Arbitration CAS 2011/O/2574 Union des Associations Européennes de Football (UEFA) v. FC Sion/Olympique des Alpes SA, award of 31 January 2012 (operative part of 15 December 2011)

Panel: Mr Hans Nater (Switzerland), President; Mr Patrick Lafranchi (Switzerland); Mr Jean Gay (Switzerland)

Football
Eligibility of players for a UEFA competition
Arbitration agreement by reference
Legal interest to obtain declaratory relief
Competence of the UEFA to review the qualification of players for participation in UEFA competitions
Restraint of competition justified by legitimate business reasons
Abuse of dominant market position
Proportionality of the declaration of forfeit
Proportionality of assessing the eligibility of players only once a protest is filed
Competence to lift provisional measures and necessity of a formal lifting

1. **In sports matters, the Federal Tribunal looks with a certain "benevolency" at the formal requirements arbitration agreements have to meet in order to facilitate efficient dispute resolution through specialized courts such as the CAS. The Federal Tribunal is holding arbitration agreements concluded by mere reference as valid. Statutes are merely a specific instance of arbitration agreements by reference.**

2. **The Federal Tribunal requires that there is a legal interest for the claimant to obtain declaratory relief, specifying that such legal interest does not merely pertain to abstract, theoretical legal issues but to concrete right and duties. The Federal Tribunal denies a legal interest if a party is merely seeking jurisdiction. In exceptional situations, the declaratory relief may relate to legal relations with third parties not involved in the proceedings.**

3. **In view of the hundreds of players qualified for the UEFA competitions, UEFA cannot review the qualification of each player. Therefore, the acceptance of the list with the registered players filed by the clubs cannot be seen as recognition that the players were validly qualified; it is simply the acknowledgment that the submission was made in the form required. However, through the possibility offered to the clubs to file a protest in case a player's qualification is disputed, UEFA can verify whether the player is qualified or not. This procedure guarantees a fair and equal application of the regulations with regard to the qualification of players taking part in the UEFA competitions, which provide that a player is eligible to play and must be registered with the association concerned on the basis of its own provisions and those of FIFA. If a national association (provisionally) authorises a player to play on the basis of a State**

court order, UEFA is not bound by such authorization. This interpretation of the applicable rules complies with sports criteria, *i.e.* to establish uniform regulations applicable equally to all clubs. In order to guarantee equality of the competitors, UEFA must be able to review the decisions of other organisations.

4. **The Swiss Competition authorities usually assess the question whether there is an abuse of a dominant market position by following a two step approach: First, they assess whether the behaviour of an undertaking having a dominant market position leads to a restraint of competition. Second, if there is a restraint of competition, they investigate whether there are legitimate business reasons justifying the restraint of competition. In sports matters, the behaviour of sports associations must be legitimated by reasons that are necessary for the proper functioning of the sport in order to qualify as "legitimate business reasons".**

5. **The fact for a sports association to issue and properly enforce its own rules cannot be considered as an abuse of its dominant position in the market. The regulations, and in particular the rules for the eligibility of football players, serve to guarantee a proper functioning of the football competition. Even if one were to take the view that a sports association abused its dominant position by applying its rules and sanctions, its behaviour would be justified by legitimate reasons. The purpose of these rules is to ensure that each football club plays the matches with duly registered players and, as a consequence, to guarantee a fair sports competition. The enforcement of the rules guarantees the equal treatment of the participants to the competition.**

6. **The declaration of matches as forfeited, in which ineligible players were involved, is a proportionate measure that cannot be achieved with another sanction such as a fine or a deduction of points. The absence of alternatives is evident particularly during the qualification phase of the tournament, where the deduction of points is not possible.**

7. **UEFA's practice of assessing the eligibility of players only once a protest is filed by a club cannot be challenged from a competition law point of view. Given the club's possibility to file a protest in case an ineligible player is fielded by the opponent club it would be inappropriate, unnecessary and disproportionate to require UEFA to control the eligibility of all players at the beginning of a tournament.**

8. **In principle, the competent authority to decide on the merits of the case has the competence to lift the provisional measures ordered by a State Court. As the provisional measures become moot once a final decision is taken on the merits, a formal lifting of the provisional measures is usually not necessary. However, if third parties are affected by the provisional measures, a formal lifting is nevertheless appropriate.**

The Parties

A. The Main Parties

UEFA is an association incorporated under Swiss law with its headquarters in Nyon, Switzerland. UEFA is the governing body of European football, dealing with all questions relating to European football and exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players of the European continent.

UEFA is one of the six continental confederations of the Fédération Internationale de Football Association (FIFA), which is the governing body of football on worldwide level and has its registered office in Zurich, Switzerland.

One of UEFA's tasks is to organise and conduct international football competitions and tournaments at European level. In this context, UEFA organises each year the UEFA Europa League (UEL), which is a competition gathering professional football teams from all over the continent of Europe.

OLA is a professional football club competing, under the sportive name "FC Sion", in the Swiss "Super League" and constituted as a limited company (société anonyme) under Article 620 of the Swiss Code of Obligations (CO) with the corporate name Olympique des Alpes SA, having its registered office in Martigny-Combe, Switzerland. It is affiliated with the Swiss Football Association (SFA) as member club no. 8700.

It is to be noted that the Football Club Sion Association is an amateur football club with registered office in Sion, Switzerland, constituted as an association in the sense of Article 60 *et seq.* of the Swiss Civil Code (CC). FC Sion Association is affiliated with the SFA as member club no. 8040 and its first team takes part in an amateur championship, which is the sixth tier national division in Switzerland.

B. The Third Parties

Atlético is a professional football club competing in the top Spanish championship. In the current season 2011/2012, Atlético takes part in Group I of the UEL together with three other European clubs.

Udinese is a professional football club competing in the top Italian championship. In the current season 2011/2012, Udinese takes part in Group I of the UEL together with three other European clubs.

Celtic is a professional football club competing in the top Scottish championship. In the current season 2011/2012, Celtic takes part in Group I of the UEL together with three other European clubs.

Stade Rennais is a professional football club competing in the top French championship. In the current season 2011/2012, Stade Rennais takes part in Group I of the UEL together with three other European clubs.

Factual Background

The present dispute finds its origins in February 2008, when Respondent hired the goalkeeper E. of the Egyptian Football Club Al-Ahly Sporting Club for a duration expiring at the end of 2011.

On 12 June 2008, Al-Ahly Sporting Club summoned E. and "FC Sion" to the FIFA Dispute Resolution Chamber (the "FIFA DRC") asking for their condemnation for breach of contract and inducement of breach of contract respectively.

On 16 April 2009, the FIFA DRC ordered E. and "FC Sion" jointly to pay a compensation fee in a considerable amount and banned "FC Sion" from registering any new players for a period of two entire consecutive registration periods.

On 18 June 2009, FC Sion Association appealed against the FIFA DRC decision of 16 April 2009 to the Court of Arbitration for Sports (CAS).

On 7 July 2009, the Deputy President of the Appeals Arbitration Division of CAS granted an interim stay of the FIFA DRC's decision dated 16 April 2009. As the summer registration period lasted from 10 June to 31 August, OLA was allowed to transfer players during that period in 2009, which it actually did.

On 1 June 2010, CAS declared the appeal of FC Sion Association against the FIFA DRC decision inadmissible, considering that FC Sion Association lacked legal interest and standing to appeal, as OLA was affected by the decision of the FIFA DRC of 16 April 2009 and not FC Sion Association.

On 1 July 2010, FC Sion Association appealed to the Swiss Federal Tribunal (the "Federal Tribunal") and asked for the annulment of the CAS Award dated 1 June 2010. Together with its appeal, FC Sion Association filed a request for stay of the execution of the FIFA DRC decision dated 16 April 2009.

On 14 July 2010, the Qualification Commission of the SFL issued two decisions, whereby FC Sion/Olympique des Alpes SA was permitted to register players during the then on-going summer registration period. In this respect, the Qualification Commission reasoned that the CAS Award was notified on 14 June 2010, *i.e.* at a point in time when the summer registration period had already started.

On 14 July and 11 October 2010, the President of the 1st Civil Court of the Federal Tribunal dismissed the request of FC Sion Association to stay the execution of the FIFA DRC decision of 16 April 2009.

On 12 January 2011, the Federal Tribunal dismissed the appeal.

OLA did not register any new players during the winter registration period of the season 2010/2011.

On 7 April 2011, FIFA reminded OLA as well as the SFA that the sporting sanction imposed on OLA would also be applicable during the following summer registration period, lasting from 10 June 2011 until 31 August 2011, and requested them to act accordingly.

On 9 May 2011, Mr Christian Constantin, President of OLA, signed the Entry Form UEL 2011/2012 on behalf of OLA. On 10 May 2011, a representative of SFA signed the Entry Form.

On 17 May 2011, OLA asked FIFA DRC to render a formal decision regarding the registration periods for which the ban on registration of new players was to be applied.

In its decision of 25 May 2011, the FIFA DRC stated that its decision of 16 April 2009 must be *"interpreted in the sense that OLA was banned from registering any new players also for the entire registration period, either nationally or internationally, following the notification of this decision"*.

On 17 June 2011, OLA filed an appeal against the FIFA DRC decision of 25 May 2011 to CAS, which was later withdrawn (see below).

On 5 and 6 July 2011, OLA requested from the SFL the registration of the following new players: Messrs S., P., J., B., M. and G. ("the Players").

On 13 July 2011, the Deputy President of the CAS Appeals Arbitration Division dismissed OLA's request for suspension of the FIFA DRC decision of 25 May 2011.

On 15 July 2011, the SFL rejected OLA's request for registration of the Players, relying on the decision of the FIFA DRC dated 16 April 2009.

On 18 July 2011, OLA and the Players appealed against the SFL decision of 15 July 2011 to the SFL Appeals Tribunal.

On 29 July 2011, the SFL Appeals Tribunal notified the operative part of its decision whereby it dismissed the appeal of OLA and the Players and confirmed the SFL decision dated 15 July 2011.

On 2 August 2011, OLA appealed to CAS against the decision of the SFL Appeals Tribunal dated 29 July 2011, and filed a request for provisional measures.

On 3 August 2011, the Players filed a request for provisional and *ex-parte* provisional measures to the District Court of Martigny and St-Maurice, Switzerland, on the grounds that the decision of the SFL Appeals Tribunal of 29 July 2011 violated their personality rights.

Also on 3 August 2011, the District Court of Martigny and St-Maurice ordered *ex-parte* provisional measures, according to which the Players shall not be barred from participating in official matches of OLA. Such measures were directed against FIFA and SFL, but not against UEFA, which was not a party to the proceedings.

On 4 August 2011, the SFL Appeal Tribunal notified its full written decision dated 29 July 2011 to the Parties.

On 5 August 2011, the SFL, referring to the order by the District Court of Martigny and St-Maurice of 3 August 2011, advised OLA that it can *"valablement, au regard de la SFL et/ou de la FIFA, faire jouer dans les matchs de football les corequérants S., P., J., B., M. and G., ce jusqu'à droit connu sur le sort de la requête de mesures provisionnelles"*. By letter of 25 August 2011, FIFA informed the Players that it also abided with this order.

On 5 August 2011, OLA withdrew its request for provisional measures, filed with its appeal to CAS of 2 August 2011.

On 8 August 2011, OLA withdrew its appeal to CAS against the FIFA DRC decision dated 25 May 2011.

On the same day, OLA submitted its UEL Player List A to UEFA, which included the Players, except S. This list was then confirmed by the SFA and approved by the UEFA Administration.

On 15 August 2011, OLA appealed to CAS against the decision of the SFL Appeals Tribunal dated 29 July 2011, notified on 4 August 2011.

On 17 August 2011, Claimant addressed a letter to Celtic and to the Scottish Football Association that stated the following: *"UEFA has been informed of the current situation, both by [SFA] and FIFA. The [SFA] has announced the players for FC Sion, including the players whose status was subject to discussions. It has confirmed to us that the players are qualified under their regulations. Therefore, UEFA has to consider that these players are eligible to participate in the UEFA Europa League 2011-12. Would it appear that players have been deemed as eligible, while their situation was in fact irregular, UEFA would certainly take appropriate steps against them and their club"*. In answer to their queries, UEFA referred Celtic and the Scottish Football Association to Articles 23 and 24 of the UEL Regulations *"which provide that a club may protest based on a player's eligibility to play, and that the case would then be heard by the UEFA Control and Disciplinary Body"*.

On 18 August 2011, OLA played a play-off match of the UEL 2011/2012 against Celtic. The match was played under protest filed by Celtic, on the grounds that OLA did not have the right to field some of the players who played the match, *i.e.* Messrs P., J., B., M. and G. ("the litigious Players"). The score of such match was 0-0.

On 25 August 2011, OLA played the second play-off match of the UEL 2011/2012 against Celtic. Such match was also played under protest, for the same reason as the first match. The score of such match was 3-1 for OLA.

On 1 September 2011, FIFA informed UEFA that five of the players fielded by OLA during the match against Celtic were not properly registered in accordance with the FIFA Regulations on the Status and Transfer of Players and had been qualified only further to the order issued by the District Court of Martigny and St-Maurice on 3 August 2011.

On 1 September 2011, the Players filed a request for *ex-parte* provisional measures to the District Court of Martigny and St-Maurice, again for breach of their personality rights, but this time directed against UEFA.

On 2 September 2011, the UEFA Control and Disciplinary Body (the "UEFA CDB"), considering that OLA fielded players who were not qualified in accordance with SFL's and FIFA's regulations, sanctioned OLA with two forfeit defeats for the matches played against Celtic in the UEL.

Also on 2 September 2011, the District Court of Martigny and St-Maurice dismissed the Players' request for *ex-parte* provisional measures against UEFA, considering that they had not proven a violation of their personality rights.

On 5 September 2011, the Players filed a new request to the District Court of Martigny and St-Maurice for *ex-parte* provisional measures against UEFA. In addition to their request of 2 September 2011, the Players asked for the reintegration of OLA in the UEL 2011/2012.

On 6 September 2011, OLA filed a request for provisional measures against UEFA before the State Court of the Canton of Valais submitting that UEFA violated Swiss competition law.

On 7 September 2011, the State Court of the Canton of Valais declared OLA's request for provisional measures against UEFA inadmissible, considering that it had no jurisdiction *ratione loci*.

On the same day, the District Court of Martigny and St-Maurice dismissed the Players' new request for *ex-parte* provisional measures against UEFA, on the ground that an illegal violation of their personality rights was not likely.

On 8 September 2011, OLA appealed to the UEFA Appeals Body against the decision of the UEFA CDB dated 2 September 2011 declaring the matches against Celtic in the UEL forfeit.

On 9 September 2011, OLA filed a request for *ex-parte* provisional measures against UEFA before the State Court of the Canton of Vaud submitting that UEFA violated Swiss competition law.

On 13 September 2011, the State Court of the Canton of Vaud granted OLA's request against UEFA, and ordered *ex-parte* provisional measures according to which UEFA was ordered to reintegrate OLA and the litigious Players in the UEL 2011/2012.

On the same day, the UEFA Appeals Body dismissed the appeal filed by OLA and confirmed the decision of the UEFA Control and Disciplinary Body dated 2 September 2011.

On 16 September 2011, Claimant requested the State Court of the Canton of Vaud to revoke its Order of 13 September 2011.

On 16 September 2011, OLA filed a request for conservatory and enforcement measures against UEFA before the State Court of the Canton of Vaud.

On the same day, the State Court of the Canton of Vaud issued an order forbidding UEFA to validate the results of Group I of the UEL 2011/2012.

By order of 20 September 2011, the State Court of the Canton of Vaud dismissed the Claimant's request for a revocation of its order of 13 September 2011.

On 26 September 2011, the UEFA Appeals Body notified its written decision dated 13 September 2011.

Summary of the Proceedings before the CAS

On 26 September 2011, UEFA filed a Request for Arbitration with CAS. As to the procedure, it requested CAS to order the consolidation of the proceedings should OLA appeal against any decision of UEFA. As to the merits it mainly requested CAS to declare that the UEFA Regulations and the disciplinary measures taken by UEFA against OLA did not violate Swiss Law. It appointed Professor Massimo Coccia as arbitrator.

On 27 September 2011, the CAS Court office forwarded the Request for Arbitration filed by UEFA to OLA and *inter alia* informed the Parties that the matter was assigned to the CAS Ordinary Arbitration Division.

In its letter of 3 October 2011, OLA informed CAS that it did not accept the jurisdiction of CAS and denied the admissibility of UEFA's Request for Arbitration. It requested an extension of the deadlines set forth by CAS in its letter of 27 September 2011. Further, it appointed Mr Jean Gay as arbitrator in case the requested time extensions were not granted. Finally, it requested that the language of the Arbitration be French allowing the Parties to file their submissions in French or English.

On 4 October 2011, OLA requested from CAS to be informed on the number of times Mr Coccia had previously been appointed as arbitrator by either UEFA or FIFA.

On 5 October 2011, UEFA informed CAS that it did not agree with an extension of the procedural deadlines set to OLA, and the language of the arbitration should be English, even though documents could be submitted in French. It maintained its request that the matter be decided in an accelerated procedure. UEFA further amended its Prayers for Relief (see below).

On 6 October 2011, the Parties were informed by the CAS Secretariat that (i) the language of the arbitration would be determined by the President of the Panel and the Parties were allowed to file,

at least pending the constitution of the Panel, documents in French as well, (ii) the Panel, once constituted, would decide on the status of the procedure (expedited or not), (iii) the nomination by OLA of Mr Gay as a CAS arbitrator was noted and (iv) the request for an extension of the deadlines insofar as it concerned the Answer was granted to OLA.

On 7 October 2011, OLA informed CAS that it had filed, on 9 September 2011, a request for *ex-parte* and provisional measures before the State Court of the Canton of Vaud. It submitted that the Prayers for Relief in the proceedings were broadly connected (*connexes*) to those requested by UEFA in the present proceedings before CAS. As a consequence, OLA requested the suspension of the proceedings before CAS on the grounds that the proceedings before the State Court of the Canton of Vaud were initiated before those before CAS (*lis pendens*). It also underlined that its nomination of Mr Gay was conditional.

On 10 October 2011, OLA filed a copy of the order issued by the State Court of the Canton of Vaud of 27 September 2011, ordering Claimant to take any appropriate measures to integrate OLA in the UEL 2011/2012, to admit the Players and to forbid to pronounce a forfeit against Respondent for letting the Players participate.

On 10 October 2011, CAS informed the Parties that UEFA was given a short deadline to express its position on OLA's request for a stay of the proceedings and invited Respondent either to confirm the designation of Mr Gay or appoint another CAS arbitrator. The Parties were informed that Mr Coccia declined to serve as an arbitrator for lack of availability, and Claimant was invited to appoint another CAS arbitrator.

On 11 October 2011, UEFA appointed Mr Luigi Fumagalli as arbitrator. In its letter of even date, UEFA objected to OLA's request for a stay of the proceedings before CAS.

On 12 October 2011, OLA filed its Answer by which it mainly (i) reiterated its request for a stay of the CAS proceedings; (ii) raised the Exception of Lack of Jurisdiction and requested an interim decision on jurisdiction; (iii) appointed Mr Niels Sörensen as arbitrator and, subsidiarily, requested the production of different statistics.

On 14 October 2011, the CAS Court Office forwarded the documents demonstrating that the Request for Arbitration filed by UEFA was made in due time to the Parties, *i.e.* on 26 September 2011.

Also on 14 October 2011, OLA requested the suspension of the proceedings before CAS and, if the request were dismissed, to rule on its competence to adjudicate the dispute.

OLA submitted that CAS is neither an independent nor an impartial arbitral tribunal in cases involving UEFA or FIFA and requested the issuance of an interim decision on this issue.

OLA requested a financial expertise on how football contributes to the financing of CAS and statistics in this regard. OLA also informed CAS that it would call several witnesses in this respect.

OLA criticised the closed list of CAS arbitrators and, in this regard, appointed Mr Niels Sörensen, judge at the State Court of the Canton of Neuchatel, in replacement of Mr Jean Gay, previously appointed by OLA, and, on a subsidiary basis, requested to be provided with some statistics.

Finally, OLA confirmed that it did not agree to take part in an expedited procedure.

On 14 October 2011, the Parties were informed by the Deputy President of the CAS Ordinary Arbitration Division that Mr Jean Gay was appointed as arbitrator for OLA.

On 14 October 2011, the Deputy President of the CAS Ordinary Arbitration Division issued an order dealing with OLA's request to suspend the CAS proceedings. It rejected OLA's request.

On 14, 17 and 18 October 2011, Atlético, Udinese, Celtic and Stade Rennais filed separate requests for intervention in the CAS proceedings, based on Article R41.3 of the CAS Code.

Together with their applications, the four clubs requested to be provided with the file of the case and to conduct the proceedings in an expedited manner.

In addition to the above-mentioned requests, Celtic and Stade Rennais requested to be allowed to file written submissions on the merits.

The Parties were invited to submit, on or before 20 October 2011, their position on the requests for intervention of the above-mentioned four clubs.

On 18 and 19 October 2011, UEFA submitted that the requests for intervention filed by the four clubs should be accepted based on Articles R41.3 and R41.4 of the CAS Code and the signed entry form to participate in the UEL 2011/2012.

On 20 October 2011, a *"Notice of formation of the Panel"* was sent to the Parties. The following arbitrators were appointed, in application of Articles R33 and R40 of the CAS Code:

President:	Dr Hans Nater, Attorney-at-law in Zurich, Switzerland
Arbitrators:	Professor Luigi Fumagalli, Attorney-at-law in Milan, Italy
	Mr Jean Gay, Attorney-at-law in Geneva, Switzerland

The President was nominated by the two co-arbitrators.

On the same date at 7:38pm, OLA requested an extension of the time limit, expiring that day, to submit its position on the requests for intervention. OLA requested a new time limit be fixed ending 28 October 2011.

On 21 October 2011, UEFA was informed that it was given a time limit until the same date at 5:00 pm to submit its observations on OLA's request.

Also on 21 October 2011, UEFA objected to OLA's request of even date.

Also on 21 October 2011, the Parties were informed by CAS that OLA was granted an extension of the time limit to express its position/observations on the requests for intervention until 24 October 2011.

On 24 October 2011, OLA filed four submissions regarding the requests for intervention of the four clubs participating in Group I of the UEL 2011/2012. OLA objected to all interventions.

Also on 24 October 2011, the Panel confirmed that the language of the proceedings was English, allowing the Parties *"to file their submissions either in French or in English as per their agreement"*. Furthermore, the Panel fixed the procedural calendar and informed the Parties that the request for a preliminary decision on jurisdiction had been deferred to the final award. The Panel informed the Parties that the hearing would be held on 24 November 2011.

On 25 October 2011, OLA requested the CAS Court Office to answer the following questions:

1. *A combien de reprises les arbitres Nater et Fumagalli ont-ils été nommés par (a) l'UEFA, (b) la FIFA, (c) l'une des associations nationales affiliées à l'UEFA? D'autre part, je souhaiterais également savoir à combien de reprises ils ont siégé dans des affaires impliquant les entités précitées.*
2. *Pourriez-vous m'indiquer la procédure suivie pour la désignation du président. En particulier, je souhaiterais savoir si les deux arbitres ont choisi librement ou s'ils l'ont fait parmi un choix limité proposé par une instance du TAS.*

On 25 October 2011, CAS, upon request by OLA, informed the Parties about the past activities of Dr Nater and Professor Fumagalli as CAS arbitrators. The Parties were also informed that Dr Nater was appointed as President of the Panel by mutual agreement of the two co-arbitrators.

On 27 October 2011, OLA contested the capacity of Messrs Lembo and Garbarski to act as counsel for UEFA, referring to Article S18 of the CAS Code. In this context, OLA requested from the Panel to state:

1. *Me Lembo et Me Garbarski n'ont pas la capacité de revendiquer pour le compte de l'UEFA.*
2. *Les frais et dépens de l'incident sont mis à la charge de l'UEFA.*

On the same day, OLA addressed a letter to the International Council of Arbitration for Sport (ICAS) challenging Professor Fumagalli as arbitrator.

OLA requested from ICAS to

1. *Récuser l'arbitre Luigi Fumagalli.*
2. *Mettre les frais de l'incident à charge de l'UEFA.*

On 28 October 2011, the CAS Court office informed the Parties that Professor Fumagalli was actually appointed only once by UEFA in the last three years and invited OLA to declare if it wished to maintain the challenge in view of such information.

Regarding the "challenge" of Messrs Lembo and Garbarski, the Panel informed the Parties that Article S18 of the CAS Code is applicable to CAS arbitrators personally and does not extend to CAS arbitrators' law firms. Furthermore, the Panel emphasized that the CAS Code did not entail any "challenge to appear before CAS" and that any sanction under Article S19 of the CAS Code for a violation of Article S18 only applies to the concerned CAS arbitrator and not to the lawyers of his/her law firm.

On 1 November 2011, OLA informed CAS that it maintained its challenge against Professor Fumagalli.

Also on 1 November 2011, UEFA filed its Statement of Claim and First Reply to the Exception of Lack of Jurisdiction.

On 2 November 2011, Professor Fumagalli informed CAS that he had decided to resign as arbitrator in order to favour a smooth resolution of the dispute, even though he strongly refuted OLA's grounds for his challenge.

On 4 November 2011, UEFA appointed Mr Patrick Lafranchi, Attorney-at-law in Bern, Switzerland, as arbitrator in replacement of Professor Fumagalli.

On 7 November 2011, the Parties were informed that Mr Lafranchi accepted his appointment and signed the *"Acceptance and Statement of Independence form"* and that the Panel was amended accordingly.

On 8 November 2011, the Panel issued four orders admitting Atlético, Celtic, Udinese and Stade Rennais as Third Parties (parties intéressées) to the present proceedings and invited the Parties to file their observations with respect to the rights which should be granted to the Third Parties.

On 10 November 2011, following a request made by OLA, the Parties were informed that Mr Lafranchi had been nominated three times since 2002 by either FIFA, UEFA, SFA and/or SFL and that he sat in seven Panels involving decisions by FIFA organs. In these cases, FIFA, UEFA, SFA and/or SFL were not involved as parties.

On the same day, following a request by OLA, Respondent was granted a time extension to submit its response.

On 11 November 2011, UEFA informed CAS that the Third Parties should be given full access to the CAS file, the right to file written submissions and the right to take part in the hearing.

On the same day, OLA reiterated that the four clubs should not be accepted as third parties. It further stated that the interventions of four new parties would affect its rights in the proceedings and that its Counsel would not be able to handle the increase of work incurred by the interventions. It requested the establishment of a new procedural calendar.

Also on 11 November 2011, the Third Parties submitted their position with regard to the rights which they should be granted in the proceedings, each of them concluding that they should be given access to the file, be allowed to file written submissions and be allowed to attend the hearing.

On 14 November 2011, the Panel issued the following decision with regard to the Third Parties' rights in the proceedings:

1) *The four interested parties will each receive a copy of the file, which has been mailed to them by DHL today.*

2) *The four interested parties are excluded from submitting written submissions unless formally requested by one of the main party [sic] by fax on or before 16 November 2011 at 4 pm in which case, the third parties requesting such submission will be invited to transmit by fax to the CAS and directly to the other parties at the latest on 21 November 2011 at 9 am a written summary of its pleadings limited to a maximum of 5 pages.*

3) *The four interested parties will in any event be allowed to attend the hearing and to plead during 15 minutes (max).*

4) *The four interested parties will not be allowed to make any requests on their own but only to support, if they wish, the main parties' requests.*

5) *The four interested parties who will attend the hearing can be represented by a maximum of one legal counsel and one representative of the club (who will have to sit at the back of the hearing room).*

On 14 November 2011, OLA filed its Response and requested the following evidentiary measures:

a) *Regarding the alleged financial links between football bodies and ICAS, respectively CAS:*

- *production par la fondation du conseil international de l'arbitrage en matière de sport de ses comptes annuels: bilan, compte d'exploitation (ou PP) de 2000 à 2010;*
- *production par la fondation du conseil international de l'arbitrage des rapports annuels sur les comptes (du réviseur/du CIAS);*
- *audition en qualité de témoin de la (des) collaborateur(s) de Fidinter SA qui ont effectué la révision des comptes de la fondation de 2000 à 2010;*
- *audition en qualité de témoin de M. Jean-Jacques Leu, c/o CIAS;*
- *audition en qualité de témoin de M. Joseph Blatter, FIFA, Zürich;*
- *expertise comptable pour laquelle il est proposé Pierre-François Brunner, Brunner & Associés SA, Route de Falaises 7 à 2011 Neuchâtel.*

b) *Regarding the alleged possibility for CAS Secretary General to have an influence on the Panel/on the issuance of a dispute*

OLA requested to hear, as witnesses

- *Matthieu Reeb, secrétaire général du TAS;*
- *Joseph Blatter, c/o FIFA, Zürich;*
- *Marco Villiger, c/o FIFA, Zürich;*

- *Gianni Infantino, c/o UEFA, Nyon.*

c) Regarding the closed list of CAS arbitrators

OLA requested the hearing of Matthieu Reeb and the filing of the following documents

- *Production par le conseil de la fondation de tous les documents comportant des propositions d'arbitres provenant des fédérations sportives, en particulier de FIFA et UEFA (pour la liste générale et pour la liste football);*
- *Production par le même conseil de tous les documents en relation avec la désignation des arbitres intégrés dans les listes depuis l'adhésion du « monde du football » au TAS (liste générale et liste football);*
- *Production par le secrétaire général du TAS d'une liste de tous les arbitres ayant siégé depuis 2003 jusqu'à ce jour dans des affaires en relations avec la FIFA, l'UEFA et leurs associations affiliées (lorsque la partie est un joueur, un club, une association) avec indication de la partie qui l'a désigné et du nombre de causes où l'arbitre a siégé, ces informations devant comprendre notamment la production des données ci-dessus; si le TAS juge cette offre de preuve trop étendue, même réquisition en lien avec tous les arbitres suisses, et les arbitres Bernasconi, Haas, Coccia, et Pinto, D'autres offres de preuves seraient alors réservées en fonction du résultat.*

On 16 November 2011, Claimant filed its Final Reply to Exception of Lack of Jurisdiction.

On 16 November 2011, UEFA's Counsel informed OLA that Mr Infantino, General Secretary of UEFA, would not appear before CAS to be heard as a witness as the reasons why OLA would like to hear him are *"completely irrelevant to the subject matter of the dispute"* and Mr Infantino had a number of professional engagements scheduled for the date of the hearing.

On 17 November 2011, Mr Villiger, Director Legal Affairs Division at FIFA, informed OLA that he would not appear before CAS to be heard as a witness stating that the independence of CAS has been confirmed several times by the Federal Tribunal and that, as a representative of FIFA who is not a party to the proceedings, he had only little knowledge of the dispute.

On 18 November 2011, the Third Parties submitted a joint written summary of their pleadings that addressed the jurisdiction of CAS as well as the merits of the case.

On the same day, Respondent filed a copy of the decision issued on 16 November 2011 by the State Court of the Canton of Valais.

Between 16 and 18 November 2011, all the Parties signed the Order of Procedure dated 15 November 2011. However, OLA emphasized that its Counsel had signed the order but not agreed to the proceedings as conducted.

On 21 November 2011, the fiduciary company Fidinter SA informed OLA that in view of its obligation related to professional secrecy it would not be represented at the hearing.

On the same date, Mr Joseph Blatter, President of FIFA, informed OLA that he would not be available for the hearing. He stated that he had other professional obligations and would not be able

to answer questions concerning the independence of CAS, which had been confirmed by the Swiss Federal Tribunal.

Also on 21 November 2011, OLA transmitted to CAS the party-appointed expert report by Professor Walter Stoffel addressing questions related to competition law.

Also on 21 November 2011, OLA informed ICAS that it was challenging the independence of the co-arbitrators Jean Gay and Patrick Lafranchi.

On 22 November 2011, a conference call took place. The participants were the counsels of the Main Parties, the President of the Panel, the Counsel to the CAS and the ad hoc clerk. The conference served to touch base with Counsel in view of the hearing scheduled for 24 November 2011. UEFA stated that the language at the hearing be English. OLA disagreed.

On the same date, former Federal Tribunal Judge Jean-Jacques Leu informed OLA that he would not testify. Not being a member of the Board of the ICAS, Mr Leu felt he did not have the capacity to represent the ICAS Foundation and considered the best person to answer OLA's queries on the functioning of CAS was Mr Reeb.

On 22 November 2011, UEFA, Mr Gay and Mr Lafranchi, and, on 23 November 2011, Mr Nater, filed their observations related to the requests for challenge filed by OLA.

On 23 November 2011, Mr Reeb, whose appearance as a witness was requested by OLA, informed the Parties that he would be available to appear as witness at the hearing. Attached to his letter, Mr Reeb filed a witness statement addressing issues of independence and impartiality of CAS which can be summarized as follows:

- It is well known that, after the recognition of CAS by FIFA, the number of cases submitted to CAS raised considerably.
- ICAS is financed by the whole Olympic Movement, *i.e.* IOC, International Federations, including FIFA, and the National Olympic Committees. This financing system was scrutinized in detail and validated by the Swiss Federal Tribunal in the *Lazutina* case. It is worth noting that UEFA is not part of the entities which finance ICAS.
- At the time of the *Lazutina* case, the IOC was financing 31,5% of the ICAS budget whereas FIFA is "only" financing 10,5% of the present ICAS budget. Therefore, the reasoning followed by the Swiss Federal Tribunal in the *Lazutina* case should be *a fortiori* applicable to the present case.
- The vast majority of football cases does not directly involve FIFA but clubs, players, coaches or agents. In such proceedings, the parties generally file an appeal regarding decisions rendered by FIFA, without FIFA being a party in such procedures.
- Mr Reeb denies OLA's assertions that CAS needs football to exist. A simple explanation is that if CAS should "lose" the football cases, the situation would simply be the same as when FIFA was not recognizing CAS, *i.e.* before 2004.

- As to Article R59 of the CAS Code, Mr Reeb states that his intervention as General Secretary only relates to matters of pure form (clerical mistakes, standardisation of style with other CAS awards, etc.) and that he might draw the Panel's attention to CAS case law when the award to be rendered is manifestly not in line with such case law. Mr Reeb notes that his advice is not binding on the arbitrators.
- As to the list of arbitrators, Mr Reeb states that according to Article S14 of the CAS Code, in force in 2011, IOC, International Federations and National Olympic Committees can propose the nomination of arbitrators but ICAS has the final exclusive competence about such nominations. Following the *Lazutina* case, CAS decided to publish a short biography and the CV of all the arbitrators.

On 23 November 2011, ICAS Board dismissed OLA's petition to challenge Messrs Lafranchi and Gay as arbitrators.

Also on 23 November 2011, OLA informed CAS that from the beginning of the proceedings the Parties were allowed to make their submissions in English and in French and that this rule should be followed at the hearing.

On the same date, CAS informed the Parties that they could express themselves at the hearing either in English or in French, as requested by OLA.

Still on 23 November 2011, OLA, in view of the refusal of Messrs Blatter, Villiger, Infantino and the fiduciary company Fidinter SA to testify before CAS, requested from the Panel to seek the assistance of the State Court in order to summon such persons to testify at the hearing, in application of Articles 375 para. 2 and 356 para. 2 of the Swiss Code of Civil Procedure (CCP). OLA further requested that the hearing be postponed.

Further to Mr Leu's letter dated 22 November 2011, OLA informed CAS on 23 November 2011 that it extended its request to the Panel to seek the State Court's assistance to subpoena Mr Leu.

Also on 23 November 2011, the Panel informed the Main and Third Parties of its decision to maintain the hearing date of 24 November 2011. The Panel further emphasized that Mr Reeb's witness statement addressed most of the issues raised by OLA in its answer, which *"may considerably reduce the discussion related to disputed facts and make the presence of witnesses and experts unnecessary"*. Finally, the Panel stated that it would consider all issues related to evidence at the outset of the hearing and, if necessary, it reserved its right to appoint a second hearing at a later stage in the event that further evidence should be produced.

On 24 November 2011, OLA requested that Mr Reeb's witness statement be removed from the file as the filing of a witness statement by a witness called upon by a party is not foreseen in the CAS Code and as this witness statement amounts to a written submission.

On 24 November 2011, a hearing took place at the CAS headquarters in Lausanne, Switzerland.

On 8 December 2011, the Panel informed the Parties that it dismissed all of the pending requests for production of documents and subpoena of witnesses filed by OLA, the grounds for the decisions would be given in the final award. The Panel further informed the Main and Third Parties that the evidentiary procedure was closed and that the final award would be issued on or before the 23 December 2011.

On 14 December 2011, the Main and Third Parties were informed that the Award, without grounds, would be notified to them on 15 December 2011.

Other relevant procedures

The present dispute finds its origins in February 2008, when OLA hired the goalkeeper E. of the Egyptian Football Club Al-Ahly Sporting Club, although the player was still under contract with the club. Since then, a myriad of procedures have been initiated, mainly by OLA and the Players. In the present chapter, the Panel summarizes the proceedings linked to the present case, irrespective of the nature of the proceedings.

A. Al-Ahly Sporting Club v. OLA & E.

a) Before FIFA

On 12 June 2008, Al-Ahly Sporting Club summoned E. and "FC Sion" to the FIFA DRC and asked for their condemnation for breach of the contract, respectively for inducement to breach the contract.

On 16 April 2009, the FIFA DRC condemned jointly E. and "FC Sion" to pay an important compensation fee, and imposed on OLA a ban from registering any new players for a period of two entire consecutive registration periods.

b) Before CAS (CAS 2009/A/1880 & CAS 20009/A/1881)

On 18 June 2009, FC Sion Association appealed against the FIFA DRC decision of 16 April 2009.

On 1 June 2010, CAS declared the appeal of FC Sion Association inadmissible, considering that FC Sion Association lacked legal interest and standing to appeal.

c) Before the Federal Tribunal (Decision ATF 4A_392/2010, dated 12 January 2011)

On 1 July 2010, FC Sion Association appealed to the Federal Tribunal and asked for the annulment of the CAS Award dated 1 June 2010.

On 12 January 2011, the Federal Tribunal dismissed the appeal filed by the FC Sion Association.

B. OLA v. FIFA

a) Before FIFA

On 17 May 2011, OLA requested from FIFA DCR a formal decision regarding the registration periods during which the relevant sporting sanction was to be served.

In its decision of 25 May 2011, the FIFA DRC stated that its decision of 16 April 2009 must be interpreted in the sense that OLA was banned from registering any new players also for the entire registration period, either nationally or internationally, following the notification of this decision (*i.e.* from 10 June 2011 to 31 August 2011 regarding international transfers and from 10 June 2011 to 30 September 2011 regarding national transfers).

b) Before CAS

On 17 June 2011, OLA appealed against the FIFA DRC decision of 25 May 2011 to the CAS, and requested the suspensive effect to be granted.

On 13 July 2011, the Deputy President of the CAS Appeals Arbitration Division dismissed OLA's request for suspensive effect.

On 8 August 2011, OLA withdrew its appeal to CAS against the FIFA DRC decision dated 25 May 2011.

C. OLA v. SFL (registration of new players)

a) Before SFL

On 5 and 6 July 2011, OLA requested from the SFL to register the Players.

On 15 July 2011, the SFL rejected OLA's request for registration of the Players, relying on the decision of the FIFA DRC dated 16 April 2009.

On 18 July 2011, OLA and the Players appealed against the SFL decision of 15 July 2011 to the SFL Appeals Tribunal.

On 29 July 2011, the SFL Appeals Tribunal dismissed the appeal of OLA and the Players and confirmed the SFL decision dated 15 July 2011.

On 4 August 2011, the SFL Appeal Tribunal notified the Parties with its written decision dated 29 July 2011.

b) Before CAS (against the operative part of the decision)

On 2 August 2011, OLA lodged an appeal against the decision of the SFL Appeals Tribunal of 29 July 2011, and requested provisional measures.

On 5 August 2011, OLA withdrew its request for provisional measures filed with its appeal to CAS dated 2 August 2011.

c) Before CAS (against the written decision)

On 4 August 2011, OLA was notified of the written decision of the SFL Appeal Tribunal dated 29 July 2011.

On 15 August 2011, OLA appealed to CAS against the decision of the SFL Appeals Tribunal dated 29 July 2011, notified on 4 August 2011.

On 3 October 2011, OLA withdrew its Appeal to CAS. The SFL decisions therefore remain unchallenged.

D. The Players v. SFL, FIFA & FIFA Transfer Matching System (FIFA TMS)

Before District Court of Martigny and St-Maurice

On 3 August 2011, the Players filed a request to the District Court of Martigny and St-Maurice, Switzerland for provisional and *ex-parte* provisional measures, on the grounds that the SFL Appeals Tribunal decision violated their personality rights (Article 28 CC).

Also on 3 August 2011, the District Court of Martigny and St-Maurice ordered *ex-parte* provisional measures, according to which the Players shall be considered as qualified and shall not be barred from participating in official matches of OLA. Such measures were directed against FIFA, FIFA TMS and SFA (SFL), but not against UEFA, which was not a party to this particular procedure.

On 27 September 2011, the District Court of Martigny and St-Maurice approved the Players' request for provisional measures which it had ordered *ex-parte*.

On 16 November 2011, the State Court of the Canton of Valais dismissed the Players' request for provisional measures holding that the personality rights of the Players had not been violated.

E. The Players v. UEFA

Before District Court of Martigny and St-Maurice

On 1 September 2011, the Players lodged again a request for violation of their personality rights with the District Court of Martigny and St-Maurice, directed against UEFA.

On 2 September 2011, the District Court of Martigny and St-Maurice dismissed the request for *ex-parte* interim measures filed by the Players.

On 5 September 2011, the Players filed a further request for *ex-parte* interim measures against UEFA before the District Court of Martigny and St-Maurice, again for violation of their personality rights and, additionally, for the reintegration of OLA in the UEL 2011/2012.

On 7 September 2011, the request of the Players was dismissed by the District Court of Martigny and St-Maurice deeming that an illegal violation of their personality rights was not likely.

F. OLA v. UEFA

a) Before the State Court of the Canton of Valais

On 6 September 2011, OLA filed a request against UEFA for provisional measures before the State Court of the Canton of Valais, for violation of Swiss competition law.

On 7 September 2011, the State Court of the Canton of Valais denied jurisdiction *ratione loci*.

b) Before the State Court of the Canton of Vaud

On 9 September 2011, OLA filed a request against UEFA for *ex-parte* interim measures before the State Court of the Canton of Vaud, for violation of Swiss competition law.

On 13 September 2011, the State Court of the Canton of Vaud granted OLA's request against UEFA, and ordered *ex-parte* interim measures according to which, inter alia, UEFA was ordered to reintegrate OLA and the litigious Players in the UEL 2011/2012.

On 16 September 2011, Claimant requested the State Court of the Canton of Vaud to revoke its order of 13 September 2011.

Also on 16 September 2011, OLA filed a request for conservatory and enforcement measures against UEFA before the State Court of the Canton of Vaud.

On the same day, the State Court of the Canton of Vaud, in view of its decision on *ex-parte* measures dated 13 September 2011 and of the decision of the UEFA Appeals Body of the same date, forbade UEFA to validate the results of Group I of the UEL 2011/2012.

On 20 September 2011, the State Court of the Canton of Vaud, rejected UEFA's request to revoke the *ex-parte* provisional measures of 13 September 2011.

On 5 October 2011, the State Court of the Canton of Vaud confirmed its decision dated 13 September 2011 and the *ex-parte* interim measures. UEFA was ordered to admit OLA to the UEL and to take the measures it deemed appropriate to reintegrate OLA in Group I. Besides, UEFA was asked to consider OLA's Players as validly qualified and prohibited to pronounce a forfeit against OLA on the sole basis of the Player's participation.

Also on 5 October 2011, OLA filed a request on the merits against UEFA with the State Court of the Canton of Vaud, in order to validate the provisional measures obtained in the morning.

c) Before the District Court of Nyon

On 10 October 2011, OLA filed a claim against UEFA with the District Court of Nyon, asking the court to annul the UEFA Appeals Body decision of 13 September 2011 in application of Article 75 CC.

Parties' Prayers for Relief

A. UEFA's Prayers for Relief

In its Statement of Claim and First Reply to Exception of Lack of Jurisdiction of 1 November 2011, Claimant requests that the Panel issue an award holding that:

> ***Requests and prayers for relief***
>
> *a) As to the merits:*
>
> *(i) To declare that UEFA Regulations, and the Regulations of the UEFA Europa League 2011/2012 in particular, are not for themselves in violation of Swiss law nor constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular;*
>
> *(ii) To declare that the disciplinary measures taken by UEFA against OLA pursuant to the Regulations of the UEFA Europa League 2011/2012 and the UEFA Disciplinary regulations are not in violation of Swiss law and are not constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular;*
>
> *(iii) To confirm that OLA is not entitled to be reintegrated in the UEFA Europa League 2011/2012;*

(iv) To declare that UEFA did not violate Swiss law nor breach in any manner OLA's personality rights or the personality rights of the six players by considering such six players ineligible as per the applicable UEFA regulations, the six players being Messrs S., P., J., B., M., and G.;

(v) To confirm that the players P., J., B., M., and G. shall not be permitted to participate in the UEFA Europa League 2011/2012 and the mentioned players as well as the player S. are not eligible in accordance with the applicable FIFA, UEFA and SFV/SFL regulations;

(vi) To consequently lift the provisional measures ordered by the Tribunal Cantonal of Vaud (Cour Civile) on 5 October 2011;

(vii) To deny any entitlement of Respondent against UEFA for compensation of damages;

(viii) To grant the Claimant any further or other relief that may be appropriate.

b) As to costs:

To order OLA to bear all costs of these arbitration proceedings and to compensate Claimant for all costs incurred in connection with this arbitration, including but not limited to the arbitration costs, arbitrator fees, and the fees and/or expenses of Claimant's legal counsel, witnesses and experts, in an amount to be shown.

B. OLA's Prayers for Relief

Together with its Response, OLA requested CAS to rule that:

1. Décliner sa compétence

2. Déclarer irrecevable la requête de l'UEFA dans toutes ses conclusions.

3. Mettre les frais de l'arbitrage à la charge de l'UEFA.

Hearing

A hearing was held in Lausanne on 24 November 2011.

At the beginning of the hearing, OLA reiterated its request that the Panel solicits the assistance of the State Court (Article 375 para. 2 CCP) in order to subpoena the witnesses called by OLA. UEFA's position in this regard is that the requested evidence is irrelevant as there is no doubt that CAS is an independent arbitral tribunal.

OLA requested again that Mr Reeb's witness statement be removed from the file and asked to be allowed to file the decision of the SFL Appeal Tribunal dated 21 November 2011 annulling the decision rendered by the SFL Disciplinary Commission pursuant to which the Players were suspended for five games.

The Panel informed the Parties that it would decide on OLA's procedural requests at a later stage, depending on the relevance of the requests.

The first witness heard was Mr Matthieu Reeb, Secretary General of CAS.

- Mr Reeb testified on the functioning and the procedural rules of CAS. He first confirmed the content of his witness statement filed on 23 November 2011.
- The witness explained the procedure to nominate arbitrators to appear on the list of CAS according to Article S14 of the CAS Code in force in 2011. 1/5th of the arbitrators are selected from among the persons proposed by the International Olympic Committee (IOC), 1/5th from among the persons proposed by the International Federations, 1/5th from among the persons proposed by the National Olympic Committees, 1/5th, after appropriate consultations, with a view to safeguarding the interests of the athletes and 1/5th from among persons independent from the aforementioned bodies. In this respect Mr Reeb admitted that the proportionality rule referred to in Article S14 of the CAS Code was not always followed, and that Article S14 of the CAS Code would be amended soon.
- With respect to the fact that the "origin" of the arbitrators was not publicly known, Mr Reeb testified that ICAS created in 2003/2004 a list of arbitrators to be appointed upon proposal of football entities. He noted that biographies of all the arbitrators were published on the CAS website, thus enabling the parties to check on possible conflicts of interest. Mr Reeb also testified that a simple request to CAS would allow a party to learn which entity proposed which arbitrator.
- Mr Reeb further testified that 1/3 of the arbitrators were often appointed, 1/3 occasionally and 1/3 very rarely. He referred to the freedom of each party to appoint an arbitrator of its choice.
- Mr Reeb testified that in the large majority of cases submitted to the ordinary procedure, *i.e.* except in case of disagreement between the co-arbitrators, the Chairman of CAS Panels is appointed by the two arbitrators appointed by the parties.
- As to the number of Swiss arbitrators, Mr Reeb declared that there were approximately twenty arbitrators who were regularly appointed and that only a few were rarely appointed.
- Mr Reeb confirmed that in 2010, Article S18 of the CAS Code was amended and that according to that provision, CAS arbitrators could not represent parties as counsel before CAS anymore.
- Mr Reeb testified that if an arbitrator was challenged by a party, Swiss law was applied primarily and the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") were also taken into consideration.
- On cross-examination, Mr Reeb testified that Mr Michele Bernasconi was still an arbitrator. However he refused to answer the question whether his fees as arbitrator were paid to him on his personal or his law firm's bank account. Mr Reeb confirmed that Mr Bernasconi was in the "top 10" of the most frequently appointed arbitrators by parties at the CAS.
- OLA referred to the alleged cross nominations among a certain group of lawyers and arbitrators (Messrs Bell, Monteneri, Villiger and Haas in particular) and requested from Mr Reeb the statistics of "cross nominations" among those individuals. Mr Reeb testified that it was possible to give statistics on "cross nominations" among arbitrators, but that it would take some time to establish a list of such nominations.

- After consultation of the Parties, the Panel decided to accept Mr Reeb's written witness statement in the file (*cf.* para. 245 and 246 of the present award).

The second person to be heard, Professor Marc Amstutz, professor of economic law at the University of Fribourg and Of Counsel for the law firm Bär & Karrer testified as a party-appointed expert. At the outset, Professor Amstutz emphasized that he did not have a labour contract with such law firm but was working "free-lance" with it. The President invited Professor Amstutz to tell the truth, subject to sanctions of perjury. Professor Amstutz affirmed, and confirmed his witness statement.

- Professor Amstutz testified that the Meca Medina case law is applicable to Switzerland as the rules contained in Swiss competition law with regard to the abuse of dominant market position are basically a "copy-paste" of the European regulations on the matter. In the Meca Medina case, the European Court of Justice set out the criteria to define a restriction of competition in sports matters, in essence legitimate goal, necessity and proportionality of the sanction.
- Following Meca Medina, Professor Amstutz concluded that the UEFA Appeal's Body Decision of 13 September 2011 did not result in a restraint of competition.
- Professor Amstutz finally stated that a subjective intent is not relevant as to the application of Article 7 of the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (the "Swiss Cartel Act" or "CA").

The President of the Panel asked the Main and Third Parties whether they had a fair chance to present their case. They affirmed, with one reservation: OLA insisted on the reservations made concerning the independence of CAS and its requests for production of documents and subpoena of witnesses.

LAW

Domestic Arbitration

1. It is not disputed by the Parties that this arbitration is a domestic arbitration subject to Part 3 of the CCP.

2. Article 353 CCP defines the scope of application as follows:

   "The provisions of this part govern proceedings before arbitral tribunals having their seat in Switzerland to the extent that the provisions of Chapter 12 of the Private International Law Act are not applicable".

3. Article 353 CCP is applicable, if the arbitral tribunal has its seat in Switzerland and, at the time of the conclusion of the arbitration agreement, all Parties had their domicile in Switzerland[1].

4. In its ruling of 8 November 2011, the Panel concluded that this arbitration be considered a domestic arbitration. None of the Parties objected. However, at the hearing, Professor Dreyer drew the Panel's attention to a clerical error in the first paragraph of the order of procedure signed by the Parties referring to PILA. At the hearing the Parties agreed that this arbitration is a domestic arbitration subject to the CCP.

5. As the requirements pursuant to Article 353 CCP are met, the proceedings are governed by the CCP.

Jurisdiction of the CAS

6. In sports matters, the Federal Tribunal looks with a certain "benevolency" at the formal requirements arbitration agreements have to meet in order to facilitate efficient dispute resolution through specialized courts such as the CAS[2]. The Federal Tribunal is holding arbitration agreements concluded by mere reference as valid[3]. Statutes are merely a specific instance of arbitration agreements by reference[4].

7. The Panel reaches the conclusion that this dispute falls under the special provisions applicable to the Ordinary Arbitration Procedure according to Article R38 *et seq.* of the CAS Code. The arbitration agreement entered into by the Main Parties is based on (i) the Entry Form to the UEL 2011/2012 signed by OLA, (ii) Articles 2.07 and 32.01 of the UEL Regulations and (iii) Articles 59 *et seq.* of the UEFA Statutes.

A. OLA signed the Entry Form for the UEFA Europa League 2011/2012

8. The Entry Form for the UEL 2011/2012 states inter alia the following:

Par la présente signature, le soussigné, représentant le club susmentionnné respectivement l'association nationale correspondante:

a) s'engage à respecter les Statuts, règlements (notamment le Règlement disciplinaire et les règlements des compétitions interclubs susmentionnés), directives et décisions de l'UEFA prises par les instances compétentes de l'UEFA en relation avec la compétition concernée;

b) s'engage à reconnaitre la compétence du Tribunal arbitral du Sport (ci-après: TAS, sis à l'Avenue de Beaumont 12, 1012 Lausanne, Suisse (tél.: +41 21-613-50-00; fax +41 613-50-01, telle qu'elle est prévue aux articles 61 et 63 des Statuts de l'UEFA (Editions 20120);

[1] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed., Bern 2010, para. 77.
[2] Decision of the Federal Tribunal 4A_246/2011, dated 7 November 2011, para. 2.2.1.
[3] Decision of the Federal Tribunal 4P.230/2000, dated 7 February 2001.
[4] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed., Bern 2010, para. 432 *et seq.*, 446.

c) accepte que tout litige porté devant le TAS sur l'admission ou la participation à l'une des compétitions susmentionnées ou sur l'exclusion de l'une d'entre elles sera soumis à une procédure accélérée conformément au Code de l'arbitrage en matière de sport du TAS et aux instructions émises par le TAS;

d) confirme que ses joueurs et officiels s'engagent à respecter les obligations énumérées ci-dessus sous lettres a) à c);

(…)

9. It is undisputed that on 9 May 2011 Mr Christian Constantin, President of OLA, signed the Entry Form for the UEL 2011/2012, on behalf of OLA, without any reservation. The reasons for the Panel's conclusions are spelled out herein after.

B. The Regulations of the UEFA Europa League 2011/2012

10. Article 2.07 of the UEL Regulations states that:

To be eligible to participate in the competition, a club must fulfil the following criteria:

(…)

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 (CAS) in Lausanne as defined in the relevant provisions of the UEFA Statutes and agree that any proceedings before the CAS concerning admission to, participation in or exclusion from the competition will be held in an expedited manner in accordance with the Code of Sports-related Arbitration of the CAS and with the directions issued by the CAS;

(…)

11. There is no doubt that OLA met the criteria contained in Article 2.07 of the UEL. In view of the clear content of the above-mentioned documents related to the participation of clubs to the UEL 2011/2012, the applicable provisions regarding CAS jurisdiction in cases arising from such competition are Articles 59 *et seq.* of the UEFA Statutes.

C. Articles 59 et seq. of the UEFA Statutes

12. The jurisdiction clause contained in Articles 61 and 62 of the UEFA Statutes, reads as follows:

Article 61(CAS as Ordinary Court of Arbitration)

1 The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration:

a) disputes between UEFA and associations, leagues, clubs, players or officials;

b) disputes of European dimension between associations, leagues, clubs, players or officials.

2 The CAS shall only intervene in its capacity as an ordinary court of arbitration if the dispute does not fall within the competence of a UEFA organ.

Article 62 (CAS as Appeals Arbitration Body)

1 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.

2 Only parties directly affected by a decision may appeal to the CAS. However, where doping-related decisions are concerned, the World Anti-Doping Agency (WADA) may appeal to the CAS.

3 The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question.

4 An appeal before the CAS may only be brought after UEFA's internal procedures and remedies have been exhausted.

5 An appeal shall not have any suspensory effect as a stay of execution of a disciplinary sanction, subject to the power of the CAS to order that any disciplinary sanction be stayed pending the arbitration.

6 The CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so.

13. In domestic arbitration, the formal validity of the arbitration agreement is determined by Article 358 CCP. The substantive validity of the arbitration agreement is subject to the law chosen by the parties, *i.e.* the Entry Form, the UEL Regulations and the UEFA Statutes.

D: Ordinary Arbitration Procedure

14. The Parties are in disagreement on the jurisdiction *ratione materiae* of CAS, whether UEFA's claim is subject to the ordinary arbitration procedure of CAS. According to Article 61 (2) of the UEFA Statutes, CAS shall only intervene in its capacity as an ordinary court of arbitration if the dispute does not fall within the competence of a UEFA organ. However, the rule does not specify the disputes which fall within the competence of a UEFA organ.

15. The Federal Tribunal has already had the opportunity to analyse and interpret Articles 61 and 62 of the UEFA Statutes, in particular Article 61 (2)[5] and reached the following conclusion:

(…) il ressort du commentaire relatif aux propositions de modification des Statuts de l'UEFA adoptées le 23 mars 2006 à Budapest par le Congrès que le nouvel al. 2 de l'art. 61 de ces Statuts devait créer un lien avec le nouvel art. 62 al. 1 "en établissant que les décisions prises par un organe de l'UEFA, parce qu'elles peuvent déjà être soumises au TAS statuant en tant qu'instance d'appel, ne sauraient être portées devant le TAS statuant en tant que juridiction arbitrale ordinaire" (document cité, § 4 ad art. 61). Sur le vu de cette remarque, il paraît raisonnable d'interpréter l'art. 61 al. 2 des Statuts de l'UEFA en ce sens que la compétence ratione materiae *du TAS en tant que tribunal arbitral ordinaire fait défaut chaque fois que la*

[5] Decision of the Federal Tribunal 4A_392/2008, dated 22 December 2008.

voie de l'appel est ouverte pour le saisir en qualité de tribunal arbitral d'appel, en application de l'art. 62 al. 1 des Statuts de l'UEFA.

16. The Panel understands the holding of the Federal Tribunal in the sense that disputes are not subject to the CAS Ordinary Arbitration Procedure whenever the object of the claim is only the challenge of a decision by an UEFA organ open for appeal to CAS.

17. In order to examine whether CAS is competent *ratione materiae* the Panel considers the following:

    (i) On 9 September 2011, OLA filed a request for *ex-parte* provisional measures before the State Court of the Canton of Vaud alleging a breach of Swiss and EC competition law by UEFA. OLA submitted that by excluding it from the UEL 2011/2012 UEFA abused its dominant position in the "market" (the organization of football competitions in Europe).

    (ii) OLA's claim lodged at the State Court of the Canton of Vaud is based on the CA, not Article 75 CC.

    (iii) On 13 September 2011, OLA filed a *Requête de conciliation* with respect to the decision of the UEFA Appeals Body dated 13 September 2011 with the District Court of Nyon, based on Article 75 CC and containing the following statement:

    "La procédure devant la Cour civile est examinée au regard de la Loi fédérale sur les cartels alors que la présente procédure est fondée sur l'art. 75 CC".

    (iv) Indeed the procedures conducted by the State Court of the Canton of Vaud (and consequently by CAS) and the District Court of Nyon have different objects: the one before the State Court of the Canton of Vaud relates to the question whether UEFA, by excluding OLA from the UEL 2011/2012, abused its dominant market position with regard to Swiss competition law and whether OLA should be reintegrated in such competition. The procedure before the District Court of Nyon is a pure appeal, based on Article 75 CC, against UEFA Appeals Body decision dated 13 September 2011.

    (v) UEFA's Claim was triggered by the provisional measures rendered by the State Court of the Canton of Vaud dated 16 November 2011 requesting UEFA to reintegrate OLA in the UEL 2011/2012 on the grounds that UEFA abused its dominant market position by excluding OLA from that tournament.

18. As a result of the above, CAS is competent *ratione materiae* to adjudicate the dispute in the Ordinary Arbitration Procedure. Article 61 UEFA Statutes, in conjunction with the Entry Form for the UEL 2011/2012, is to be considered as a binding arbitration clause between the Parties and therefore constitute the basis for the jurisdiction of the Panel, acting as an ordinary arbitration tribunal, to hear the claim filed by UEFA. The Panel reaches the conclusion that the arbitration proceedings at hand are subject to Article 38 *et seq.* of the CAS Code. Hence, it does not follow OLA's submission that UEFA, by lodging its claim, circumvented the CAS arbitration procedure.

19. OLA's argument related to the alleged lack of independence and impartiality of CAS will be addressed below.

Applicable Law

20. Article R45 of the CAS Code reads as follows:

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.

21. The rules applicable to adjudicate this case are (i) the Entry Form to the UEFA Europa League 2011/2012, the (ii) Regulations of the UEFA Europa League 2011/2012 (the "UEL Regulations") and (iii) the UEFA Statutes. Swiss Law is applicable subsidiarily.

Procedural Requests

A. Mr Reeb's witness statement

22. OLA requested Mr Reeb's witness statement of 23 November 2011 to be removed from the file. UEFA disagreed.

23. The Panel, after consultation of the Parties in the course of the hearing, decided to reject OLA's request to remove Mr Reeb's witness statement from the file on the grounds that according to Article R44.3 (2) of the CAS Code, the Panel may at any time order the production of additional documents or the examination of witnesses. The Panel notes that it is standard practice for witnesses heard in international arbitration proceedings to submit witness statements prior to the hearing.

B. Evidence requested by OLA

24. In view of the refusals of Messrs Blatter, Infantino, Villiger and Leu to testify at the hearing OLA requested that the Panel seek the assistance of the state courts in order to summon such persons to testify at the hearing, in application of Article 375 para. 2 and Article 356 para. 2 CCP. In addition, OLA requested the filing by ICAS of *"ses comptes annuels, bilan, compte d'exploitation (ou PP) de 2000 à 2010"* and of the *"rapports annuels sur les comptes (du réviseur/du CIAS)"* as well as a chartered accountancy.

25. On 8 December 2011, the Panel informed the Parties that OLA's request to seek the assistance of the state courts in order to summon the aforementioned witnesses and all other procedural requests filed by OLA were dismissed. The Panel takes the view that the documents requested by OLA are irrelevant. It is satisfied by Mr Reeb's detailed testimony that this Panel and CAS in general meet the requirements of independence and impartiality

required by Swiss law. In a recent decision, the Federal Tribunal stated that the CAS is providing adequate guarantee for an independent and impartial dispute resolution[6].

26. According to Article R44.3 (1) of the CAS Code: *"[a] party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that the documents are likely to exist and to be relevant"*. The CAS Code is however silent with respect to orders directed at third persons.

27. Furthermore, according to Article R44.2 (5) of the CAS Code: *"the Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance"*.

28. In casu, the evidence and testimonies requested by OLA are related to three allegations, (i) les *"[l]iens financiers entre les instances du football (FIFA et ses affiliées) et le CIAS, respectivement le TAS"*; (ii) la *"[p]ossibilité pour une personne extérieure – le secrétaire général – d'influencer la formation/d'influencer l'issue du litige"*; and (iii) la *"[l]iste fermée des arbitres"*.

a) The financial links between the world of football and CAS

29. The evidence requested by OLA *"visent notamment à établir: (i) la manière dont le football contribue au financement du CIAS/TAS, (ii) l'évolution du budget du TAS depuis l'adhésion du football, (iii) la part du football dans les recettes du TAS de 2000 à 2010 et (iv) les conséquences financières pour le TAS d'un retrait éventuel du football. Leur administration est nécessaire pour démontrer la dépendance financière du TAS face au monde du football. L'audition de M. Blatter a pour but d'établir les circonstances et les négotiations menées entre FIFA et CIO, aboutissant à l'abandon du TAF au profit du TAS. Ces preuves sont pertinentes"*.

30. The Panel is of the opinion that the information provided by the CAS Secretary General answered all the questions raised by Respondent.

31. According to the statement of the Secretary General, FIFA's budget participation is by far lower than the contribution of the IOC at the time the Federal Tribunal rendered the Award in the *Lazutina* case[7]. Mr Reeb stated that FIFA is not a party in the present proceedings and the financial links between CAS and the world of football can in no way jeopardize the Panel's independence and impartiality.

32. In 2003, the Federal Tribunal rendered a landmark decision confirming that CAS is independent from the IOC[8]. It noted that CAS is not "the vassal" of the IOC and is sufficiently independent to render awards comparable to awards of state courts. The Federal Tribunal reached this conclusion by analysing in detail the functioning of CAS and ICAS. In this decision the Federal Tribunal also confirmed that the system of the closed list of

[6] Decision of the Federal Tribunal 4A_246 2011, dated 7 November 2011.
[7] ATF 129 III 445.
[8] ATF 129 III 445.

arbitrators, as adapted in 1994, meets the constitutional requirements of independence and impartiality applicable to arbitral tribunals.

33. The Panel underlines here that, according to CAS Secretary General's statement, upon which the Panel sees absolutely no reasons not to rely on, the part of the CAS budget that comes from FIFA is by far less important than the one coming from the IOC when the *Lazutina* award was issued, and (ii) FIFA is not a party to the present proceedings and, (iii) the financial links between CAS and the world of football can therefore in any event not jeopardize the Panel's independency and impartiality towards either the Claimant UEFA, which does not contribute at all to the funding of ICAS, or the Respondent.

b) Article R46 (1) of the CAS Code

34. According to such provision: *"Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified"*.

35. OLA' s position in this regard is that *"[d]ans son principe même, cette possibilité instituée par le règlement autorisant le secrétaire général à demander au Tribunal arbitral de «revoir» sa sentence ne peut qu'aboutir à la conclusion qu'une «circonstance extérieure à la cause est susceptible d'influer l'issue du litige» (ATF 129 III 454). Cet élément a aussi été relevé par la Cour d'Appel de Bruxelles dans l'affaire «Keisse» comme étant contraire à 6 §1 CEDH"*.

36. The Panel first notes that the quotation of the Federal Tribunal in *Lazutina* is not applicable to the case at hand, as it was made in the context of the challenge of an arbitrator. Furthermore the reference to a decision rendered by a Belgian court in the *Keisse* case is also irrelevant, first because such decision was not filed and commented on. Besides, according to Mr Reeb's witness statement and confirmed by UEFA at the Hearing that decision seems to have been squashed by a higher Belgian court.

37. Furthermore, Mr Reeb stated in his witness statement that his intervention only relates to matters of pure form (clerical mistakes, standardisation of style with other CAS awards, etc.). Moreover, he might also draw the Panel's attention to CAS case law when the award about to be rendered is manifestly not in line with such case law and that the Panel has not motivated its decision in this regard. The "influence" of the CAS Secretary General is therefore limited to a power of suggestion which does not affect the freedom of the Panel.

38. In view of the information provided by the CAS Secretary General, the Panel holds that the examination of other witnesses with regard to the role of the Secretary General according to Article R46 of the CAS Code is not necessary.

c) The closed list of arbitrators

39. With this respect, OLA made, in its Response, the following procedural requests:

(…) production par le conseil de la fondation de tous les documents comportant des propositions d'arbitres provenant des fédérations sportives, en particulier de FIFA et UEFA (pour la liste générale et pour la liste football).

Production par le même conseil de tous les documents en relation avec la désignation des arbitres intégrés dans les listes depuis l'adhésion du «monde du football» au TAS (liste générale et liste football).

Production par le secrétaire général du TAS d'une liste de tous les arbitres ayant siégé depuis 2003 jusqu'à ce jour dans des affaires en relation avec la FIFA, l'UEFA et leur association affiliées (lorsque la partie est un joueur, un club, un association) avec indication de la partie qui l'a désigné et du nombre de causes où l'arbitre a siégé, ces informations devant comprendre notamment la production des données ci-dessus; si le TAS juge cette offre de preuve trop étendue, même réquisition en lien avec tous les arbitres suisses, et les arbitres (sic !) Bernasconi, Haas, Coccia et Pinto. D'autres offres de preuves seraient alors réservées en fonction du résultat.

Témoin: Matthieu Reeb, secrétaire hors conseil de la fondation.

40. Again, the Panel relies on the *Lazutina* decision, which approves the so-called "closed list". Moreover, the IBA Guidelines (point 3.1.2) provide an exception: *"for certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice"*. The Panel is of the opinion that sports law is a kind of arbitration subject to this exception provided for the IBA Guidelines.

41. The Panel is satisfied with the information provided for by the CAS Secretary General.

d) Conclusion

42. In view of all the above, the Panel hereby confirms its decisions of 8 December 2011, to dismiss all procedural requests including the request to subpoena witnesses.

Independence and Impartiality of the CAS

43. OLA submits that CAS cannot adjudicate this dispute as it is not an independent and impartial arbitral tribunal.

44. The Panel disagrees referring to the Federal Tribunal's reasoning in the *Lazutina* decision (see para. 32).

45. The Panel concludes that CAS is an independent and impartial arbitral tribunal and, accordingly, confirms the jurisdiction of CAS in the case at hand.

UEFA's Prayers for Relief

A. Admissibility

46. It is OLA's submission that UEFA's Prayers for Relief on the merits are not admissible. It contends that there is neither a legal interest of UEFA to obtain the declaratory relief nor any uncertainty concerning UEFA's rights. OLA addresses each prayer for relief substantiating the reasons for considering each and every prayer inadmissible ("irrecevable").

47. In its Final Reply to Exception of Lack of Jurisdiction of 16 November 2011, UEFA submits the following:

According to Swiss case law, a request for declaratory relief is notably admissible when Claimant is threatened by an uncertainty concerning either its rights or those of third parties, and that such uncertainty can only be clarified with a declaratory award précising the existence and content of the legal relationship [ATF 123 414 par. 7b; ATF 120 II 20 par. 3a]. The interest of Claimant to obtain such declaratory relief exists anytime its future actions or those of third parties are potentially limited because of the uncertainty of the legal relationship between the parties [ATF 136 III 102 para 3.1; ATF 135 III 378 par. 2.2; ATF 133 III 282 par. 3.4, JdT 2008 I 147; ATF 131 III 319 par. 3.5, SJ 2005 I 449; ATF 123 III 414 par. 7b, JdT 1999 I 251]. This case law, developed before the implementation of the Swiss Code of Civil Procedure, is still fully relevant and applicable under the new federal procedure [MCF, FF 2006, p. 6901; Gehri, BSK ZPO, N 8 ad Article 59].

In the case at hand, Claimant does not need to call for a "public interest", as this case is not about a public administrative matter, but is a civil litigation opposing the Claimant to the Respondent, with a legitimate interest (a "schutzwürdiges Interesse") of Claimant (as well as of the four intervening clubs) to have a decision on the merits. Therefore, the jurisprudence quoted by Respondent (page 26 of the Response) is totally irrelevant and non-applicable.

The decision of the Swiss Federal Tribunal quoted by Respondent, ATF 137 II 199, refers to determination in a public administration procedure and directed to a public administrative authority/ "Verwaltungsverfahren"). Additionally, the decision refers to Article 25 of the Swiss Federal law on Administrative Procedure ("VwVG"), which states that the relevant condition is the existence of a legitimate interest ("schutzwüridges Interesse") of the claiming party. Therefore, the jurisprudence quoted by Respondent is of no help to it.

The interest of UEFA is legitimate and obvious: there is presently a provisional decision of a tribunal, the Cantonal Tribunal of Vaud, that alleges that Claimant has violated Swiss cartel law. As indicated, that statement and the consequences linked to it shall be confirmed (as Respondent probably hopes) or denied (as Claimant is confident to be able to prove).

48. The Federal Tribunal requires that there is a legal interest by the claimant to obtain declaratory relief, specifying that such legal interest does not merely pertain to abstract, theoretical legal issues but to concrete right and duties[9]. The Federal Tribunal denies a legal

[9] ATF 137 II 199 consid. 6.5.

interest if a party is merely seeking jurisdiction (so-called "forum running")[10]. In exceptional situations, the declaratory relief may relate to legal relations with third parties not involved in the proceedings[11]. In a decision related to competition law, the Federal Tribunal decided that a party in an investigation of the Competition Commission only has the right to receive a declaratory judgment if there is an interest in such a judgment concerning not abstract, theoretical question but concrete rights and duties (*"(…) ein entsprechendes schutzwürdiges Feststellungsinteresse, das nicht bloss abstrakte, theoretische Rechtsfragen, sondern nur konkrete Rechte oder Pflichten zum Gegenstand hat"*)[12].

a) UEFA's Prayer for Relief (a)/(i)

"To declare that UEFA Regulations, and the Regulations of the UEFA Europa League 2011/2012 in particular, are not for themselves in violation of Swiss law nor constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular".

49. The Panel takes the view that this Prayer for Relief is inadmissible, as it addresses an abstract legal issue. The Panel follows OLA's conclusion that UEFA lacks a legal interest, as the request does not pertain to concrete rights and duties of the Parties.

b) UEFA's prayer for relief (a)/(ii)

"To declare that the disciplinary measures taken by UEFA against OLA pursuant to the Regulations of the UEFA Europa League 2011/2012 and the UEFA Disciplinary regulations are not in violation of Swiss law and are not constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular".

50. It is OLA's submission that UEFA has no legal interest in prayer for relief (a)/(ii) as it is merely seeking jurisdiction by forum running. The Panel reaches the conclusion that prayer for relief (a)/(ii) aims at a negative declaratory award with regard to an abstract legal issue, *i.e.* the compatibility between its disciplinary regulations and disciplinary measures with Swiss law. On this ground, the Panel declares prayer for relief (a)/(ii) as inadmissible.

51. However, at this point the Panel wishes to stress that if this request for relief is not admissible the examination of the Parties' submissions on this point will have to be made in order to assess the merits of others requests for relief that are admissible: OLA has not filed an appeal against the UEFA Appeal's Body's decision of 13 September 2011 with CAS. CAS expresses its view on the validity of that decision only in view of its assessment on whether UEFA

[10] ATF 131 III 319 consid. 3; cf. OBERHAMMER P., in: OBERHAMMER P. (ed.), Kurzkommentar ZPO, Basel 2010, CPC 88 N 23 with further references; SCHENKER U., in: BAKER & MCKENZIE (ed.), Schweizerische Zivilprozessordnung, Bern 2010, CPC 88 N 2; MORF R., in: GEHRI/KRAMER (ed.), Kommentar Schweizerische Zivilprozessordnung, Zürich 2010, CPC 59 N 21; MOHS F., in: GEHRI/KRAMER (ed.), Kommentar Schweizerische Zivilprozessordnung, Zürich 2010, CPC 88 N 2.
[11] BOHNET F., in: BOHNET F. [ET AL.], Code de procédure civile commenté, Bâle 2011, Art. 88, N 6-8.
[12] ATF 137 II 199 consid. 6.5.

abused its dominant market position. This issue, which lies at the heart of the case, may be decided differently depending on whether UEFA violated the UEL Regulations by declaring the matches against Celtic forfeit leading to OLA's consequent elimination from the UEL 2011/2012. The section B of the present award will therefore be dedicated to the qualification of the Players in order for the Panel to decide on the Claimant's requests for relief on which it has a very concrete interest (see below para. 53 *et seq*.).

52. Since the Panel already considers this request for relief inadmissible, there is no need to further assess the other arguments put forward by OLA in support.

c) UEFA's prayer for relief (a)/(iii)

"To confirm that OLA is not entitled to be reintegrated in the UEFA Europa League 2011/2012".

53. The Panel concludes that this prayer for relief is admissible, as UEFA has a legitimate interest to clarify the uncertainty whether OLA has the right to be reintegrated into the UEL or not. If the Panel were to decide that OLA should be integrated in the UEL 2011/2012 the whole tournament would have to be reorganized. UEFA's rights to render disciplinary measures are at stake.

54. The Panel's view is supported by its assessment that UEFA has a legitimate interest that the issue of integration and reintegration respectively is clarified, as the State Court of the Canton of Vaud in its decision of 5 October 2011 on conservatory measures, was of the view, that UEFA breached Swiss Cartel Law.

d) UEFA's prayer for relief (a)/(iv)

"To declare that UEFA did not violate Swiss law nor breach in any manner OLA's personality rights or the personality rights of the six players by considering such six players ineligible as per the applicable UEFA regulations, the six players being Messrs S., P., J., B., M., and G.".

55. The Panel concludes that this prayer for relief is inadmissible, as it addresses the relationship between UEFA and the Players who are not involved in the proceedings at hand and cannot be qualified as an exceptional situation justifying the admissibility of the present relief in spite of the absence of the Players. Besides, in its decision dated 16 November 2011 the Tribunal Cantonal of the Canton of Valais lifted the ruling of the Court of Martigny et St.-Maurice dated 3 August 2011 ordering FIFA and SFL to communicate to OLA that the Players are entitled to play.

e) UEFA's prayer for relief (a)/(v)

"To confirm that the players P., J., B., M., and G. shall not be permitted to participate in the UEFA Europa League 2011/2012 and the mentioned players as well as the player S. are not eligible in accordance with the applicable FIFA, UEFA and SFV/SFL regulations".

56. Again, the Panel finds that this prayer for relief is inadmissible as it concerns an abstract legal issue. As the qualification or non-qualification of the Players is concerned, reference is made to para. 53 *et seq*. above and to para. 73 *et seq*. below.

f) UEFA's prayer for relief (a)/(vi)

"To consequently lift the provisional measures ordered by the Tribunal Cantonal of Vaud (Cour Civile) on 5 October 2011".

57. In domestic arbitration, the state court or the arbitral tribunal can order provisional measures in order to avoid in particular that the disputed claims of the parties may be compromised or even frustrated while proceedings are pending[13].

58. With regard to domestic arbitration, Article 374 para. 1 CCP states the following:

"L'autorité judiciaire ou, sauf convention contraire des parties, le tribunal arbitral peut, à la demande d'une partie, ordonner des mesures provisionnelles, notamment aux fins de conserver des moyens de preuve".

59. In the case at hand, OLA requested, and obtained, conservatory measures by decisions rendered by the State Court of the Canton of Vaud dated 13 September 2011 (*ex-parte* interim measures) and 5 October 2011 (provisional measures).

60. Provisional measures can be modified or revoked in accordance with Article 268 CCP, which states:

"Les mesures provisionnelles peuvent être modifiées ou révoquées, s'il s'avère par la suite qu'elles sont injustifiées ou que les circonstances se sont modifiées.

L'entrée en force de la décision sur le fond entraîne la caducité des mesures provisionnelles. Le tribunal peut ordonner leur maintien, s'il sert l'exécution de la décision ou si la loi le prévoit".

61. As to the question of which authority is competent to deal with a request to modify or revoke the provisional measures ordered, legal scholar states that *"La compétence matérielle relève en principe du droit cantonal. Sauf réglementation contraire, si le tribunal a été saisi au fond, c'est lui qui est compétent pour modifier des mesures prises par un autre juge avant le dépôt de la demande au fond"*[14].

62. In the case at hand, a case is pending before CAS in which the prayers for relief demonstrate that it is the same claim as the one introduced by OLA before the State Court of the Canton of Vaud. Such fact is recognized by OLA in its letter to CAS dated 7 October 2011, in which it states: *"(…) en date du 9 Septembre 2011, Olympique des Alpes S.A. a déposé une requête devant le Tribunal cantonal vaudois, dont les conclusions sont largement connexes à celles prises par l'UEFA dans la présente procédure arbitrale".*

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[13] BOHNET F., in: BOHNET F. [ET AL.], Code de procédure civile commenté, Bâle 2011, Art. 268, N 2-3
[14] BOHNET F., in: BOHNET F. [ET AL.], Code de procédure civile commenté, Bâle 2011, Art. 268, N 9.

63. Furthermore, the State Court of the Canton of Vaud stated that CAS was the competent authority to decide on the merits of the case[15].

64. As the competent authority to decide on the merits of the case, the Panel has therefore, in principle, the competence to lift the provisional measures ordered by the State Court of the Canton of Vaud in the case at hand.

65. However, as stated by Article 268 para. 2 CCP, the provisional measures are moot once a final decision is taken on the merits.

66. In this regard, the same author[16] states that *"avec le prononcé final et complet (sur la recevabilité ou le fond, Article 236) entré en force, les mesures provisionnelles tombent, et ce, que la demande ait été admise, partiellement ou entièrement, ou qu'elle ait été rejetée"*. Such position is confirmed by a majority of Swiss legal scholars, which state that a formal lifting of the conservatory measures is not necessary[17].

67. However, if third parties are affected by conservatory measures, a formal lifting of the measures should be considered. Moreover, a third party having an interest can request a formal lifting of the conservatory measures[18]. Another author is even of the opinion that a formal lifting is appropriate[19].

68. In view of the above, the Panel concludes that UEFA's prayer for relief (a)/(vi) is admissible.

g) UEFA's prayer for relief (a)/(vii)

"To deny any entitlement of Respondent against UEFA for compensation of damages".

69. UEFA seeks to receive a declaratory award stating that OLA is not entitled to compensation or damages from UEFA, which is not admissible if there are no concrete rights or duties.

70. As UEFA does not mention any particular grounds or facts related to such claim, the Panel concludes that such claim shall be declared inadmissible.

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[15] Order on provisional measures rendered on 5 October 2011 by the State Court of the Canton of Vaud, p. 16.
[16] BOHNET F., in: BOHNET F. [ET AL.], Code de procédure civile commenté, Bâle 2011, Art. 268, N 12-13.
[17] SPRECHER Th., in: SPÜHLER/TENCHIO/INFANGER (ed.), Basler Kommentar – Schweizerische Zivilprozessordnung, Basel 2010, CPC 268, N 32; ZÜRCHER J., in: BRUNNER/GASSER/SCHWANDER (ed.), ZPO, Schweizerische Zivilprozessordnung, Kommentar, Zürich/St. Gallen 2011, CPC 268, N 15; TREIS M., in: BAKER & MCKENZIE (ed.), Schweizerische Zivilprozessordnung, Bern 2010, CPC 268, N 3; ROHNER/WIGET, in: GEHRI/KRAMER (ed.), Kommentar Schweizerische Zivilprozessordnung, Zürich 2010, CPC 268, N 4; EHRENZELLER S. K., in: OBERHAMMER P. (ed.), Kurzkommentar ZPO, Basel 2010, CPC 268, N 6; HUBER L., in: SUTTER-SOMM/HASENBÖHLER/LEUENBERGER (ed.), Kommentar zur Schweizerischen Zivilprozessordnung [ZPO], Zürich/Basel/Genf 2010, CPC 268, N 12.
[18] ZÜRCHER, *op.cit.*, CPC 268, N 16; TREIS, *op.cit.*, CPC 268, N 3; ROHNER/WIGET, *op.cit.*, CPC 268, N 4.
[19] SPRECHER, *op.cit.*, CPC 268, N 32.

h) UEFA's prayer for relief (a)/(viii)

"To grant the Claimant any further or other relief that may be appropriate".

71. This prayer for relief lacks specificity. It is upon Claimant to indicate its prayers for relief.

72. As this prayer for relief has not been substantiated, the Panel concludes that it is inadmissible.

B. Qualification of the Players

73. OLA submits that the UEFA Appeal's Body erroneously based its decision of 13 September 2011 on the assumption that the Players were not qualified to play the matches against Celtic. It underlined that the State Court of the Canton of Vaud, in its order of 5 October 2011, approving OLA's request for provisional measures, confirmed that the Players were qualified to play the games against Celtic.

74. The following issues are in point:

a) Was UEFA allowed to review the eligibility of the players following Celtic's protest?

b) Was OLA banned from registering new players in the summer transfer period 2011/2012?

a) Was UEFA allowed to review the eligibility of the players following Celtic's protest?

75. It is OLA's position that the FIFA Regulations assign the primary competence regarding the eligibility of players to the SFA and the SFL. According to OLA, the competence shifts to FIFA only in case the previous club does not agree to release the player. OLA notes that the Players were released by their previous clubs and, therefore, FIFA did not have jurisdiction to decide on the qualification of the Players. OLA further submits that FIFA and UEFA do not have any competence with regard to the qualification of players. OLA contends that the Players were eligible as the SFL declared the player to be qualified. Moreover, OLA asserts that UEFA, in its letter of 17 August 2011, confirmed that the qualification requirements according to Article 18 of the UEL Regulations had been met. Finally OLA submits that UEFA could not rely on the FIFA DRC's decision of 25 May 2011 on the grounds that the CAS declared the decision non-enforceable.

76. UEFA's position with respect to the qualification of the Players for the UEL 2011/2012 is that both of its organs applied the applicable rules correctly. In its decision of 13 September 2011, UEFA Appeals Body stated that: *"According to paragraph 18.01 of the UEL regulations in order to be eligible to participate in UEFA club competitions, players must be registered with UEFA to play for a club within the time limits and must fulfil all the conditions set out in the provisions of the regulations. (…) Paragraph 18.02 of the UEL regulations states: «Players must be duly registered with the association concerned in accordance with the association's own rules and those of FIFA, notably the FIFA Regulations on the Status and Transfer of Players»* [emphasis added]. *Each club must announce its players to its*

association, by means of a duly signed list (para. 18.04). The association then submits the list to UEFA. UEFA can examine questions of player eligibility (para. 18.06). Articles 23 and 24 of the UEL regulations give the clubs the possibility to file protests in relation to player and Article 14bis(3) DR, in particular, provides for a match to be declared forfeit if an ineligible player is fielded, as long as the opposing club files a protest".

aa) Letter from UEFA dated 17 August 2011

77. It is OLA's view that the letter of 17 August 2011 is a formal decision on authorization pursuant to Article 18.06 of the UEL Regulations and that this decision is binding and can no longer be amended. The Panel does not follow OLA's reasoning.

78. The eligibility to play in UEFA club competitions is defined in Articles 18.01 *et seq.* of the UEL Regulations. Article 18 reads as follows:

18.01 In order to be eligible to participate in the UEFA club competitions, players must be registered with UEFA within the requested deadlines to play for a club and must fulfil all the conditions set out in the following provisions. Only eligible players can serve pending suspensions.

18.02 Players must be duly registered with the association concerned in accordance with the association's own rules and those of FIFA, notably the FIFA Regulations on the Status and Transfer of Players.

(…)

18.05 The club bears the legal consequences if it fields a player whose name does not appear on list A or list B or who is not eligible to play for some other reason.

18.06 The UEFA administration decides on eligibility to play. Contested decisions are dealt with by the controlling and disciplinary chamber.

79. In view of the position of its Appeals Body, UEFA concludes that it can freely review the eligibility of players fielded by a club in the UEL 2011/2012, whenever a protest is filed by the opponent club.

80. In their submissions, UEFA and the Third Parties insisted on the fact that for international competitions like UEL 2011/2012, which includes the participation of more than 50 countries, the principle of equality among participants should be preserved. If the only competent authorities to review the registration of players were the national federations, it would not be possible to achieve equality.

81. It appears that UEFA was allowed to review the qualification of the players registered by their club to participate in the UEL 2011/2012. In view of the hundreds of players qualified it seems obvious that UEFA cannot review the qualification of each player. Therefore, the acceptance of the list with the registered players filed by the clubs cannot be seen as recognition that the players were validly qualified. The acceptance of the list is simply the acknowledgment that the submission was made in the form required.

82. However, through the possibility offered to the clubs to file a protest in case a player's qualification is disputed, UEFA can verify whether the player is qualified or not. This procedure guarantees a fair and equal application of the FIFA Regulations with regard to the qualification of players taking part in the UEL 2011/2012.

83. The Panel notes that the possibility to file protests in relation to player-eligibility according to Article 23 and 24 of the UEL Regulations is a strong indication for admitting UEFA's right to review the players' qualification. As a matter of fact a club can protest against a player's qualification only after knowing the names of the players fielded by the opponent club, hence after transmission of the players' list of the opponent club. Was the acceptance of the players' list already to constitute a final decision on eligibility to play, the provisions of Articles 23 *et seq.* UEL Regulations would no longer be applicable as the decision which was taken could no longer be changed, even if an opposing club were to lodge a protest.

84. As an interim conclusion, it must therefore be noted that Article 18.06 of the UEL Regulations is to be interpreted in the sense that UEFA is entitled to decide on the eligibility of players. The argument put forward by OLA according to which the letter of 17 August 2011 constitutes a formal decision is not convincing as the acceptance of the list of players is not a decision pursuant to Article 18.06 of the UEL Regulations. The list merely serves to indicate the names of the players to be forwarded to the opponent club.

85. In addition, UEFA expressly stated in its letter of 17 August 2011 that no decision on the Players' eligibility had been taken and that, if the Players were ineligible, the sanction mechanism would apply. The following statement was contained in this letter:

"Would it appear that players have been deemed as eligible while their situation was in fact irregular, UEFA would certainly take appropriate steps against them and their club".

86. The letter of 17 August 2011 clearly shows that UEFA reserves the right to take legal action should it transpire that the Players are not eligible.

87. Based on the above, the Panel concluded that OLA cannot derive any arguments in its own favour from the letter of 17 August 2011.

ab) Competence of FIFA or of UEFA

88. OLA takes the view that under the applicable regulations only the national associations are authorized to decide whether players are eligible to play. It submits that it is within the competence of FIFA to decide on the eligibility of the players.

89. OLA submits that UEFA must abide the decision taken by a national association granting permission to play and cannot deviate from that decision. As the players were authorized to play by the SFL/SFA, it believes that UEFA is bound by that decision.

90. However, it must be noted that Articles 18.01 and 18.02 of the UEL Regulations provide that registration, with a national federation, in accordance with the federation's own rules and those of FIFA, is one of the conditions for the players' eligibility.

91. In the case at hand, the Players had been provisionally registered by SFL based on the *ex-parte* interim measures ordered by the District Court of Martigny and St-Maurice on 3 August 2011, which were directed against FIFA and SFA/SFL. Similar requests directed against UEFA were rejected.

92. If a third federation, such as the SFL/SFA, (provisionally) authorises a player to play on the basis of a court order, UEFA is indeed not bound by such authorization. The UEL Regulations provide that a player is eligible to play and must be registered with the association concerned on the basis of its own provisions and those of FIFA. However, the Panel notes that the SFL registered the Players only based on the court order on provisional measures.

93. Moreover, the Panel's interpretation of the applicable rules complies with sports criteria, *i.e.* to establish uniform regulations applicable equally to all clubs. In order to guarantee equality of the competitors, UEFA must be able to review the decisions of other organisations.

94. It results from the above that UEFA had the authority and was entitled to review the Player's eligibility upon the protests by competitors. It was authorized to state on the ineligibility of the Players based on the applicable regulations.

b) Was OLA banned from registering new players in the summer transfer period 2011/2012?

95. On 16 April 2011, FIFA sanctioned OLA with a ban from registering any new players for a period of two entire consecutive registration periods. In its decision dated 1 June 2010, CAS made clear that it was OLA, and not FC Sion Association which was the subject of FIFA's decision and which shall therefore respect the above-mentioned sanction. The decision of the CAS was confirmed by the Federal Tribunal on 12 January 2011.

96. It appears that OLA did not register new players for only one entire transfer period, *i.e.* the winter registration period in the 2010/2011 season.

97. On 25 May 2011, following a request from OLA, the FIFA DRC issued a decision (interpretation) confirming that OLA was barred from registering new players during the following registration period, *i.e.* the summer registration in the season 2011/2012. In its decision, the FIFA DRC stated in particular that *"the DRC noted that the only entire registration period, during which the Swiss club had served the sanction, was the registration period lasting from 16 January 2010 until 15 February 2010. By contrast, during the registration period lasting from 16 January 2011 until 15 February 2011, the petitioner had been able to register players without restriction, and during the summer registration periods from 10 June until 31 August of the years 2009 and 2010, the Swiss club had had more than half of the relevant registration periods at its disposal to register players"*. The FIFA DRC concluded that as OLA only abode by one entire registration ban, it should be barred

from registering new players during the following transfer period, *i.e.* the summer registration period in the season 2011/2012.

98. The reasoning by FIFA DRC is supported by the CAS award addressing the issue in a similar situation in the following terms[20]:

"S'agissant de la période d'interdiction, la Formation relève que le Club même a confirmé avoir pu procéder à des transferts durant la période de juillet et août 2007 et ce malgré le retrait de sa requête d'effet suspensif. Il en résulte que la période d'interdiction n'a pas encore commencé. La Formation considère ainsi qu'il se justifie de confirmer l'interdiction d'enregistrer de nouveaux joueurs nationaux ou internationaux pour les deux périodes de transfert, à compter de la notification de la présente décision".

99. It must be noted that, on 8 August 2011, OLA withdrew its appeal to CAS against the FIFA DRC ruling of 25 May 2011 (cf. above). The ruling was final and binding, as OLA was banned from registering new players from 10 June to 31 August 2011 regarding international transfers and from 10 June to 30 September 2011 regarding national transfers. The Panel rejects OLA's submission that the transfer ban periods had already ended a long time ago.

100. OLA submitted that the FIFA DRC decision of 25 May 2011 was neither binding nor directly applicable. At first glance it seems that the CAS supports OLA's view:

"Le Président de la Chambre arbitrale d`appel du TAS a rejeté la demande d`effet suspensif déposée par Olympique des Alpes SA, estimant qu'elle était sans objet en raison du défaut de caractère exécutoire de la décision appelée".

101. It is not a matter for this Panel to decide whether the FIFA DRC's decision of 25 May 2011 is enforceable. The crucial question in the case at hand is whether OLA violated any transfer ban periods or not. It is the Panel's view that, if OLA fielded players hired during the period of the transfer ban, these players cannot be considered as duly registered, as the registration would violate the FIFA Regulations on the Status and Transfer of Players. The fact is that a transfer ban for the transfer period in Summer 2011 was imposed upon OLA by FIFA on 16 April 2009 as confirmed by the interpretation of 25 May 2011. This decision is final and binding.

102. Since the Panel does not rely upon the SFL Appeal Tribunal decision of 29July/4 August 2011 to reach its conclusion with respect to the litigious Players' ineligibility, it will not further assess the Parties' arguments related to this decision.

103. The Panel takes the view that the UEFA Appeal's Body decision dated 13 September 2011 is valid on the grounds that OLA has been banned from registering any new players in the summer transfer period in 2011.

104. In view of the above, the Panel concludes that UEFA was allowed to review the eligibility of the Players following Celtic's protests and rightly declared the two games of OLA against the latter club lost by forfeit.

[20] CAS 2007/A/1233 & 1234, para. 67.

C. OLA is not entitled to be reintegrated in the UEFA Europa League 2011/2012

a) Arguments of the Parties

aa) OLA's Arguments

105. OLA submits that UEFA abused its dominant market position by excluding OLA from the UEL 2011/2012 on the false grounds that its players were ineligible. OLA notes that UEFA violated its own statutes and regulations as well as Article 7 CA by rendering forfeit sanctions. Finally, OLA submits that the only reason for its exclusion by UEFA lies in the fact that OLA's six players addressed themselves to the civil courts.

ab) UEFA's Arguments

106. UEFA opposes the reintegration of OLA into the 2011/2012 tournament and considers the forfeit sanctions rendered by UEFA Appeal's Body on 13 September 2011 lawful both under EC and Swiss competition law. UEFA submits that the sanctions imposed on OLA were appropriate, legitimate sporting sanctions with the purpose to protect the stability of the contracts, fairness and the integrity of the competition. UEFA submits that the reason why two matches of OLA against Celtic FC have been sanctioned as forfeit, twice 0:3, is a normal, ordinary, proper, justified and not abusive decision. According to UEFA's submission, the decisions were made by two independent disciplinary bodies, based on the undisputed fact that OLA fielded some players that had not been transferred nor registered in conformity with the applicable regulations. UEFA further submits that its rules and decisions are in conformity with Swiss and EC competition law. UEFA emphasises that the FIFA Regulations on the Status and Transfer of Players of their application are legitimate. In addition, UEFA submits that, as the organiser of the UEL 2011/2012 it has the right and legitimate interest to establish rules regarding the participation in this competition. Finally, UEFA disputes having sanctioned OLA because their players addressed the civil court.

b) The relevant provisions of the Swiss Cartel Act

107. Hereinafter, the Panel outlines the relevant provisions of the CA and continues its reasoning by addressing the following issues: (i) is UEFA an undertaking according to Article 2 CA? (ii) What is the relevant market and does UEFA hold a dominant market position? (iii) Has UEFA abused its dominant market position?

The relevant provisions read as follows[21]:

Article 2 CA (Scope):

"(…)

1bis Whoever requests or offers goods or services in the marketplace, independent of the legal or organizational structure, shall be deemed to be an 'undertaking'.

(…)".

Article 4 CA (Definitions):

"(…)

2 The term 'undertakings having a dominant position in the market' means one or more undertaking being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, offerors or offerees) in the market.

(…)".

Article 7 CA (Illicit practices of undertakings having a dominant position)

"1 Practices of undertakings having a dominant position are deemed illicit if such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market or if they discriminate against trading partners.

2 Such illicit practices may in particular include:

a. a refusal to enter into a transaction (e.g. refusal to supply or buy goods);

b. a discrimination of trading partners with regard to prices or other conditions of trade;

(…)".

c) UEFA is an undertaking according to Article 2 CA

108. Whoever offers goods or services in the marketplace, independent of the legal or organizational structure, shall be deemed to be an undertaking[22].

109. An undertaking is an entity that participates in the economical process as producer of goods or services, irrespective of its legal or organisational structure[23]. It follows that an association according to Article 60 *et seq*. CC such as UEFA can constitute an undertaking in the sense of the Article 2 para. 1bis CA[24].

110. The UEL 2011/2012 is an international sports competition between European football clubs. By participating at the UEFA Europe League 2011/2012 the football clubs pursue financial interests. UEFA, by organising the UEL 2011/2012 in a professional manner, is seeking to

[21] ZURKINDEN/TRÜEB, Das neue Kartellgesetz, Handkommentar, Zurich 2004, p. 209 *et seq*.
[22] Article 2 para. 1bis CA.
[23] LEHNE J., in: AMSTUTZ/REINERT (ed.), Basler Kommentar – Kartellgesetz, Basel 2010, CA 2, N 9.
[24] LEHNE *op.cit*., CA 2, N 13.

maximise its profits. To this end, UEFA issues every year specific regulations that apply to all football clubs aiming to participate in the UEL. Moreover, UEFA controls the marketing of the UEL 2011/2012 as well as the selling of the television rights and the distributions of the proceeds generated with the UEL 2011/2012.

111. It results from the above that UEFA qualifies as an undertaking in the sense of Article 2 para. 1bis CA. This conclusion is in line with the considerations of the Swiss Competition authority which had ruled already in 1998 that the Swiss Football League[25] has to be considered as an undertaking in the sense of Article 2 CA[26].

d) Market definition and Claimant's dominant market position

112. The *relevant product market* covers all goods or services which the trading partners consider to be substitutable[27]. The market definition has to be conducted from the trading partners' point of view. In the case at hand, the relevant product market is the international sports competition between European football clubs. There are no other football competitions in Europe comparable to the UEL and the UEFA Champions League. The competitions on the national level, e.g. the competitions organised by the Swiss Football League, cannot be considered as a substitute for the international competitions of the UEL 2011/2012, as they differ considerably with respect to their economical and performance potential.

113. The *relevant geographic market* covers the area in which the goods or services of the relevant product market are offered or demanded[28]. Since UEFA offers participation in football competitions within Europe, the relevant geographic market covers the countries of all national football federations that are qualified to participate in the UEL 2011/2012.

114. According to Article 4 CA, an undertaking is deemed to have a *dominant position* if it is able to behave in a substantially independent manner with regard to other participants (competitors, offerors or offerees) in the market.

115. Within the defined market[29], UEFA, being the sole and exclusive organiser of the international football competitions within Europe, has a dominant market position. UEFA has the power to act independently from the national football federations and clubs and can determine the sports and economic rules that participants are subject to.

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[25] The organization that organises the national football competitions in Switzerland.
[26] RPW 1998/4, p 567 *et seq.*, para. 12.
[27] KÖCHLI/REICH, in: BAKER & MCKENZIE (ed.), Handkommentar Kartellgesetz, Bern 2007, CA 4, N 42 with further references; BORER J., Wettbewerbsrecht I, 3rd edition, Zurich 2011, CA 5, N 10; REINERT/BLOCH, in: AMSTUTZ/REINERT (ed.), Basler Kommentar – Kartellgesetz, Basel 2010, CA 4, N 104 *et seq.*
[28] KÖCHLI/REICH, *op.cit.*, CA 4, N 44; BORER, *op.cit.*, CA 5, N 14.
[29] Above, para. 112 and para. 113.

e) No abuse of UEFA's dominant market position

116. According to Article 7 para. 1 CA, practices of undertakings having a dominant market position are deemed illicit if they, through the abuse of their dominant position, prevent other undertakings from entering or competing in the relevant market or if they discriminate against trading partners. Such illicit practices include a refusal to enter into a transaction[30] or a discrimination of trading partners[31].

117. Under Swiss Cartel Law, a dominant market position of an undertaking is not prohibited *per se*[32]. An undertaking abuses its dominant position only if – without legitimate business reasons – it (i) prevents other undertakings from entering or competing in the market or (ii) discriminates against trading partners.

118. Pursuant to Article 7 para. 2 lit. a CA a refusal of an undertaking to enter into a transaction may be illegal. This provision aims at preventing behaviour of an undertaking with a dominant market position that tries to foreclose competitors from the market or prevent competitors from entering into the market[33].

119. Discrimination of trading partners is prohibited according to Article 7 para. 2 lit. b CA. The term "other conditions of trade" has to be interpreted extensively[34]. An undertaking with a dominant market position must not disadvantage a competitor unless there is an objective reason for doing so[35].

120. The Swiss Competition authorities usually assess the question whether there is an abuse of a dominant market position by following a two step approach: First, they assess whether the behaviour of an undertaking having a dominant market position leads to a restraint of competition. Second, if there is a restraint of competition, they investigate whether there are legitimate business reasons justifying the restraint of competition[36].

121. In sports matters, the term "legitimate business reasons" cannot be limited to economic reasons. The message of the Federal Council of 23 November 1994 to the Swiss Parliament regarding the CA refers to commercial principles which may constitute legitimate business reasons[37] and keeps the range open for a wider interpretation of the term, without explicitly taking into consideration the specificity of sport. In sports matters, the behaviour of sports associations must be legitimated by reasons that are necessary for the proper functioning of the sport in order to qualify as "legitimate business reasons"[38].

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30 Article 7 para. 2 lit. a CA.
31 Article 7 para. 2 lit. b CA.
32 REINERT P., in: BAKER & MCKENZIE (ed.), Handkommentar Kartellgesetz, Bern 2007, CA 7, N 2 with further references.
33 BORER, *op.cit.*, CA 7, N 10 with further references.
34 REINERT, *op.cit.*, CA 7, N 16.
35 AMSTUTZ/CARRON, in: AMSTUTZ/REINERT (ed.), Basler Kommentar – Kartellgesetz, Basel 2010, CA 7, N 155.
36 AMSTUTZ/CARRON, *op.cit.*, CA 7, N 57.
37 Federal Council Message of 23 November 1994, BBL 1995, p. 569.
38 PHILIPP P., Kartellrecht und Sport, Jusletter, 11 July 2005, para. 36.

122. The UEFA Appeals Body, in its decision dated 13 September 2011, considered that OLA fielded players in the qualification matches that were ineligible under the UEL Regulations. Due to this violation of the UEL Regulations, the matches against Celtic FC were declared forfeit against OLA and as a consequence OLA has been excluded from the UEL 2011/2012.

123. The rights, duties and responsibilities of all parties participating and involved in the preparation and organisation of the UEL 2011/2012, including the qualifying phase and the play-offs, are governed by the UEL Regulations. According to the UEL, a football club participating in the UEL 2011/2012 is allowed to field eligible players only[39]. In case a football club violates these regulations, UEFA is entitled to render a sanction, in particular to declare the matches forfeited.

124. Article 18 of the UEL Regulations authorizing UEFA to sanction a club which is fielding ineligible players is a rule to guarantee the efficiency and equal treatment of the clubs participating in the UEL 2011/2012.

aa) No refusal to enter into business relationship (Article 7 para. 2 lit. a CA)

125. UEFA did not refuse to allow OLA compete, that is to say to enter into a transaction according to Article 7 para. 2 lit. a CA. In fact, OLA participated (successfully) at the UEL 2011/2012.

126. However, Respondent fielded players that were ineligible according to the relevant regulations. As UEFA pointed out in its Statement of Claim the fact that OLA fielded players who were not properly registered is the source of the forfeit sanction. The exclusion from the group phase of the UEL 2011/2012 by UEFA was solely based on the fact that OLA competed with players that were ineligible.

ab) No discrimination of OLA (Article 7 para. 2 lit. b CA)

127. There is no indication of any discriminatory behaviour of UEFA, as UEFA applied the UEL Regulations to all (potential) participants of the UEL 2011/2012 and treated each football club in the same way.

128. There is no indication that UEFA would not have imposed the same sanction, *i.e.* to declare the matches forfeit based on Article 14bis para. 3 of the UEFA Disciplinary Regulations Edition 2011 (the "UEFA DR"), to other clubs it had imposed to OLA.

129. As no unequal treatment of OLA by UEFA has been substantiated let alone proven, there is no discrimination of OLA in the sense of Article 7 para. 2 lit. b CA.

[39] Article 18 of the UEL Regulations for details.

ac) No abuse of UEFA's dominant position pursuant to the general clause (Article 7 para. 1 CA)

130. The fact that UEFA issued the UEL Regulations cannot be considered as an abuse of its dominant position in the market. The regulations, and in particular the rules for the eligibility of football players, serve to guarantee a proper functioning of the football competition within the UEL 2011/2012. With regard to the eligibility of the players, the UEL Regulations intend to ensure that all football clubs in Europe respect the identical rules, in particular the rules related to transfers. The main intention of the UEL Regulations is to ensure the equal treatment of the clubs.

131. Taking into consideration the principle of proportionality, the Panel does not see any alternative regulation to the UEL Regulations. The declaration of matches as forfeited, in which ineligible players were involved, is a proportionate measure that cannot be achieved with another sanction such as a fine or a deduction of points. The absence of alternatives is evident particularly during the qualification phase of the tournament, where the deduction of points are not possible.

132. It results from the above that UEFA, by issuing the UEL Regulations, did not abuse its dominant market position according to Article 7 para. 1 CA.

133. The Panel considers that the sanctions, *i.e.* the declaration of the matches as forfeited and as a consequence the exclusion of OLA from the UEL 2011/2012 serves to guarantee a proper functioning of the football competition within the UEL 2011/2012. The sanctions are appropriate, necessary and proportionate. In a previous decision, the CAS expressly considered that the *ratio legis* and the justification of the sanctions are to ensure a legal certainty in the sports competition of the UEL 2011/2012[40].

134. It must be underlined that UEFA is bound to apply those sanctions to all the participants of the UEL 2011/2012 in the same manner.

135. In conclusion, the UEL Regulations as well as the sanctions based on the UEFA DR are rules imposed by UEFA as organiser of the UEL 2011/2012. They are appropriate, necessary and proportionate.

136. By properly enforcing its own rules UEFA did in no way abuse its dominant market position. The disciplinary measures imposed by UEFA on 13 September 2011 were justified[41] and have not been rendered in violation of Article 7 CA.

137. Even if one were to take the view that UEFA abused its dominant position by applying the rules and sanctions according to the UEL Regulations and the UEFA DR, UEFA's behaviour would have been justified by legitimate reasons. The purpose of these rules is to ensure that

[40] CAS 2007/A/1278 and 1279, para. 131.
[41] Above, para. 95 *et seq*.

each football club plays the matches with duly registered players and, as a consequence, to guarantee a fair sports competition. The enforcement of the rules guarantees the equal treatment of the participants of the UEL 2011/2012.

138. Finally, the Panel refers to the fact that OLA signed the entry form in May 2011 according to which OLA accepted to respect UEFA's statutes, regulations, directives and decisions, in particular the UEL Regulations and the UEFA DR. Respondent therefore knew the consequences of playing with players that were ineligible.

139. Even if one were to assume that, contrary to the UEFA Appeals Body decision dated13 September 2011, the Players were qualified to play the two matches against Celtic FC, it is still the Panel's finding that UEFA did not abuse its dominant market position.

140. UEFA had justifiable reasons to consider the Players were ineligible[42]. In the view of the Panel, the Appeals Body decision of the UEFA of 13 September 2011 was neither arbitrary nor contrary to Swiss Competition Law.

141. Moreover, UEFA's practice of assessing the eligibility of players only once a protest is filed by a club cannot be challenged from a competition law point of view. Given the club's possibility to file a protest in case an ineligible player is fielded by the opponent club it would be inappropriate, unnecessary and disproportionate to require UEFA to control the eligibility of all players at the beginning of a tournament.

142. It is the Panel's view that UEFA had justifiable reasons to rely on the FIFA DRC's decision of 25 May 2011. OLA appealed against the decision with CAS, however, on 8 August 2011, withdrew the appeal. Moreover, the SFL initially rejected OLA's request for registration of the Players. The SFL Appeals Tribunal confirmed this decision. The Players were only qualified to play in the Swiss national league based on the Orders by the District Court of Martigny and St-Maurice dated 3 August 2011 and 27 September 2011.

143. The Panel wishes to underline that UEFA treated all the clubs alike.

144. The Panel reaches the conclusion that UEFA did not abuse its dominant market position, as it had justified reasons to act in the way it did. The Panel would not reach a different conclusion under the assumption that, contrary to the UEFA Appeals Body's decision dated 13 September 2011, the Players were qualified to play the two qualification matches.

145. UEFA filed two experts' reports supporting its position that UEFA, by excluding OLA from the UEL 2011/2012, did not violate Swiss competition law.

146. In his expert report, Professor Amstutz stressed that UEFA applied the UEL Regulations to all football teams alike. He stated and confirmed at the hearing that UEFA did not abuse its dominant market position nor discriminate against other clubs. He denied that the conditions of Article 7 para. 1 lit. b CA and Article 7 para. 1 lit. a CA have been met. He reached the

[42] Above para. 95 *et seq.*

conclusion that, even if UEFA had abused its dominant market position, there were legitimate reasons for doing so.

147. Professor von Büren, in his expert report, concurs with Professor Amstutz. He points out that the UEL Regulations serve to guarantee a football competition in a proper manner and that the registration of the players is necessary to ensure the orderly running of football matches under equal conditions for all participating clubs. UEFA's issuance of the UEL Regulations cannot be considered as an abuse of a dominant market position. For the same reasons, Professor von Büren confirms the Panel's finding that UEFA, by adopting the UEFA DR, does not commit any obvious abuse of its market position. He confirms that Article 7 para. 1 CA and Article 7 para. 2 lit. b CA are not applicable. Professor von Büren's considerations are convincing that the sanctions imposed by UEFA were based on objective reasons and legitimate grounds. Finally, Professor von Büren submits that OLA, through its own inadmissible conduct, caused UEFA to declare the matches forfeit. He follows that OLA cannot claim now to be the victim of discrimination simply because UEFA sanctioned it on account of its own behaviour (*venire contra factum proprium*).

148. OLA submits that it had been excluded by UEFA only because the Players addressed themselves to the civil court of Martigny. UEFA rejects this submission.

149. The Panel takes the view that OLA has not succeeded in substantiating let alone proving this submission. The decision of the UEFA Appeals Body dated 13 September 2011 as well as its reasons can be followed by this Panel. The UEFA Appeal Body explains in a clear manner that the matches had been declared forfeited, because OLA used players that were ineligible.

150. Besides, it may be noted that, according to the Swiss doctrine, the issue whether there is an abuse of a dominant market position has to be assessed based on an objective, verifiable behaviour, even if the undertaking has the intention to hinder other undertakings from entering or competing in the market[43].

151. OLA further submits that UEFA abused its dominant market position by violating its own statutes and regulations. As stated above, the decision of the UEFA Appeals Body is correct. The Panel takes the view that UEFA applied its statutes and regulations correctly. Further, the Panel refers to its finding that UEFA's statutes and regulations do not violate Swiss competition law[44].

152. OLA submits that UEFA violated Article 7 CA by refusing to recognize the results on the playing field. However, OLA must account for the fact that it fielded ineligible players. The matches it won against Celtic were correctly declared forfeited. As mentioned above, OLA signed the Entry Form in May 2011 and knew in advance the consequences of fielding players who were ineligible.

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[43] REINERT, *op.cit.*, CA 7, N 6; CLERC E., in: TERCIER/BOVET (ed.), Commentaire Romand – Droit de la concurrence, Bâle 2002, CA 7, N 66.
[44] Above, para. 130 *et seq.*

153. OLA compares UEFA's behaviour with the underlying facts of the MOTOE case (C-49/07) of the European Court of Justice. However, the facts in the MOTOE case differ considerably from the facts of the case at hand. In the MOTOE case, the European Court of Justice considered that *"a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC"*[45]. In her opinion of 6 March 2008, the advocate general, Juliane Kokott, identified the problem from a competition law point of view in the following way: a legal person which itself organises and markets sports events (in this case motorcycling events), is granted from the State a right of co-decision in the authorisation of these sports events of other, independent service providers[46]. However, in the case at hand, it is out of the question that UEFA has the right to exclude other legal entities from organising international football competitions. It is undisputed that UEFA acted merely as organiser of the UEL.

154. OLA filed an expert report written by Professor Walter Stoffel dated 16 November 2011.

155. Professor Stoffel based his report on the following facts:

- UEFA refused to accept the fact that SFL had declared the Players qualified;
- UEFA did not comply with the order of the Tribunal Cantonal of Vaud for provisional measures of 13 September 2011.

156. Based on those facts, Professor Stoffel takes the view that UEFA abused its dominant market position by preventing OLA from continuing to play in the UEL 2011/2012, although it was qualified to do so based on the results on the playing field.

157. Professor Stoffel did not assess whether UEFA abused its dominant market position by declaring the matches of OLA against Celtic forfeit and excluding OLA from the UEL 2011/2012.

158. The Panel does not follow the reasoning of Professor Stoffel as he bases his deviating conclusion on different facts, *i.e.* the Players' eligibility.

[45] Decision of the European Court of Justice dated 1 July 2008, Motosykletistiki Omospondia Ellados NPID (MOTOE) vs. Elliniko Dimosio, C-49/07, para. 53.
[46] Opinion of the advocate general J. Kokott dated 6 March 2008, Motosykletistiki Omospondia Ellados NPID (MOTOE) vs. Elliniko Dimosio, C-49/07, para. 98.

f) Conclusion

159. The Panel concludes that UEFA did not:

- refuse OLA to enter into a transaction according to Article 7 para. 2 lit. a CA[47];
- discriminate OLA pursuant to Article 7 para. 2 lit. b CA[48];
- abuse a dominant market position pursuant to Article 7 para. 1 CA. Even if it were to decide that the UEL Regulations as well as the sanction imposed on OLA based on the UEL Regulations constitute an abuse of UEFA's dominant position, there are legitimate reasons that justify UEFA's decision and behaviour[49].

D. Provisional measures ordered by the Tribunal of the Canton of Vaud dated 5 October 2011

160. As seen above, the conservatory measures ordered by the State Court of the Canton of Vaud dated 5 October 2011 will, according to Article 268 para. 2 CPC, automatically be rendered moot by the entry into force of the present Award. As a consequence, a formal lifting is not necessary.

161. However, as third parties are actually affected by such conservatory measures and in view of the importance of the present dispute, the Panel is of the opinion that a formal lifting of the measures is appropriate and therefore shall be ordered.

Publication

162. Pursuant to Art. R43 of the Code, in view of the Order of Procedure dated 15 November 2011 and considering that none of the Parties has objected to the publication of the final award, the present award can be published by the CAS.

[47] Above, para. 125 *et seq.*
[48] Above, para. 127 *et seq.*
[49] Above, para. 130 *et seq.*

The Court of Arbitration for Sport rules:

1. The defence of lack of jurisdiction filed by Olympique des Alpes SA is dismissed and the CAS jurisdiction is affirmed.

2. The request for arbitration filed by UEFA on 26 September 2011 is partially granted;

   2.1 The request to declare that the UEFA Regulations, and the Regulations of the UEFA Europa League 2011/12 in particular, are not for themselves in violation of Swiss law nor constitutive of an abuse of a dominant position pursuant to Swiss competition law and to Federal Act of 6 October 1995 on Cartels and other restraints of Competition in particular is inadmissible.

   2.2 The request to declare that the disciplinary measures taken by UEFA against OLA pursuant to the Regulations of the UEFA Europa League 2011/12 and the UEFA Disciplinary regulations are not in violation of Swiss law and are not constitutive of an abuse of a dominant position pursuant to Swiss competition law and to Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular is inadmissible.

   2.3 The request to confirm that OLA is not entitled to be reintegrated in the UEFA Europa League 2011/12 is admissible and upheld.

   2.4 The request to declare that UEFA did not violate Swiss law nor breach in any manner OLA's personality rights or the personality rights of the six players by considering such six players ineligible as per the applicable UEFA regulations, the six players being Messrs S., P., J., B., M., and G. is inadmissible.

   2.5 The request to confirm that the players P., J., B., M., and G. shall not be admitted to participate in the UEFA Europa League 2011/12 and that the mentioned players as well as the player S. are not eligible in accordance with the applicable FIFA, UEFA and SFV/SFL regulations is inadmissible.

   2.6 The provisional measures ordered by the Tribunal Cantonal of Vaud (Cour civile) on 5 October 2011 shall be lifted.

   2.7 The request to deny any entitlement of Respondent OLA against UEFA for compensation of damages is inadmissible.

(…)

5. All other requests and/or motions submitted by the Parties are dismissed.

6. The present award is not confidential and shall be published.