes and Art. 28(a) DR), it can be assumed that the right to challenge or appeal is identically formulated for both stages of the proceedings (before the UEFA AB and before the CAS).

A. The legal quality of Art. 62(2) of the UEFA Statutes

18. First, the nature of Art. 62(2) of the UEFA Statutes is questionable (see also in this regard CAS 2007/A/1278 & 1279, no. 75 *et seq.*). The Second Respondent appears to want to classify the provision as a condition for admissibility. The wording of the provision does not, however, give any (clear) insight into its legal nature.

19. The starting point for the Panel is first the fact that the purpose of Art. 62(2) of the UEFA Statutes is not to curtail the scope of the arbitration agreement and thereby the jurisdiction of the CAS. For, if disputes, which do not satisfy the requirements of Art. 62(2) of the UEFA Statutes, were not covered by the arbitration clause, the jurisdiction of the state courts would be open for them. However, it is precisely this consequence which Art. 62(1) of the UEFA Statutes is intended to prevent; for according to said Article there is to be no recourse to the state courts for disputes concerning a decision by a UEFA organ. The present interpretation of Art. 62(2) of the UEFA Statutes is also supported by a looking at a decision by the Swiss Federal Tribunal *(Bundesgericht)*. The latter had to deal with the interpretation of a limitation in Art. 13 of the World Anti-Doping Code (which was comparable with Art. 62(2) of the UEFA Statutes). Said provision reserved the right to file an appeal against a decision taken by an association in doping-related matters to only very specific (natural and legal) persons. According to the Swiss Federal Tribunal this limitation was also not to be understood as a restriction of the arbitration agreement or of the arbitrators' mandate (in this regard see the judgment by the Swiss Federal Tribunal, 4P.105/2006 of 4.8.2006, no. 6.2).

20. The question remains as to whether Art. 62(2) of the UEFA Statutes is a (special) condition for admissibility or a question of justifying the request for arbitration. An examination of the legal situation before state courts does not take us very far. If one compares the appeals arbitration procedure before the CAS – which appears logical due to the wording – with an appeal procedure before state courts, the right to challenge (more correctly the right to appeal) would have to be classified as a condition for admissibility. In an appeal procedure before state courts the right to file an appeal is in any event (at least under Swiss law) deemed to be a question of the admissibility of the appeal (cf. judgment of the Swiss Federal Tribunal, 4P.105/2006 of 4.8.2006, no. 6.2; VOGEL/SPÜHLER, Grundriss des Zivilprozessrecht, 8th ed., Bern 2006, § 13 no. 49 *et seq.*). In the absence of any such right, the state court therefore dismisses the appeal as inadmissible.

21. However, it is now questionable whether an appeal to the CAS in an appeals arbitration procedure can really be compared with an appeal procedure before the state courts; for in reality the CAS acts not as a second instance but as a first instance – even in an appeals arbitration procedure. This is because the arbitration agreement prevents the first instance state court, which would otherwise be seized of the matter, from admitting the case. However, if the decision by a sports organization were to be appealed against before a (first instance) state court (e.g. pursuant to Art. 75 Swiss Civil Code *(ZGB)*), the right to appeal would be classified as a requirement for justification. The court would therefore, if the person concerned is not entitled to appeal, dismiss the action not as inadmissible but as unfounded (cf. RIEMER, Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht, Bern 1998, no. 70, 82; see also, for a more detailed analysis of the question, CAS 2007/A/1278 & 1279, no. 75 *et seq.*).

22. Whether in the light of these rules Art. 62(2) of the UEFA Statutes is now to be considered to be a special condition for admissibility or a requirement for justification of the request for arbitration is not crucial for a decision in the present case, for in the Panel's opinion the Appellants do in any event have standing to appeal under this provision.

B. The group of persons with standing to appeal

23. The group of persons with standing to appeal is set out in Art. 62(2) of the UEFA Statutes. According thereto any party who is "directly affected" by a decision taken by a UEFA organ can appeal to the CAS. The rules do not stipulate in any further detail when a party is "directly affected" (or "concerned") by a measure by a federation for the above purposes. Art. 28(2) DR merely stipulates that, *"the individual/body directly concerned is the individual/body on whom/which the disciplinary measures have direct consequences"*. However, this only substitutes an indefinite term "directly concerned" with another, namely "direct consequences".

24. The wording of Art. 62(2) of the UEFA Statutes does not do much to put the flesh on the bones of the provision either. At most one can see an attempt that not just any effect on the complainant's legal position should suffice in order to justify a right to appeal. Rather the decision taken by the association must directly interfere with the rights of the person. The latter is always the case if the matter concerns the accused or the addressee of the (potential) measure by the association or disciplinary measure. However, the wording of Art. 62(2) of the UEFA Statutes does not exclude the possibility that a third party can also be a party, i.e. a person against whom the measure taken by the association is not directly aimed; for the provision refers to the actual state of being affected, not to whether someone is formally the addressee of the measure or not.

25. A source for interpreting a provision is – apart from the wording of the provision – also how it is applied in practice by the association's organs. In the present case this also supports a "broad" understanding of the provision; for in the present case – at least up until the hearing before this Panel – the association's organs assumed that the Appellants had the standing of parties even though the proceedings were at the time instituted only against Porto. Thus, the Appellants are expressly called "parties" in the decision by the UEFA AB (see the recitals). Throughout the reasons for the decision the Appellants are also described as parties or "directly concerned parties". The operative part of the decision by the UEFA AB also provides that it is to be served on the Appellants. However, not only the UEFA AB appears to have assumed that the Appellants had the standing of parties. Rather UEFA's legal counsel at the time was also obviously of this opinion when he invited the Appellants by letter of 9 June 2008 to participate in the proceedings before the UEFA AB as "parties". The counsels to the Appellants in the present arbitration proceedings also – at least in their written submissions – automatically assumed that the Appellants had the standing of parties.

26. Finally, a source for interpreting a provision can also be its historical genesis (CAS 2006/A/1176, no. 7.6; CAS 98/199, Clunet 2001, 270, 272 *et seq.)*. In this connection the First Respondent particularly refers to the minutes of the XXXth ordinary UEFA Congress of 23 March 2006, where the introduction of this provision was resolved. The minutes read:

"Para 2 states that only parties directly affected by a decision taken by a UEFA organ may appeal against it. This rule generalises among other things para 8 of the annex to the UEFA club competition regulation entitled 'Club Licensing System – Control Procedures' which stipulates that 'only the banned and/or disqualified club in question may submit an appeal to CAS' and that 'other clubs, national associations, leagues and/or ay other third party shall have no right of appeal against UEFA concerning disqualification, exclusion or the sporting consequences of disqualification".

27. The legislative history to Art. 62(2) of the UEFA Statutes therefore supports a very restrictive understanding, according to which only whoever is the direct addressee of the measure has a right to appeal.

28. Since the various sources for interpreting the provision point in various directions, they must be weighed up against each other.

29. In weighing up the considerations, the better reasons support the argument that third parties also be granted a right of appeal – under certain conditions. First, the wording of the provision has particular importance compared with the historical "legislative materials"; for the rules and regulations of an association must, first and foremost be interpreted according to their objective wording and purport, not according to the subjective will of the association's organs responsible for the provision. This is particularly so when – as in the present case – the (extremely) restrictive interpretation of the provision is not sufficiently demonstrated in its wording. Secondly, an argument in support of the opinion held here, is that this opinion is in line with Swiss law, which after all applies subsidiarily in the present case. Although according to Swiss law only the members of an association, who voted against a resolution, have the right to challenge the association's resolution pursuant to Art. 75 Swiss Civil Code *(ZGB)*, if the challenge concerns a decision by an organ of the association, which the members cannot influence, not only the addressee of the measure has the right to appeal but so do third parties, who are directly affected by the resolution (RIEMER, Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht, Bern 1998, no. 155; ID., Berner Kommentar, Bern 1990, ZGB 75 no. 17, 20; see also CAS 2007/A/1278 & 1279, no. 78).

30. A final argument in support of the Panel's opinion is that the autonomy of the association's legislator when developing the right to appeal is limited. It is undeniable that the association's legislator can extend the group of persons, who have a right to appeal, compared with the statutory model in Art. 75 Swiss Civil Code *(ZGB)* (CAS 2007/A/1278 & 1279, no. 87). By contrast, the Panel is of the opinion that the association's legislator cannot make the group of persons, who have a right to appeal, smaller than the statutory model; for it is an indispensable essential part of the ordre public that an individual's legal protection against measures by an association is guaranteed by an external instance that is independent from the

association. Since it can be assumed that the association's legislator wanted to comply with these (minimum) statutory requirements, this is also an argument for granting third parties the right to appeal if they are directly affected by the measure taken by the association.

C. The delimitation of directly affected parties from indirectly affected parties

31. When a third party, who is himself not the addressee of the measure taken by an association, is directly affected and therefore has a right of appeal, is a question of the facts of the individual case. The CAS has already dealt with this question on several occasions. Thus, for example, it granted an athlete placed second the right to appeal against a decision by the IOC to leave the gold medal with the first-placed athlete – despite her involvement in a doping scandal (CAS 2002/O/373, no. 62 *et seq.*). By contrast, athletes who lack any chance of obtaining a medal have no right of appeal (CAS 2002/O/373, no. 66). If FIFA has banned a player from matches because of a breach of contract with a club, the club cannot file an appeal against this decision with the objective of obtaining a higher penalty against the player (TAS 2006/A/1082-1104, no. 102 *et seq.*). If in a league system which extends over a whole season a match is newly evaluated because a win is allowed or disallowed, a club, which was not involved in that match, should also not be able to appeal the new evaluation of the match (CAS 2007/A/1278 & 1279, no. 82 *et seq.*). The above decisions all display a "common thread", which can be succinctly put as follows: Where the third party is affected because he is a competitor of the addressee of the measure/decision taken by the association, – unless otherwise provided by the association's rules and regulations – the third party does not have a right of appeal. Effects that ensue only from competition are only indirect consequences of the association's decision/measure. If, however, the association disposes in its measure/decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal.

32. If one applies this test to the present case, the Appellants are directly affected; for if UEFA grants a club a starting place in a championship which has a closed field of starters, it has at the same time made a negative decision about including other candidates for said starting place. However, UEFA's allocation or denial of a starting place in the CL is not the realisation of any vague hope or fateful bad luck for the club concerned. Rather, it is a decision about a legal right of the clubs (more particularly specified in the UCL-Regulations). For the clubs have a right that when it awards the starting places the First Respondent firstly complies with its own rules and secondly treats all of the candidates for said starting places equally. If therefore, the UCL-Regulations provide in Art. 1.07 that the starting place goes to the next-best-placed club in the top domestic league, said club has a right against the First Respondent that if the appropriate requirements are met this provision is applied just as the Second Respondent has a right to be admitted to the CL pursuant to Art. 1.05 of the UCL-Regulations if it fulfils the admission criteria.

33. To summarize, in the Panel's opinion the Appellants have standing to appeal or to sue and, more particularly, both in the association's internal legal process as well as before the CAS.

As to the Merits

34. Whether the decision by the UEFA AB is lawful or unlawful depends first and foremost on Art. 1.04 of the UCL-Regulations. According thereto the Second Respondent is – *inter alia* – excluded from participating in the CL if it *"has been involved in any activity aimed at ensuring the integrity of the competition as defined in Article 2"*. The Second Respondent is now asserting that the test has to be supplemented by unwritten legal principles. For, according to the Second Respondent, the provision is a provision with a disciplinary or penal character. However, it is acknowledged that for such measures taken by an association they must comply with certain constitutional legal principles. These include in particular the principle of non-retroactivity.

A. The Character of Measures taken by an Association

35. Usually, measures taken by an association are divided into acts of administration and disciplinary measures (cf. also CAS 2007/A/1381, no. 55 *et seq.*) However, it must thereby not be overlooked that all disciplinary measures are also acts of administration. The latter is therefore the generic term. Now, it is typical for a disciplinary measure that it imposes a "sanction" on the person affected and is therefore – in order to protect this person – basically subject to a stricter test. In the decision CAS 2007/A/1381, no. 92 *et seq.* the sole arbitrator at the time rightly justified this with the argument that there is an imbalance between the association and the person affected. This is expressed by the fact that the person affected only has the choice of whether to accept performing the sport under the conditions dictated by the association or to give up performing the sport altogether. Since this imbalance carries the risk that the association abuses its position of power, certain protective standards must apply ("droits de protection") in the interests of the person affected. Thus the decision states the following under nos. 96 *et seq.*:

"Ainsi, en droit suisse, l'intérêt légitime du sociétaire à ce que l'association respecte la loi est protégé, d'une part, par le droit de l'association et, d'autre part, par différents principes généraux et valeurs fondamentales de l'ordre juridique suisse (qui peuvent être de source nationale ou internationale).

Cet ensemble de normes qui protègent directement ou indirectement les sociétaires, et notament les athlètes s'agissant d'associations sportives, est souvent désigné sous le vocable «droits de protection»".

36. As regards the sphere of application of said principles the decision further states:

"Les droits de protection visent autant les règles édictées par l'association sportive que les décisions qui sont prises sur cette base: "L'association doit exercer son pouvoir en matière d'édiction et d'application de normes dans le respect de certains principes généraux du droit" (BADDELEY M., L'association sportive face au droit – Les limites de son autonomie, Bâle 1994, p. 108)".

37. For the question of whether the provision in Art. 1.04 of the UCL-Regulations has a disciplinary character, one must consider, inter alia, the effects, which the application of the rule has on the addressee (CAS 2007/A/1381, nos. 109 *et seq.*). From the addressee's point of view it undeniably has a penal character for the person affected must feel that the exclusion from the CL because of particular past conduct is a penalty for said conduct. But also from UEFA's point of view, the provision in Art. 1.04 of the UCL-Regulations does not only have the purpose of ensuring the smooth running of the competition; for admission to the CL is excluded in Art. 1.04 of the UCL-Regulations if – to use the words of the disciplinary inspector – the candidate has seriously violated the values and objectives of UEFA. The intent and purpose of non-admission to the CL is – according to the disciplinary inspector – that a club, whose violation of UEFA's values and objectives has been established, "may not take part in the most prestigious competition unpunished". The text of the *"réquisitions adressées à L'Instance de Contrôle et de Discipline de l'UEFA"* of 29 May 2008 reads *verbatim*:

"Un club dont il vient d'être établi qu'il a contravenu de manière grave aux valeurs et objectifs del'UEFA ne saurait participer impunément, dans les mois qui suivent la condamnation, à la compétition la plus prestigieuse pour le club".

38. In the light of this analysis of the interests one can take no other view than that the (possible) non-admission of the Second Respondent to the CL also has at least an inherent disciplinary aspect.

B. Consequences of the qualification of the provision

39. The question now is what consequences must be drawn from the fact that the provision in Art. 1.04 of the UCL-Regulations has a disciplinary character. The Second Respondent concludes from the provision's sanctioning character, inter alia, that the "principle of non-retroactivity" – borrowed from criminal law – therefore applies automatically. This principle is expressed in Art. 2(1) of the Swiss Penal Code. Freely translated this reads:

"A person can be judged pursuant to the present Code only for offences committed after the entry into force of this code".

The Second Respondent's line of argument is that its non-admission to the CL would breach the prohibition on non-retroactivity because at the time of its – alleged – involvement in acts of bribery the provision in Art. 1.04 of the UCL-Regulations was not yet in force.

40. The Panel does not agree with this line of argument.

41. The Panel first points out that care must be taken when applying criminal principles to the disciplinary jurisdiction of sports associations. At first such an application seems logical; after all, the terms disciplinary measure, penalty and sanction are all similar. Also, it often makes no difference from the point of view of the person affected whether the pain inflicted on him is

imposed by a state or by a private institution (cf. for this opinion for example CAS 91/56, Digest of CAS Awards I, p. 99, 102, *"Toutefois, compte tenu de la gravité des mesures qui peuvent être prononcées à son encontre et qui s'apparentent d'ailleurs à des sanctions pénales (…)"*). Nevertheless, misgivings about an unreflected application of criminal principles are appropriate (see also CAS 2007/A/1381, no. 98). To this extent the Panel considers itself to be perfectly in line with former case law of the CAS:

"CAS is not, however, a criminal court and can neither promulgate nor apply penal laws" (CAS 1998/002, Digest of CAS Awards I, p. 419, 425); *"To adopt criminal standard … is to confuse the public law of the state with the private law of an association …"* (CAS 98/208, Digest CAS Awards II, p. 234, 247); *"Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties*" (CAS 2006/A/1102-1146, no. 52); *"Disciplinary sanctions imposed by associations are subject to civil law and must be clearly distinguished from criminal penalties. A punishment imposed by an association is not a criminal punishment"* (CAS 2005/C/976 & 986, no. 127).

The criminal principles are the expression of a weighing up of the state's interests (in criminal prosecution) and a citizen's right to freedom. However, under Swiss law the right of associations to impose sanctions or disciplinary measures on athletes and clubs is not the exercise of a power delegated by the state, rather it is the expression of the freedom of associations and federations (cf. CAS 2005/C/976 & 986, no. 125: *"The jurisdiction to impose (…) sanctions is based on the freedom of associations to regulate their own affairs"*). The analogous application of criminal principles to limit the powers of sports organizations is therefore only a possibility if the principle in question is an expression of a fundamental value system that penetrates all areas of the law.

42. Even if a principle of criminal law is the expression of this fundamental value system (across all areas of the law), it does not follow that the principle applies without exception and irrefutably in the relationship between a sports association and the athlete/club. This is clearly shown by, for instance, taking a look at the principle of criminal law *"nulla poena sine culpa"*. As regards this, although there is a large consensus that this principle is one of the fundamental legal principles that also applies in the relationship between a sports association and an athlete/club (cf. also CAS 2007/A/1381, no. 99 with numerous authorities), the principle nevertheless does not apply to every measure taken by an association that has a disciplinary character (cf. CAS 2007/A/1381, no. 59 *et seq.*) Thus, the CAS has consistently held that the an athlete or club can be disqualified irrespective of fault – even though such disqualification is painful for the person affected (CAS 94/129, Digest of CAS Awards I, p. 187, 193 *et seq.*; CAS 95/141, Digest of CAS Awards I, 2000, p. 215, 220). The CAS has also already decided on several occasions that a penalty against a club because of rioting by its fans can be imposed completely independently of whether the club is itself to blame for the riots (CAS 2002/A/423, no. 6.1.1.1 *et seq.*; CAS 2007/A/1217, no. 11.9 *et seq.*). These examples alone show that the individual measures taken by an association are – even if they all have the character of a sanction – far too different to be able to measure them all by the same yardstick. Instead, a differentiated examination is required for the test to be applied in the

respective case. The latter is the result of a careful weighing up of the interests involved ("droits de protections" and principle of "freedom of associations"), not a dogmatic long-range effect of a rigid principle of criminal law (born out of a completely different context).

43. As regards the principle of non-retroactivity, the Second Respondent is correct to the extent that this is a fundamental legal principle, which does – basically – apply to measures taken by associations having the character of a sanction (see also CAS 2000/A/289, Digest of CAS Awards II, p. 424, 427). However, it does not follow from this that the principle applies without limitation. Rather, the Panel is of the opinion that – just as with the principle *"nulla poena sine culpa"* – a closer differentiation must be made in the course of weighing up the interests, depending on the type of measure. For, the analogous application of the criminal law prohibition of non-retroactivity to measures taken by an association having the character of a sanction is, after all, the expression of the concept of providing legal protection to a person who relies on the principle of good faith. However, when considering whether a person's reliance on good faith merits protection, it makes a difference whether that party already holds a legal position or will do so only in the future. Someone, who has already acquired a legal position in any event deserves to have his reliance on good faith protected to a greater extent. By contrast, someone, who would like to obtain a legal position in the future cannot simply rely on the fact that the conditions for obtaining that legal position will not change in the future. If therefore, an association sets the conditions for participation in a competition, then before admission to the competition the candidate does not yet hold a legal position, to which the legal protection of reliance on good faith could attach. For, the candidate only has a right that the association complies with the rules it has drawn up and that it applies said rules in the same way to all candidates. However, if the admission criteria change, then this does not constitute any interference with a legal position so long as the new rules are applied to all candidates in accordance with the principle of equality.

44. To summarize therefore, the Panel is of the opinion that the criminal law prohibition of retroactivity does not apply to Art. 1.04 of the UCL-Regulations, which governs the requirements for being admitted to the CL.

45. In the opinion of the Panel the club is not placed in an unprotected position by the non-application of the criminal law prohibition of retroactivity because, due to the measure's character as a sanction, it is perfectly possible that other legal principles, which are part of the "droits de protection", apply. In this regard one must think of the principle of legality, the principle of proportionality, the principle of equal treatment and also the principle of *"nulla poena sine culpa"* (on all this see CAS 2007/A/1381, no. 99).

46. Particularly in the light of the principle of proportionality the Panel has serious doubts about the reasonableness of the rule in Art. 1.04 of the UCL-Regulations. According to the wording, the provision has the consequence that a club, which at some point in time was involved in some way or other with the actions described therein can never again participate in the CL. Ultimately, the rule gives rise to a "lifelong" boycott of the club. The UEFA CDB has even

recognized that this can hardly be proportional and so it wants to interpret the provision narrowly. In its decision of 4 June 2008 it states in this regard:

"The panel is aware that the current wording of Article 1.04 letter (d) is far-reaching. In this respect, the panel considered that the date of judgment rendered by a competent disciplinary body should be relevant for the application of Article 1.04 letter (d), whereby this date should be in the year preceding the date of registering clubs with UEFA. Any other interpretation would endanger the security in law".

47. The Panel points out that this interpretation appears arbitrary, for there is nothing in the wording of the rule that even begins to support it. Furthermore, it gives rise to an unequal treatment of clubs, which is difficult to reconcile. For, if a club is found guilty of bribery in a sporting season, in which it does not meet the sporting criteria for qualifying for the CL, this remains without consequence for it (for ever). This is so even if the offence was only a short while back. However, a club, which qualifies for the CL in a year, in which the prohibited conduct is proven, is treated differently. That club will not be admitted, even if the offence took place perhaps many years in the past. However, it is not readily apparent why the reputation of the CL should be harmed if a club participates in the CL in the one case (according to the decision by the UEFA CDB of 4 June 2008), but not in the other. However, there is ultimately no need to answer whether UEFA has overstepped the limits of an association's autonomy with the rule in Art. 1.04 of the UCL-Regulations because the Panel is satisfied that the rule's criteria are not fulfilled.

C. The Criteria of Art. 1.04 of the UCL-Regulations

48. In order to be able to participate in the CL the club must, according to Art. 1.04 UCL-Regulations, fulfil the criterion that, *"it must not be or have been involved in any activity aimed at arranging or influencing the outcome of the match at a national or international level"*. The provision does not state who has the burden of submitting and proving the presence or absence of this circumstance. In view of the serious consequence, which non-admission to the CL has for the club affected, the Panel is of the opinion that – in the absence of any provision to the contrary – a club may only not be admitted to the CL if the involvement in an activity aimed at arranging or influencing the outcome of a match has been established to the satisfaction of the instance (in this case the Panel) called upon to decide the case.

49. In the present case the Appellants have submitted various indications of such involvement by the Second Respondent (or its Chairman). However, in the Panel's opinion, on the basis of the facts submitted, the involvement by the Second Respondent (or its Chairman) in the prohibited activity has not been established with the necessary certainty.

50. The Appellants claim that the Second Respondent accepted the penalty imposed on it by the DC PLPF and that this must be considered an admission of involvement in the illicit acts. The Panel is not sufficiently convinced of this. For, the Second Respondent submitted reasons for its conduct which allow a different evaluation. Thus, the Second Respondent was

a lot of points ahead of the second-placed club in the national championship. It was clear that the Second Respondent – whether with or without a deduction of points – would in any event win the championship. The Second Respondent therefore had no compelling reason to file an appeal against the deduction of points. Furthermore, the Second Respondent submitted that the appeal filed by its Chairman with the CJ PFF would also benefit it and therefore the "last word" had not yet been spoken on the fine in the amount of EUR 150,000. The Second Respondent proved this by, inter alia, filing a legal opinion by the legal consultant to the PFF, Mr Rui Sá. This states, inter alia, *"[t]hus, there is no doubt that the possible admissibility of the appeal of [P.] fully benefits FC Porto"*. This legal opinion is also backed by the letter by the PFF to the First Respondent of 2 June 2008 (see above). Finally, the expert witness Prof. José Joaquim Cordeiro Tavares, who was examined in the oral hearing, also held this legal opinion.

51. Also the two decisions (CJ PFF and DC PLPF) do not demonstrate with the requisite certainty that the Second Respondent (or its Chairman) was involved in the illicit activity. First it must be pointed out that neither the First Respondent nor the Panel is legally bound by said decisions. In particular, Art. 1.04 of the UCL-Regulations does not produce any automatism whereby if a national association has sentenced a club for match-fixing, UEFA is automatically bound by this finding. Rather UEFA must make its decision autonomously and independently on the basis of all of the factual circumstances available to it. To this extent decisions by the national associations form only one of the factual circumstances – even if it is perhaps a substantial one – which UEFA must take into consideration and evaluate when making its decision. Whether therefore the appeal filed by the Chairman of the Second Respondent also benefited the Second Respondent legally, is therefore not decisive in the present case. It is debatable how the decision by the CJ PFF should be evaluated. Firstly, the Panel does not have an English translation of the full decision. Secondly, the surrounding circumstances in which the decision was passed are not really clear. The parties have submitted different theories to the Panel about how it could come to the turbulences when the decision was made by the CJ PFF. All these theories could not contribute to strengthening confidence in the effectiveness of the decision taken by the CJ PFF. Furthermore, there are currently several appeals against the decision by the CJ PFF pending before the administrative courts. In this regard, the parties have submitted that an appeal to the administrative courts is basically possible against the decisions by the judicial organs of the PFF and that – in principle – such an appeal has suspensive effect. There is also agreement that the suspensive effect is stayed if it is in the public interest that the decision by the judicial organs of the PFF is enforced immediately. However, the parties disagree on whether the conditions for this exception are met. From the parties' submissions in the oral hearing the Panel has gained the impression that the suspensive effect is the rule and the immediate enforceability of the decision in the public interest (in accordance with Art. 128(1) of the Code of Procedure in the Administrative and Tax Court) is rather the exception that has to be justified. In this regard the Panel notes that the decision by the CJ PFF has not, at least has not yet, been declared to be immediately enforceable.

52. To summarize therefore, and taking into consideration that the present decision is adopted (i) on the basis of the facts and documents existing on the day of the hearing and (ii) the submissions by the parties, the two decisions by the judicial organs of the PFF – whether considered alone or in the overall context – do not convince the Panel with the requisite certainty that the Second Respondent (or its Chairman) was involved in the illicit activity mentioned in Art. 1.04 of the UCL-Regulations. The appeal and the Appellants' requests must therefore be dismissed. In view of the outcome of the proceedings there is also no need to rule on the unspecific (and therefore inadmissible) request by the Second Respondent, *"to grant FC Porto any other relief it deems appropriate"*.

The Court of Arbitration for Sport rules:

1. The appeals filed on 26 June 2008 by Sport Lisboa e Benfica SAD and Vitória Sport Clube against the decision issued on 13 June 2008 by the UEFA Appeals Body are dismissed.

(…)