



Arbitration CAS 2013/A/3324 & 3369 GNK Dinamo v. Union des Associations Européennes de Football (UEFA), award of 13 June 2014

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Jean-Philippe Rochat (Switzerland); Prof. Martin Schimke (Germany)

Football

Disciplinary sanction against a club imposed by UEFA

Disciplinary sanctions imposed by Swiss associations and criminal sanctions under Swiss criminal law

Conditions for the application of Swiss criminal law in case of alleged racist behaviour

Interpretation of statutes under Swiss law

Principles of interpretation found in CAS jurisprudence

Interpretation of Article 14 of the UEFA Disciplinary Regulations

Use of the word “gypsy” as an insult under the UEFA Disciplinary Regulations

Conformity of the strict liability of a club for the acts of its supporters with the principles of fairness and public policy

- 1. According to Swiss law, sporting measures imposed by Swiss associations are subject to Swiss civil law and must be clearly distinguished from criminal penalties. Under Swiss law the right of associations to impose sanctions or disciplinary measures on athletes and clubs is not the exercise of a power delegated by the State, rather it is the expression of the freedom of associations and federations. CAS is not a criminal court and can neither promulgate nor apply penal laws. Even if a principle of criminal law is the expression of a fundamental value system (across all areas of the law), it does not follow that the principle applies automatically or without exception to the relationship between a sports association and the athlete/club.**
- 2. Criminal law can only be applied by the public entities which are empowered by a State. Criminal matters cannot be subject to arbitration in Switzerland. Furthermore, according to the principle of territoriality, the Swiss Criminal Code (the “SCC”) is only applicable to offences committed on Swiss territory. The place where an offence is committed is determined by the place where the offender performed the act, but also the place where the consequences of the crime occurred. Notwithstanding the principle of territoriality, the SCC could only apply to other situations if there were connecting factors between the alleged racist behaviour and Switzerland.**
- 3. Under Swiss law, the interpretation of statutes has to be rather objective and always start with the wording of the rule. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association that drafted the rule, and such body may also take account of any relevant historical background that illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located. As a variety**

of elements can be taken into consideration in construing a regulation of a Swiss association, Swiss criminal law could be applied to interpret the notion of racial discrimination if the notion of racial discrimination was to be considered as insufficiently precise in the regulations of the association that drafted the rule.

4. CAS jurisprudence itself establishes the following principles of interpretation of those regulations of a federation breach of which entail disciplinary sanctions: they must be precise if binding upon athletes or, *mutatis mutandis*, clubs; any ambiguity in the rules must be construed *contra proferentem*. The rule maker, not the ruled, must suffer the consequences of imprecision; however, the rules must be applied according to their spirit not merely according to their letter.
5. Article 14 UEFA DR has two elements which must be satisfied before sanctions can be imposed: there must be an insult to the human dignity of either a person or a group of persons; the insult must be on grounds of, *inter alia*, race or ethnic origin. Furthermore, the insult can be conveyed by whatever means, which would include chanting. It is, however, not necessary for an offence to be committed under Article 14 UEFA DR to prove that the person charged intended to insult; it is sufficient that he or she did insult. The precondition of intention is significantly not prescribed by the Article. The test of whether or not there has been an insult qualifying for sanctions under Article 14 UEFA DR, is the perception of the reasonable onlooker. It is in that sense objective not subjective.
6. Even if the word “gypsy” could in some circumstances not be used as an insult, it does not follow that it can never be used as an insult.
7. Article 8 UEFA DR fixes the club with strict liability for the acts of its supporters. Strict liability for the behaviour of a club’s supporters is neither inconsistent with Article 6 of the European Convention on Human Rights or Swiss procedural public policy, nor violative of the legal principle of *nulla poena sine lege*.

1. THE PARTIES AND THE APPEALS

- 1.1 These appeals bring before CAS for the first time the subject matter of racism in football, although it has too frequently been the subject of proceedings before UEFA Tribunals. Whether football, indisputably the most popular sport in a diverse Europe, is to be a force for unity or for conflict is an issue of considerable importance.
- 1.2 GNK Dinamo, (the “Appellant” or the “Club”) is a Croatian professional football club and is affiliated with the Croatian Football Federation.

- 1.3 Union des Associations Européennes de Football (the “Respondent” or “UEFA”) is the governing body of European football. It is an association under Swiss law, has its headquarters in Nyon, Switzerland, and exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players.
- 1.4 The club appealed against two decisions of the UEFA Appeals Body, the first on the 29 August 2013 (the “First Decision”) and the second on 5 October 2013 (the “Second Decision”) upholding the imposition of sanctions on the club by the UEFA Conduct and Disciplinary Body for misconduct by the club supporters at three matches consisting mainly, but not exclusively, of allegedly racist chanting.
- 1.5 Because of the identity of the parties and the overlap of the issues, the appeals were considered at a combined hearing.

2. KEY FACTUAL BACKGROUND

- 2.1 The following summary is taken from the undisputed record. Because the cases are conjoined it is sensible for ease of understanding to deal in a single section with the basic facts and the response to them of UEFA.
- 2.2 On 23 July 2013, the Club played against CS Fola Esch in the UEFA 2013/2014 Champions League match in Zagreb, Croatia (the “First Match”). During the First Match, a group of the Clubs spectators performed chants containing the line “*Mamicu cigane, odlaži iz svetinje*” to be translated into English as “*Mamic, gypsy, get out of our temple*”. The alleged addressee of the chants, Mr Zdravko Mamic, is the executive chairman of the Club. The match report stated, so far as material, as follows:

Crowd behaviour			
GNK Dinamo	Excellent	Satisfactory	Unsatisfactory
<i>Supporters have been singing several times “Mamicu cigane, odlaži iz svetinje” that means manicu gypsy, get out of our club –temple-</i>			

- 2.3 On 26 July 2013, the UEFA Control and Disciplinary Body found the Club guilty of a violation of Article 14 of the UEFA Disciplinary Regulations (2013 Edition, the “UEFA DR”) and imposed on it the following sanctions:

1. Fine of EUR 25,000.
2. Partial Stadium Closure of the GNK Dinamo stadium. In particular, to close the East section of the GNK Dinamo stadium during the next (1) UEFA club competition match in which GNK Dinamo would play as a host club”.

(the “First Disciplinary Decision”)

- 2.4 On the same day the First Disciplinary Decision was notified to the Club.
- 2.5 On 30 July 2013, the Club played against FC Sheriff in the UEFA 2013/2014 Champions League match in Zagreb, Croatia (the “Second Match”). The Club abided by the First Disciplinary Decision and closed the East section of its stadium for the Second Match. However, the same chants as had been performed in the First Match were voiced again during the second match.

The Match report stated, so far as material, as follows:

Security Incidents			
GNK Dinamo	Yes	No	
<i>West stand was closed for this match by UEFA for disciplinary reasons. The Ultras (Bad Blue Boys) who used to occupy this tribune, went tonight in the North Stand, central lower part. A good part of them (around 400-500) sang “Mamicu cigane, odlazi iz svetinje” translated “Mamicu gypsy, get out of the temple”. This song was clearly against Dinamo President. First time it was sang during the first two minutes of the match. Other spectators, especially in the West stand whistled in dissent with their ultras. A public announcements was immediately given saying that police would remove the troublemakers from the stand if they continue. Later in 10’minute the song was heard again with the same consequences as before (dissent from the other spectators and public announcement). Despite of this, in an isolated way, the song was repeated in the 12th, 22nd, 32nd and 39th minute. (report to be continued in “crowd behaviour part”)</i>			
Crowd behaviour			
GNK Dinamo	Excellent	Satisfactory	Unsatisfactory
<i>Since it was clearly not a racist behaviour against players or spectators and came from a limited part of spectators, match was not stopped at this moment. In the second half the song was repeated in the 46th and 48th minute. After another public announcement police started to surround the troublemakers. With a proactive intent the ultras repeated the song in the 61st, 62nd and 63rd minute. At this moment I was considering to give the first UEFA announcement when I realized that police, after having evacuated normal spectators being over the group of troublemakers, started to remove the latter out from the stadium and this happened between the 66th and 71st minute, when all of them were sent out. After this the situation calmed down. Police commander informed me that they were all held outside the stadium and all data and pictures were taken from them. The leaders in particular will be sent to court and many of the troublemakers should receive stadium ban according to the police.</i>			

- 2.6 On 2 August 2013, the Club filed an appeal with the UEFA Appeals Body against the First Disciplinary Decision (the “First Appeal”). While the Club agreed to serve the partial stadium closure at the occasion of the Second Match, it stipulated that its agreement did not amount to any acceptance of culpability in respect of the First Disciplinary Decision and reserved its right to continue with the proceedings before the UEFA Appeals Body.
- 2.7 On 27 August 2013, the Club played a UEFA 2013/2014 Champions League away match against FK Austria Wien (the “Third Match”). In the third match also, the same chants were performed by a group of the Club’s spectators. Furthermore 11 Bengal lights were ignited,

two of which were thrown by the Club supporters onto the field of play. Some Club supporters outside the stadium also launched pyrotechnic devices that landed inside the stadium (the “Firework Incidents”)

The Match Report stated, so far as material, as follows:

Organisation of the Security			
Austria Wien	Excellent	Satisfactory	Unsatisfactory
<i>Pre match cooperation between clubs. Police, stewards, VD, Delegate and Security Officer was excellent. MD-1 security meeting and MD organisational meeting both very good and well attended by all appropriate people. No problems at all pre match and all issues discussed at length and properly. At MD meeting I asked the question what would happen to any away fans who ended up in home sections. They would be ejected. ON the night, at the match, this did not happen. Despite 185 official away fans behind goal in correct sector, and 240 VIP away fans in main tribune, there was probably between 800-900 away fans in the ground, spread across 4 separate areas. Flares (Bengal lights) (5) were let off, or thrown into the ground from outside. A flag against the DZ club president was held aloft at various times, at length, throughout the game. Police stood behind these fans the whole game and did not move them.</i>			
GNK Dinamo			
<i>Pre match co-operation very good, excellent. Very much aware of problem fans, Bad Blue Boys, and discussed at length pre match. DZ brought 40 stewards with them to ‘spot’ fans and helped greatly.</i>			

Security Incidents		
Austria Wien	Yes	No
<i>Several Bengal lights in opening 10-12 minutes of game, coming from DZ fans (in home sector) and 2 thrown into ground from outside. No racist issues, no fighting by fans. Standing in stairways by AV fans in east stand. Other issues in additional reports.</i>		
GNK Dinamo	Yes	No
<i>Issues with Bengal lights by DZ fans in home sector, west stand. No fighting, no racist issues. Examined carefully some “clothing brands” (‘Lonsdale’ from FARE pictures) for infringements. Issues in additional reports</i>		
Use of pyrotechnics/ Laser pointers		
Austria Wien	Yes	No
<i>Yes, but by DZ fans only, but within home sector. Full details in additional report.</i>		
GK Dinamo		
<i>5 Bengal lights in the first 12 minutes of game, and a 6th Bengal light in 53rd minute (4 of these by DZ fans in home sector. 2 thrown into ground from outside by, I suspect, DZ fans.</i>		

Crowd Behaviour			
Austria Wien	Excellent	Satisfactory	Unsatisfactory
<i>Fans were very supportive throughout, and very celebratory at end. However, in main home fans area, both upper and lower tiers of east stand, standing in stairways throughout the game, and in other parts of stadium.</i>			
GNK Dinamo	Excellent	Satisfactory	Unsatisfactory
<i>Issues with flares etc as above. These fans weren't officially organised by DZ though, they bought Austrian end tickets</i>			

Discriminatory Behaviour			
Austria Wien	Yes	No	
<i>No issues by home fans</i>			
GNK Dinamo	Yes	No	
<i>The DZ fans in home sector, held aloft at various times throughout the game, a white and red flag which was later identified to us as a picture of their club president. This was a red circle over his face with a line through it, and Bengal lights were lit below.</i>			
Conduct of teams (players and officials)			
Austria Wien	Excellent	Satisfactory	Unsatisfactory
<i>No major issues but not excellent. Problems with official's accreditations, more to follow in additional report.</i>			
GNK Dinamo	Excellent	Satisfactory	Unsatisfactory
<i>Indiscipline on pitch and a red card for a player, on the bench in 90+1 for offensive/insulting gesture by a DZ player to AV bench</i>			

- 2.8 On 29 August 2013, the UEFA Appeals Body dismissed the First Appeal. This is the subject of the appeal in the procedure CAS 2013/A/3324 GNK Dinamo v. UEFA.
- 2.9 On 11 September 2013, the dismissal of the appeal was notified to the Club.
- 2.10 On 12 September 2013, the UEFA Control and Disciplinary Body handed down another decision in relation to further allegedly racist chants voiced during the Second and Third Matches and in relation to the fireworks incidents. By virtue of this decision the Club was, *inter alia*, ordered to play the next UEFA competition match behind closed doors with a second match behind closed doors imposed under the suspension of a five-year probationary period, and was fined EUR 65,000 (the "Second Disciplinary Decision").
- 2.11 On 23 September 2013, the Second Disciplinary Decision was notified to the Club.
- 2.12 On 4 October 2013, the Club filed an appeal with the UEFA Appeals Body against the Second Disciplinary Decision (the "Second Appeal").
- 2.13 On 15 October 2013 the UEFA Appeals Body dismissed the Second Appeal against the Second Disciplinary Decision. This is the subject of the appeal in the procedure CAS 2013/A/3369 GNK Dinamo v. UEFA.

- 2.14 Facts contained in official UEFA Reports are presumed to be accurate, pursuant to Article 38 UEFA DR. No challenge was made to the relevant reports before the Panel.
- 2.15 Relevant matters, additional to those in the reports, will be set out below where necessary for the analysis. The Panel would add this observation, namely that the distinction between submissions and evidence should be, but was not always recognised by the parties (in this and, indeed, in other cases). Submissions are not themselves evidence: but in so far as they refer to matter of fact, they should be based on evidence.
- 2.16 In the event when matters of fact, not in evidence were relied on by the parties, it was established under questions from the Panel that they were either the subject of agreement or of no disagreement. Therefore what divided the parties were ultimately the conclusions to be drawn from undisputed facts and the legal consequences thereof.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 CAS 2013/A/3324 GNK Dinamo v. UEFA

Written Proceedings

- 3.1.1 On 19 September 2013, the Club filed its statement of appeal together with a request for provisional measures for, *inter alia*, a stay of execution of the First Disciplinary Decision, in accordance with Articles R37, R47 and R48 of the Code of Sports-related Arbitration (the “Code”).
- 3.1.2 On 27 September 2013, UEFA filed its reply to the request for provisional measures, in accordance with Article R37 of the Code.
- 3.1.3 On 1 October 2013, the Club filed its appeal brief, in accordance with Article R51 of the Code.
- 3.1.4 On 14 October 2013, the President of the CAS Appeals Arbitration Division rendered the operative part of an Order on provisional measures, rejecting, *inter alia*, the request for a stay.
- 3.1.5 On 24 October 2013, UEFA filed its answer, in accordance with Article R55 of the Code.

3.2 CAS 2013/A/3369 GNK Dinamo v. UEFA

Written Proceedings

- 3.2.1 On 26 October 2013, the Club filed its statement of appeal, in accordance with Articles R47 and R48 of the Code.
- 3.2.2 On 6 November 2013, the Club filed its appeal brief, in accordance with Article R51 of the Code.
- 3.2.3 On 28 November 2013, UEFA filed its answer, in accordance with Article R55 of the Code.
- 3.3 Oral Presentation in Both Cases

In accordance with Article R57 of the Code, the parties and their experts and witnesses, if any, were heard in a conjoined hearing held at the CAS Headquarters on 10 February 2014.

The Club was represented by Mr Gianpaolo Monteneri and Ms Anna Smirnova and called Mr Toti Dedic as witness and expert, heard by telephone.

UEFA were represented by Dr Emilio García, Mr James Mungavin and Mr Carlos Schneider and called Mr Piara Power to testify as expert.

The Panel consisted of:

President: The Hon. Michael J. Beloff QC, Barrister in London, United Kingdom

Arbitrators: Mr Jean-Philippe Rochat, Attorney-at-law in Lausanne, Switzerland
(nominated by the club)

Prof. Dr. Martin Schimke, Attorney-at-law in Düsseldorf, Germany
(nominated by UEFA)

The secretarial duties of the Panel were performed by Mr Christopher Singer, Counsel to the CAS.

- 3.4 At the start of the hearing both parties expressed their contentment with the composition of the panel and at its conclusion their satisfaction that they had been accorded due process and that their right to be heard had been fully respected.

4. JURISDICTION

The club relied on Article 62 paragraph 1 of the UEFA Statutes (2012 edition) as conferring jurisdiction on CAS. UEFA accepted the jurisdiction of CAS and it is confirmed by signature of the order of procedure by both parties.

5. ADMISSIBILITY

Both appeals were filed within 10 days of the date of the respective decisions and hence were admissible, pursuant to Article 49 of the Code and Article 62.3 of the UEFA Statutes.

6. THE APPLICABLE LAW

In accordance with Article R58 of the Code, the law to be applied in this dispute was the UEFA DR as Swiss Law applied subsidiarily.

7. UEFA DR

Under Article 2 (6) of the UEFA Statutes one of UEFA objectives is to “*promote football in Europe without any discrimination on account of race [...]*”. Under Article 52 of the UEFA statutes “*disciplinary measures may be imposed for contravention of UEFA’s regulations*”. Pursuant to Article 56 of the UEFA Statutes, the UEFA Executive Committee issued the following disciplinary regulations which provide, so far as material, as follows:

“Preliminary Title

Article 1- Subject and Objectives

1 These regulations contain the substantive and formal provisions governing the punishment of disciplinary offences falling within their scope of application. They describe the infringements, regulate the application of penalties and govern the organisation and actions of the disciplinary bodies and the procedure to be followed before these bodies.

2. The regulations serve to ensure that the objectives of UEFA are attained in accordance with Article 2 of the UEFA Statutes

Article 2 – Scope of material application

3. These regulations apply to every match and competition organised by UEFA.

4. They also apply to any serious violation of UEFA’s statutory objectives.

Article 3- Scope of personal application

1 [...]

(b) clubs

2. The above-mentioned entities and persons are subject to UEFA’s disciplinary powers. They are bound by and recognise UEFA’s Statutes and regulations.

Article 4- Scope of temporal application

1. These regulations apply to all those who fall under UEFA's jurisdiction on the day the alleged disciplinary offence is committed.

Article 5- Applicable Law

The disciplinary bodies base their decisions on UEFA's Statutes, regulations, directives and decisions, as well as the Laws of the Game and Swiss Law and any other law that the competent disciplinary body considers applicable.

Title I: Substantive Law **Chapter I- General Provisions**

Article 6- Disciplinary Measures

1. The following disciplinary measures may be imposed on member associations and clubs:

[...]

c) Fine;

[...]

b) Playing of a match behind closed doors;

[...]

i) Full or partial stadium closure;

[...]

Article 8- Responsibility

A member association or club that is bound by a rule of conduct laid down in UEFA's Statutes or regulations may be subject to disciplinary measures and directives if such a rule is violated as a result of the conduct of one of its members, players, officials or supporters and any other person exercising a function on behalf of the member association or club concerned, even if the member association or the club concerned can prove the absence of any fault or negligence.

[...]

Chapter II - Offences

Article 11 - General principles of conduct

1. Member associations and clubs, as well as their players, officials and members, must respect the Laws of the Game, as well as UEFA's Statutes, regulations, directives and decisions, and comply with the principles of loyalty, integrity and sportsmanship.

Article 14 - Racism, other discriminatory conduct and propaganda

1. Any person under the scope of Article 3 who insults the human dignity of a person or group of persons by whatever means, including on the grounds of skin colour, race, religion or ethnic origin, incurs a suspension lasting at least ten matches or a specified period of time, or any other appropriate sanction.

2. If one or more of a member association or club's supporters engage in the behaviour described in paragraph 1, the member association or club responsible is punished with a minimum of a partial stadium closure.

3. The following disciplinary measures apply in the event of recidivism:

a) A second offence is punished with one match played behind closed doors and a fine of € 50,000;

b) Any subsequent offence is punished with more than one match behind closed doors, a stadium closure, the forfeiting of a match, the deduction of points or disqualification from the competition.

4. *If the circumstances of the case require it, the competent disciplinary body may impose additional disciplinary measures on the member association or club responsible, such as the playing of one or more matches behind closed doors, a stadium closure, the forfeiting of a match, the deduction of points or disqualification from the competition.*
5. *If the match is suspended by the referee because of racist and/or discriminatory conduct, the match may be declared forfeit.*

Article 16 - Order and security at UEFA competition matches

1. *Host associations and clubs are responsible for order and security both inside and around the stadium before, during and after matches. They are liable for incidents of any kind and may be subject to disciplinary measures and directives unless they can prove that they have not been negligent in any way in the organisation of the match.*
2. *However, all associations and clubs are liable for the following inappropriate behaviour on the part of their supporters and may be subject to disciplinary measures and directives even if they can prove the absence of any negligence in relation to the organisation of the match:*

[...]

b) *The throwing of objects;*

c) *The lighting of fireworks or any other objects;*

[...]

e) *The use of gestures, words, objects or any other means to transmit any message that is not fit for a sports event, particularly messages that are of a [...] offensive or provocative nature;*

[...]

Article 17- General Principles

[...]

3. *The disciplinary measures enumerated in Article 14 of the regulations are standard measures and can be reduced or increased by the competent disciplinary body only under exceptional circumstances.*

[...]

Article 19 - Recidivism

1. *Recidivism occurs if another offence of a similar nature is committed within:*

a) *one year of the previous offence if that offence was punished with a one-match suspension;*

[...]

2. *Recidivism counts as an aggravating circumstance.*

Article 20 - Suspension of disciplinary measures

[...]

2. *The probationary period must be a minimum of one year and a maximum of five. This period may be extended in exceptional circumstances [...].*

3. *If a further offence is committed during the probationary period, the competent disciplinary body, as a rule, orders that the original disciplinary measure be enforced. This may be added to the disciplinary measure imposed for the new offence.*

Title II: Procedural Law

Chapter I - Organisation and competence

Article 22 - Disciplinary bodies

1. *The disciplinary bodies are:*

- a) *The Control and Disciplinary Body;*
- b) *The Appeals Body.*

2. *Members of the Control and Disciplinary Body and Appeals Body are elected by the Executive Committee for a term of four years.*

Article 23 - Control and Disciplinary Body

1. *The Control and Disciplinary Body consists of a chairman, two vice-chairmen and seven other members. As a rule, the Control and Disciplinary Body reaches decisions in the presence of all of its members, but it is entitled to take decisions if at least three of its members are present.*

2. *The chairman of the Control and Disciplinary Body, one of its vice-chairmen or one of its members acting as ad hoc chairman may take a decision as a judge sitting alone:*

- a) *In urgent or protest cases; or*
- b) *In cases where the sanction imposed is a warning, a reprimand, a fine of up to €10,000, or a suspension from playing or carrying out a function of up to two matches.*

3. *The Control and Disciplinary Body has jurisdiction to rule on disciplinary issues and all other matters which fall within its competence under UEFA's Statutes and regulations. In particularly urgent cases (especially those relating to admission to, or exclusion from, UEFA competitions), the chairman may refer the case directly to the Appeals Body for a decision.*

4. *The Control and Disciplinary Body also has jurisdiction in the event of a UEFA member association and/or its members failing to prosecute, or prosecuting in an inappropriate manner, a serious violation of the UEFA statutory objectives.*

Article 24 - Appeals Body

1. *The Appeals Body consists of a chairman, two vice-chairmen and nine other members.*

2. *As a rule, the Appeals Body reaches decisions in the presence of three of its members. In cases that are particularly difficult or could set an important precedent, the chairman may expand the quorum to five members.*

[...]

Article 47 - Court of Arbitration for Sport

The UEFA Statutes stipulate which decisions taken by the disciplinary bodies may be brought before the Court of Arbitration for Sport, and under which conditions”.

8. THE PARTIES' SUBMISSIONS

8.1 The Club's main submissions were:

- 1) The chants were not performed with the intention to denigrate the gypsy community nor to suggest any inferiority of that ethnic group.

- 2) The term gypsy is not inherently pejorative but derives etymologically from the ancient spelling of Egyptian based on a belief that Egypt was the country of origin of that group.
- 3) Gypsy in Roma language means 'good man'.
- 4) Gypsy can be used as a term of cultural description as in the music group Gypsy King or even of affection as in the UK television programme "My Big Fat Gypsy Wedding".
- 5) The chants were directed neither at the players nor supporters of the organising team, but only at Mr Mamic and there was no evidence that Mr Mamic, the object of the chants, was offended by them.
- 6) In Croatian, Gypsy rhymes with Temple.
- 7) The supporters who chanted were only voicing their disagreement with Mr Mamic and the way in which he denied them any aspect of control over the club's affairs.
- 8) Under Swiss Criminal Code the chants would not have been considered racist nor would the club have been made liable for them.

In CAS 2013/A/3324 GNK Dinamo v. UEFA, the Club sought the following requests for relief:

1. *To set aside the Challenged Decision;*
2. *To establish that the chant "Mamic gypsy, get out of our temple" neither in its Croatian version nor in its English translation violates Article 14 of the DR and does not constitute a racist act;*
3. *To cancel the fine of EUR 25,000 imposed on the Appellant or, alternatively to reduce the fine to a minimum at discretion of the Panel.*
4. *to condemn the Respondent to the payment in the favour of the Appellant of the legal expenses incurred;*
5. *to establish that the costs of the arbitration procedure, if any, shall be borne by the Respondent".*

In CAS 2013/A/3369 GNK Dinamo v. UEFA, the Club sought the following requests for relief:

1. *To set aside the Challenged Decision;*
2. *To establish that the chant "Mamic gypsy, get out of our temple" neither in its Croatian version nor in its English translation violates Article 14 of the DR and does not constitute a racist act;*
3. *To establish that the Appellant shall not be held responsible for the lighting of fireworks and/or other disorders;*
4. *To establish that the Respondent incorrectly condemned the Appellant for recidivism;*
5. *In the event that the Appellant should be found guilty of the violation of any provision of the Disciplinary Code, to reassess the sanctions under consideration of the mitigating and other circumstances of the case;*
6. *to condemn the Respondent to the payment in the favour of the Appellant of the legal expenses incurred;*
7. *to establish that the costs of the arbitration procedure shall be borne by the Respondent".*

8.2 UEFA's main submissions were:

- 1) The use of the word gypsy had to be viewed against a background of admitted discrimination against Romas (or Gypsies) in Croatia.
- 2) The club has a record of racist chants including "monkey".
- 3) The end of the chant "get out of the temple" was obviously hostile, not friendly.
- 4) Given that Mr Mamic was not a gypsy (although, on the evidence, sympathetic to and helpful to the Roma community) the gratuitous use of the epithet was itself discriminatory.
- 5) Examples of neutral or even benign use of the word Gypsy in other contexts, for example music or television, was immaterial.
- 6) The fact that the words for 'Gypsy' and 'Temple' rhyme in Croatian does not prevent the conclusion that the former was a racist insult. Nazis used to chant in German rhyme that Jews were criminals.
- 7) The objection of the chanters to Mr Mamic was in part on account of his pro Roma sympathies.
- 8) Swiss Criminal Law was not itself applicable and could not be used to override or read down Article 14 UEFA DR

In CAS 2013/A/3324 GNK Dinamo v. UEFA, UEFA sought the following requests for relief:

- *Rejecting the reliefs sought by GNK Dinamo Zagreb.*
- *Confirming the decision under appeal.*
- *Ordering GNK Dinamo Zagreb to pay of all the costs of this arbitration and a significant contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings".*

In CAS 2013/A/3369 GNK Dinamo v. UEFA, UEFA sought the following requests for relief:

- *Declaring the appeal filed by GNK Dinamo Zagreb as non-admissible.*
- *In any event:*
 - *Rejecting the reliefs sought by GNK Dinamo Zagreb.*
 - *Confirming the decision under appeal.*
 - *Ordering GNK Dinamo Zagreb to pay of all the costs of this arbitration and a significant contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings".*

8.3 The merits of these competing submissions will be considered in the next section of this award.

8.4 Even if every submission made by either party has not been specifically summarised, the Panel has nonetheless taken all submissions into account.

9. ANALYSIS

9.1 The Panel is firmly of the view that the appeal must be decided by reference to the UEFA DR and not Swiss Criminal Law

Swiss Law

9.2 It is widely recognised by CAS panels that:

- Swiss law applies complementarily to the regulations of the sport associations
- According to Swiss law, sporting measures imposed by Swiss associations are subject to Swiss civil law (CAS 2006/C/976 & 986, para. 127) and must be clearly distinguished from criminal penalties (CAS 2006/A/1102 & 1146, para. 52).
- Under Swiss law the right of associations to impose sanctions or disciplinary measures on athletes and clubs is not the exercise of a power delegated by the state, rather it is the expression of the freedom of associations and federations (cf. CAS 2005/C/976 & 986, para. 125)
- CAS is not a criminal court and can neither promulgate nor apply penal laws (CAS 1998/002, Digest of CAS Awards I, p. 419, 425)
- *“To adopt criminal standard is to confuse the public law of the state with the private law of an association [...]”* (CAS 98/208, Digest CAS Awards II, p. 234, 247)
- Even if a principle of criminal law is the expression of a fundamental value system (across all areas of the law), it does not follow that the principle applies automatically or without exception to the relationship between a sports association and the athlete/club (CAS 2008/A/1583 & 1584, para. 42).

9.3 Criminal law can only be applied by the public entities which are empowered by a State (DFT 118 II 353, p. 355, 358) – Article 2 of the Swiss Code of Criminal Procedure. Criminal matters cannot be subject to arbitration in Switzerland (art. 177 LDIP; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Berne 2010, p. 101, paras 190 and 191). Furthermore, in view of its scope of application, the Swiss Criminal code is not applicable to the present case.

9.4 According to the principle of territoriality, the Swiss Criminal Code (the “SCC”) is applicable to all offences committed on Swiss territory (Article 3 SCC). The place where an offence is

committed is determined by the place where the offender performed the act, but also the place where the consequences of the crime occurred (Article 8 SCC).

9.5 Notwithstanding the principle of territoriality, the SCC may apply to other situations (Article 4-7 SCC). However, the SCC does not seem to apply in this case due to a lack of connecting factors between the alleged racist behaviour and Switzerland.

9.6 Swiss criminal law could be applied to interpret the notion of racial discrimination if the notion of racial discrimination was to be considered as insufficiently precise in the UEFA DR.

9.7 The principles of interpretation of regulations/statutes of Swiss associations were well summarized in a recent ad hoc case at the Sochi Games (CAS OG 14/002, paras. 7.3 - 7.4), as follows:

*“Under Swiss law, the interpretation of statutes has to be rather objective and always start with the wording of the rule. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association that drafted the rule, and such body may also take account of any relevant **historical background** that illuminates its derivation, as well as **the entirely regulatory context in which the particular rule is located** (CAS 2008/A/1673; CAS 2009/A/1810; CAS 2009/A/1811; see also ATF 87 II 95 consid. 3; ATF 114 II 193, p. 197, consid. 5.a; decision of the Swiss Federal Court of 3 May 2005, 7B.10/2005, consid. 2.3; decision of the Swiss Federal Court of 25 February 2003, consid. 3.2; and ZEN-RUFFINEN P., *Droit du Sport*, 2002, par. 168, p. 63)”* (Emphasis added).

9.8 As can be seen from the above citations, a variety of elements can be taken into account in construing a regulation of a Swiss association. If the definition of the concept of racial discrimination were to be considered to be incomplete in the UEFA DR, it would accordingly seem reasonable to take into account the concept of racial discrimination in Swiss criminal law (to the extent that it assists in understanding of the concept and in addition to any other contextual elements) in order to construe it. Indeed, such an exercise could be validated by Article 5 UEFA DR itself.

9.9 However, for reasons explained below, the Panel finds Article 14 UEFA DR to be self-sufficient and to set a higher standard than Swiss public law.

9.10 There is nothing anomalous, still less offensive, in a private body setting higher standards of conduct for its members than a state does for its citizens.

Article 14 UEFA DR

9.11 Although the UEFA DR do not make express provision as to the interpretation of its Articles, and Swiss law, as noted, applies supportively only, by way of preface it should be recollected that CAS jurisprudence itself establishes the following principles of interpretation of those regulations of a federation breach of which entail disciplinary sanctions:

- (i) They must be precise if binding upon athletes or, *mutatis mutandis*, clubs (cf. e.g. CAS 2007/A/1437).
- (ii) (Accordingly) any ambiguity in the rules must be construed *contra proferentem*. The rule maker, not the ruled, must suffer the consequences of imprecision (cf. e.g. CAS 2011/A/2612).
- (iii) However, the rules must be applied according to their spirit not merely according to their letter. In other words, the Panel has to interpret the rules in question in keeping with the perceived intention of the rule maker, and not in a way that frustrates it (cf. CAS 2001/A/354 & 355; CAS 2007/A/1437 and CAS OG 12/002).

9.12 Viewed against that background, Article 14 UEFA DR has two elements which must be satisfied before sanctions can be imposed:

1. There must be an insult to the human dignity of either a person or a group of persons;
2. The insult must be on grounds of, *inter-alia*, race or ethnic origin.

Furthermore, the insult can be conveyed by whatever means, which would include chanting; it is, however, the Panel's view that it is not necessary for an offence to be committed under Article 14 UEFA DR to prove that the person charged intended to insult; it is sufficient that he or she did insult. The precondition of intention is significantly not prescribed by the Article. This distinguishes the position under the Article from that which obtains under Article 261 bis SCC and Article 12 SCC which, read together, makes racial discrimination criminal only where intentional but has an analogy in Part 111 RACIAL HATRED of the (English) Public Order Act 1986 which specifies that insults must either be intended or likely to stir up racial hatred.

9.13 In the Panel's view the test of whether or not there has been an insult qualifying for sanctions under Article 14 UEFA DR, is the perception of the reasonable onlooker. It is in that sense objective not subjective.

9.14 Further, as a senior English judge, Lord Steyn, once said "*in the law, context is everything*" [Daly v Secretary of State for Home Department 2001 2 AC S32 (28)] so to determine whether words, chants gestures or other behaviour constitute racial insults all the circumstances must be considered; who is saying what to (or about) whom, when, what, how and against what background.

The Chant

- 9.15 Even if the word gypsy could in some circumstances not be used as an insult, it does not follow that it can never be used as an insult. Indeed Mr Powar, FARE's Executive Director and UEFA's expert with a long pedigree in racial issues in sport and elsewhere suggested that it would, in general, be a word best to be avoided; and in one discrimination case in England an appellate Judge noted that "*gypsies may prefer to be referred to as travellers as they believe this is a less derogatory expression*" (CRE v Dutton 1989 QB783 Nicholls LJ at 798 and 801).
- 9.16 The Panel is in no doubt that the criteria for the engagement of Article 14 are satisfied in this case for the following main reasons:
- 1) Even accepting, which UEFA were not disposed to dispute, that those who chanted were opposed to the way in which Mr Mamic ran the club, that opposition could have been coherently voiced without any reference to gypsy at all. The chant if that was merely its purpose could have been articulated as "*Mamic get out of the Temple*".
 - 2) Mr Mamic was not himself a gypsy, although he was known to be supporter of the Roma ethnic minority (as indeed of other ethnic minorities). It was that alone that could explain the reference to him as a gypsy.
 - 3) Mr Dedic, Head of the World Romani Organisation, accepted that it was that aspect of his policies which explained the use of the word gypsy by those who were chanting.
 - 4) Mr Dedic referred on several occasions to those who were responsible for the chant as "hooligans". This forcibly suggested that their attitude towards Mr Mamic could not be described as anything other than hostile.
 - 5) The chant did not only refer to Mr Mamic as a gypsy, it called for him to "*get out of the temple*" (a proxy in this context, as was agreed on both sides, for stadium). That was further evidence that the chant was hostile and not friendly.
 - 6) The fact that in Croatian "gypsy" and "temple" rhymed was not a point that could be in the clubs favour but against it. The word "gypsy" was not chosen because it rhymed with "temple". The word temple was chosen because it rhymed with "gypsy".
 - 7) Even on the dubious and unproven premise that some of the fans were familiar with the Roma language, they were not chanting because they considered Mr Mamic to be a "good man" but because, in terms of his policies, they considered him to be a "bad man".
 - 8) The degree of discrimination against the Roma in Europe is authoritatively addressed in a paper by the European Commission (Com/2010/0133final). Moreover, the European Court of Human Rights ruled that Croatia discriminated against Roma (Gypsy) school pupils by segregating them in Roma only classes (Orsus v. Croatia: 16 October 2010).

Even, if contrary to the Panels view, it were necessary to establish that the fans intended to insult Mr Mamic racially it would find on the basis of the same facts that intention established.

The Club's responsibility

- 9.17 Article 8 UEFA DR fixes the Club with strict liability for the acts of its supporters.
- 9.18 Additionally, when a Club agrees to participate in a UEFA competition, it agrees to comply with the relevant UEFA regulations (Article 2.04 (e) of the regulations of the UEFA Champions League 2013/2014) and the Club signed a document to that effect on 7 May 2013.

The Firework Incidents at the Vienna Match: Article 16 UEFA DR

- 9.19 A powerful argument was advanced on the behalf of the Club by Ms Smirnova who had carriage of this section of the submission to the effect that the entire responsibility to the breakdown of order was to that of the host club FC Vienna. The Panel was told by UEFA that FC Vienna have been fined for an offence contrary to Article 16 UEFA DR and have not appealed.
- 9.20 Ms Smirnova contended that in circumstances where the host club was (and had been held to be) responsible for the breakdown of order and security, there was no space left for charging the away club in this case. It was pointed out – correctly – that the UEFA tribunals had wrongly identified the Club as being the host club when it was in fact playing an away match in Vienna, and this must (if was submitted) have influenced the adverse decision. She also suggested that the persons who were responsible both for the fireworks and the chanting could not be considered supporters of the Club but rather as “anti-fans”, whose presence at the match was not authorised by the Club which had indeed sought to advise FC Vienna to take steps to ensure that they were not admitted, steps which were either not taken at all or if taken, failed to achieve their purpose.
- 9.21 The concept of supporters of a club is not defined in the UEFA DR. However, in CAS 2013/A/3139 the Panel rejected an argument that the persons who committed offences were unknown to the Club and were criminals without any link to it, albeit necessarily based on the facts and circumstances of that case, the Panel was satisfied that the perpetrators of the misconduct in question- the throwing of fireworks -must be considered, despite their disreputable behaviour, as the supporters of the Club, “*particularly in the eyes of the reasonable and objective observer*” (para. 80 of that decision).
- 9.22 In the UEFA report on the third match, those who threw the fireworks, both inside and outside the stadium were identified as “DZ” (i.e. the clubs) fans. If one asked the question, which side in that match did the “DZ” fans hope would win, the answer would clearly be the Club, not its opponent FC Vienna. It is one thing to object to the management of the club; quite another to object to the club itself. The submission if taken to its logical (but unacceptable) conclusion would mean that the worse a Clubs supporters’ behaviour, the less a club could be held responsible for them.

- 9.23 The overriding difficulty with the argument advanced by the Club under Article 16 lay in the wording of the Article itself. It is indisputable as a matter of language that there can be a situation in which both the host club (see article 16.1) and the away club (see article 16.2) are in breach of the article itself. Indeed article 16.2 by the use of the introductory word “*however*” reinforces what the substantive language of that article 16.2 provides. It is to be further noted that even if the away club “*can prove the absence of any negligence in relation to the organisation of the match*”- (ditto) which the Club clearly can do on the basis of the UEFA match report, nonetheless, it would be liable to disciplinary measures if there has been, amongst other matters the lighting of fireworks or flares by its supporters.
- 9.24 An argument that the imposition on the club of strict liability in such situation is contrary to basic fairness or public policy is foreclosed by the decision in the CAS 2013/A/3139 case itself in which the Panel, in considering an argument to like effect determined that strict liability for the behaviour of a club’s supporters is neither inconsistent with Article 6 of the European Convention on Human Rights or Swiss Procedural Public Policy (see para. 103 of that decision), nor violative of the legal principle of *Nulla Poena Sine Lege*. (Ditto, see further CAS 2013/A/3094 paras 85-90). Moreover, the compatibility of strict liability of club’s for their supporters’ behaviour with public policy, is supported by the decision of the Permanent Court of Arbitration for Clubs and Corporations of the German Professional Leagues in Football (“*Ständiges Schiedsgericht für Vereine und Kapitalgesellschaften der Lizenzligen*”) dated 14 May 2013 in SG Dynamo Dresden e.V. v. Deutscher Fussball-Bund e.V., published in *Zeitschrift für Sport und Recht*, 5/2013, p. 200 seq. See also CAS 2013/A/3258, para. 133.
- 9.25 The Panel also appreciates the force of the argument advanced by the Club that if a Club is held in breach of the UEFA DR in a situation such as the present, it would lie in the hands of dissident supporters to procure either the dismissal of an officer of the Club to whose policies they objected or his capitulation to those self-same supporters and implementation of their preferred policies by repeatedly exposing the Club to sanctions for their misconduct until they achieved their objective. Whether this were to be so or not, this is not a consideration that the UEFA DR allows to be taken into account.

Sanctions General

- 9.26 On 24 May 2013 at the XXXVII UEFA Congress, member associations unanimously approved a resolution to fight racism in football and enhanced sanctions for racist offences. On 31 May 2013 a policy of ‘zero tolerance’ of racism was published by a UEFA circulation letter (24/2013).
- 9.27 In that context, the Panel must consider whether or not the penalties imposed by UEFA were disproportionate.
- 9.28 It is of course established that CAS panels “*have full power to review the facts and the law*” in relation to decisions against which an appeal is launched, pursuant to Article R57 of the Code.

- 9.29 It is equally well established by CAS panels that, without fettering their powers, under Article R57 of the Code respect is naturally placed on the reasoning underlying decisions of expert and experienced regulators as to what sanctions are appropriate for a particular offence. See generally CAS 2011/A/2518 paras. 10.4-10.7.
- 9.30 For breach of Article 14 UEFA DR, the standard sanction can be modified only in “*exceptional circumstances*”, Article 17 (3) UEFA DR. None were apparent to the Panel and so subject to the qualification imposed by Article 17 (3) UEFA DR.
- 9.31 The Panel would, however, observe that even in a case, where a breach of Article 14 UEFA DR is established, there are gradations and degrees of seriousness. The Panel would respectfully suggest with reference to the flexibility inherent in Rule 14 (1) and (3) UEFA DR that UEFA does indeed consider each case on its own merits and in its particular context rather than relying on some rule of thumb. The cases drawn to the Panel’s attention from the UEFA file shows that while all racist chants are intolerable some are less tolerable than others, even in relation to gypsies: when the crowd recited “*we have always hated gypsies*” and “*fuck the gypsies*” (Steaua Bucharest; Decision of 26 January 2013).

Sanctions: The Fine

- 9.32 Given that the Club, as was clearly stated, is concerned not with the monetary aspect of this particular appeal but rather of the principle, the Panel finds it unnecessary to say more and will not interfere with the fine imposed.

Sanctions: Procedure

- 9.33 The Panel has some sympathy with the Club’s submission that it was penalised on the basis of recidivism in circumstances where its appeal against the First Disciplinary Decision had not yet finally been resolved by CAS. The Panel discerns a tension inherent in the UEFA DR between entitlement to the natural desire of UEFA to enforce a decision that unless and until appealed to and overturned by CAS must be taken to be correct and the position of a club which has an outstanding appeal which may succeed, but is nonetheless penalised before the appeal is heard on the basis of finding recidivism which may in the event prove to be unjustified. This, however, is a consequence of the way in which the UEFA DR is drafted.
- 9.34 Eventually, given the Panel’s decision that the chants were racist in the First, as in the Second and Third Matches the Club were not in the end disadvantaged.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals filed by GNK Dinamo on 19 September and 26 October 2013 are dismissed.
2. The decisions of the UEFA Appeals Body dated 29 August and 15 October 2013 are upheld.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.