



Arbitration CAS 2015/A/3926 FC Gelsenkirchen-Schalke 04 v. Union des Associations Européennes de Football (UEFA), award of 6 October 2015

Panel: Prof. Lukas Handschin (Switzerland), Sole Arbitrator

Football

Disciplinary sanction imposed on a club for stairways blocked by supporters during a match

Autonomy of an association under Swiss law

UEFA's competence to adopt security regulations

Interpretation of Article 38 of the UEFA Safety and Security Regulations

Burden of proof and regulatory assumption under Article 38 of the UEFA Safety and Security Regulations

Recidivism in case of a club

1. The autonomy of the association is enshrined in Article 23 of the Swiss Constitution. The Swiss law of private associations provides in Art. 60 et seq. Swiss Civil Code (CC) a very wide degree of self-determination, autonomy and independence. Private associations may issue rules concerning their governance, membership and their own competitions. This association-autonomy has been recognized by the CAS in several cases.
2. Article 2 of the UEFA Statutes foresees in particular UEFA's competence to adopt security regulations which protect the spectators. Security regulations which protect the spectators are based on the objective to *"organise and conduct international football competitions"* and to *"ensure that the needs of the different ... supporters ... in European football are properly taken into account"*. UEFA is entitled based on the association autonomy to regulate for the benefit of the safety of the spectators a norm that requires the organizer of a football match to keep the stairways free.
3. Article 38 of the UEFA Safety and Security Regulations reads in its English version: *"The match organizer must take measures to ensure that all public passageways, corridors, stairs, doors, gates and emergency exit routes are kept free of any obstructions, which could impede the free flow of spectators"*. The focus of this rule is clearly that the stairs must be kept *"free of any obstructions"* and not only obstructions, which could impede the free flow of spectators. If the rule would only apply to those obstructions which impede the free flow of spectators, the rule would be very difficult to apply, since the effect of the obstruction would always have to be considered when applying the rules.
4. Article 38 of the UEFA Disciplinary Regulations creates a *"regulatory assumption"*, that the statements contained in official UEFA reports are correct. This regulatory assumption that the report of the UEFA inspector is correct results in a shift of the burden proof to the other party. To assume a *"regulatory assumption"* in this case

makes sense, because only the home club has the domestic authority (Hausrecht) and only the home club has the possibility to secure the evidence in this respect.

5. For clubs and associations it is generally acknowledged that recidivism must be assumed if an offense of a similar nature is committed within five years. Only for corruption and match-fixing cases the time limit for recidivism is ten years.

I. PARTIES

1. FC Gelsenkirchen-Schalke 04 e.V. (“Schalke” or the “Appellant”) is a German football club with its seat in Gelsenkirchen, Germany. It is a member of the German Football Association which is affiliated to UEFA.
2. Union des Association Européennes de Football (“UEFA” or the “Respondent”) is the administrative body for association football in Europe.

II. FACTS

3. On 30 September 2014, a group match of the 2014/2015 UEFA Champions League competition (the “UCL”) between the Appellant and NK Maribor (the “Match”) took place in the Veltins-Arena in Gelsenkirchen (the “Stadium”).
4. The report of the UEFA delegate Claude Runavot submitted on 30 September 2014, 23:06, (the “UCL Delegate Report”), stated in its section “crowd behaviour (home team) - controversial banner, fans standing blocking the stairways” the following: “supporters were blocking the stairways”. Further, the UCL Delegate Report rated this situation as “unsatisfactory”. The UCL Delegate Report pointed out, that further details would follow in an additional report. The UCL Delegate Report was filed by the Appellant with its appeal brief.
5. In his additional report of 1 October 2014 (the “Additional Report”), Claude Runavot further specified his observations. This Additional Report stated the following: “FC Schalke 04 supporters were standing in two aisles of the North stand, behind the goal, throughout the match. No incident to be indicated due to the positive behaviour of German supporters”.
6. On 16 October 2014, the UEFA Control, Ethics and Disciplinary Body sanctioned Schalke with a fine of EUR 10,000 ruling as follows:

I. Facts Of The Case

1. *The elements set out below are a summary of the main relevant facts, as established by the Control, Ethics and Disciplinary Body on the basis of the official reports, the written submissions, the exhibits filed and the statement produced in the course of the Control, Ethics and Disciplinary Body*

proceedings. While this UEFA disciplinary body has considered all the facts, allegations, legal arguments and evidence submitted by the club in these proceedings, it refers in the present decision only to the submissions and evidences it considers necessary to explain its reasoning.

2. *Briefly, the most relevant facts of this case can be summarized as follows:*

- *FC Schalke 04 supporters were standing on two aisles of the North stand, behind the goal throughout the match.*

II. *The Respondent's position*

3. *The Club in its statements dated on 6 October 2014, provides with some pictures of those sectors alleged to be blocked during the second half.*

4. *According to the Club, those pictures show that supporters were standing next to the stairways without blocking them in any way. It raises that there is always the possibility for the free flow of third parties, i.e. spectators, security forces and other responsible, as well as it shows that security responsible were at place as to impede the obstruction of the stairways.*

5. *The more detailed arguments made by the club in support of its written submissions are set out below in as far as they are relevant.*

III. *Merits of the Case*

UEFA's competence.

6. *Pursuant to Article 52 of the UEFA Statutes, as well as Article 23 of the UEFA Disciplinary Regulations (DR), the Control, Ethics and Disciplinary Body is competent to deal with the case.*

7. *In light of the above, the UEFA Statutes, rules and regulations, in particular the UEFA Disciplinary Regulations are applicable to these proceedings.*

The blocking of stairs

Applicable legal framework and general remarks

8. *According to Article 38 of the UEFA Safety and Security Regulations "the match organiser must take measures to ensure that all public passageways, corridors, stairs, doors, gates and emergency exit routes are kept free of any obstructions, which could impede the free flow of spectators".*

The responsibility of the club

9. *The purpose of the UEFA Safety and Security Regulations is to maintain the safety and security of everyone present at the match (Article 2 of the UEFA Safety and Security Regulations). In order to achieve this goal there are several provisions concerning spectator control at the stadium.*

10. *In the present case, FC Schalke 04 supporters were standing on two aisles of the North stand, behind the goal throughout the match.*
 11. *The Club argues that security was well placed in order to maintain free the stairways as well as there was always the possibility for third parties, mainly security forces and stewards, to move and to maintain the free flow of spectators. In this respect, the club provides the Panel with pictures taken from the match.*
 12. *This UEFA Disciplinary Body recalls that according to Article 38 DR, facts contained in official UEFA reports are presumed to be accurate. Proof of their inaccuracy may, however, be provided. Consequently, the burden of proof relies on the Respondent in order to prove contrary.*
 13. *The Control, Ethics and Disciplinary Body deems therefore that the above arguments put forward by the Club do not breach the accuracy of the UEFA official's report, which clearly contemplates that stairways were blocked by supporters throughout the match. It derives from the fact that the image provided by the Club merely gives a partial view of the incident, as well as it does not justify the fact that supporters were standing on aisles throughout the match. In addition, and according to Article 38 UEFA Safety and Security Regulations, the match organiser shall keep public passageways, corridors, stairs, doors, gates and emergency exit routes free of "any obstruction". It obviously includes spectators standing on the aisles.*
 14. *FC Schalke 04 as the host and match organizer therefore violated the above-mentioned provisions and must be punished accordingly.*
 - IV. *The determination of the appropriate disciplinary measure*
 15. *Based on Article 17 DR the Control, Ethics and Disciplinary Body determines the type and extent of the disciplinary measures to impose according to the objective and subjective elements of the case, taking account of any aggravating and mitigating circumstances. In the case of multiple offences, the punishment shall correspond to the most serious offence and be increased depending on the specific circumstances.*
 16. *In the present case, the Control, Ethics and Disciplinary Body identified and took into account the seriousness of the offence committed.*
 17. *In the light of the above considerations, the Control, Ethics and Disciplinary Body*
decides
 1. *To fine FC Schalke 04 € 10'000.*
 2. *The above fine must be paid into the bank account indicated below within 90 days of communication of this decision".*
7. Against this decision of 16 October 2014 (the "First Decision") Schalke appealed with the UEFA Appeals Body which decided on 2 February 2015 that the appeal lodged by FC Schalke

04 is rejected and the decision of the Control, Ethics and Disciplinary Body of 16 October 2014 is upheld (the “Appealed Decision”).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

8. The proceedings before the CAS can be summarized as follows:
9. On 13 February 2015, the Appellant filed its statement of appeal against the Appealed Decision. The statement of appeal was, presumably due to a clerical mistake, dated 19 November 2014, but was effectively filed by courier on 13 February 2015, in accordance with Article R31 of the Code of Sports-related Arbitration (the “Code”). In its statement of appeal, the Appellant nominated Prof. Dr. Martin Schimke, Attorney-at-Law in Düsseldorf, Germany, as arbitrator.
10. On 17 February 2015, the Appellant requested an extension of its time limit to file the appeal brief by one month relying on the fact, that it was only in the possession of the operative part of the Appealed Decision, but had not received the grounds yet.
11. On 18 February 2015 and upon request of the CAS Court Office, the Appellant provided the CAS Court Office with a proof of payment of the CAS Court Office fee.
12. On 19 February 2015 the CAS Court Office acknowledged receipt of the statement of appeal and opened the appeal arbitration proceedings under the reference *CAS 2015/A/3926 FC Gelsenkirchen-Schalke 04 v. UEFA*.
13. On 20 February 2015, UEFA agreed to the Appellant’s request for an extension of the time limit to file the appeal brief until 24 March 2015. Further, in accordance with Article R53 of the CAS-Code, UEFA nominated Mr. Bernhard Welten, Attorney-at-Law in Bern, Switzerland, as arbitrator.
14. On 4 March 2015, UEFA informed the Appellant and the CAS Court Office that the grounds of the Appealed Decision had been notified to the Appellant on that day.
15. On 5 March 2015, the CAS Court Office informed the Parties, that Prof. Dr. Martin Schimke, Arbitrator nominated by the Appellant had declined his nomination. Further, the Parties were invited to consider submitting the arbitration to a Sole Arbitrator in view of the circumstances of the case and were advised that in the affirmative, a Sole Arbitrator would be appointed by the President of the CAS Appeals Arbitration Division, in accordance with Article R53 of the Code, unless the Parties agreed on the person of the Sole Arbitrator.
16. On 6 March 2015, UEFA agreed to submit the proceedings to a Sole Arbitrator.
17. On 12 March 2015, the Appellant also agreed to submit this arbitration to a Sole Arbitrator.

18. On 18 March 2015, Prof. Dr. Lukas Handschin, accepted his appointment as Sole Arbitrator by the President of the CAS Appeals Arbitration Division by duly signing the Arbitrator's Acceptance and Statement of Independence form.
19. On 23 March 2015, the Appellant filed its appeal brief, in accordance with Article R51 of the Code.
20. On 24 March 2015, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had appointed Prof. Dr. Lukas Handschin, Attorney-at-law in Zurich, Switzerland, as Sole Arbitrator.
21. With letter of 25 March 2015 UEFA, requested an extension to file its answer until 4 May 2015.
22. On 26 March 2015, the Appellant agreed to the Respondent's request for an extension of the time limit to file its answer until 4 May 2015.
23. On 29 April 2015, UEFA requested that the Appellant would specify the names of its witnesses, including a brief summary of their expected testimony and names of any experts, stating their area of expertise referring to Article R51 of the Code.
24. On 30 April 2015, the Sole Arbitrator ordered the Appellant to produce on or before 6 May 2015 brief summaries of the expected testimonies of the respective witnesses to the extent that it intends to rely on them. Further, the Sole Arbitrator suspended the time limit for the Respondent's answer until notification of the witness summaries through the CAS court office.
25. On 5 May 2015, the Appellant submitted the requested witness summaries and the CAS Court Office in turn lifted the suspension of the Respondent's time limit to file its answer.
26. On 8 May 2015, the Respondent filed its answer to the appeal brief, in accordance with Article R55 of the Code.
27. On 18 May 2015, UEFA informed the CAS Court Office that bearing in mind that both Parties called up witnesses to provide their testimonies, there is a need to hold a hearing on this matter.
28. On 20 May 2015, Appellant informed the CAS Court Office that it also considered a hearing necessary.
29. On 27 May 2015, the CAS Court Office informed the Parties that the Sole Arbitrator has decided that a hearing shall be held. Further, it was mentioned, for the sake of good order, that the decision to hold a hearing has no bearing on the relevance of the testimonies called by a party.
30. On 24 August 2015, the hearing took place. The Appellant was represented by its attorney, Dr. Caspar Luig; UEFA was represented by Dr. Emilio Garcia, Head of Disciplinary and

Integrity, Mr. Carlos Schneider, Disciplinary Lawyer, and Mr. Andrew Mercer, UEFA's Legal Counsel. At the hearing the following witnesses were examined: J., witness summoned by the Appellant, and K., witness summoned by the Respondent. Their testimonies shall be discussed below in fig. VII, Merits. Finally, the Parties submitted their oral pleadings; their pleadings shall be discussed in fig. IV, Parties' requests for relief, and fig. VII, Merits. At the end of the hearing, the Parties declared that their right to be heard had been fully respected.

IV. PARTIES' REQUESTS FOR RELIEF

31. The Appellant

32. In its statement of appeal, the Appellant requested that:

"The decision of the UEFA Appeals Body of February 2nd 2015 is changed and the decision of the UEFA Control, Ethics and Disciplinary Body of October 16th 2014 is set aside".

33. The Appellant admits that during the match some spectators on the North Stand of the Stadium had risen from their seats and followed the Match in a standing position. Some isolated spectators stood directly next to their seats by the stairways. As an example of this behaviour the Appellant submitted Photographs of the North Stand during the Match. According to the Appellant these photographs show the state of the stairways and the vomitoria during the whole Match of 30 September 2014.

34. The Appellant refers to these pictures, which show that isolated spectators stood directly next to their seat; however the Appellant emphasises that the stairways were not blocked by the spectators. The Appellant holds that at no point the stairways were blocked by the spectators. Further, there was security personnel in the aisles during the entire Match to ensure that the aisles were kept free. The Appellant holds that there was a free passageway at all times and that at no point in time during the Match the smooth free flow of spectators was endangered or in any way adversely affected by the isolated spectators standing in the staircases.

35. The Appellant attached two letters to its appeal brief. One letter by the Gelsenkirchen police headquarters, signed by C., Kriminaloberrat, and one letter from the fire service of the city of Gelsenkirchen, signed by Mr. Axinger, head of the fire department, both of 23 October 2014.

36. The letter of the Gelsenkirchen Police reads:

37. *"Seitens der Einsatzleitung der Polizei konnten Personen im Bereich der dortigen Treppenanlagen auch während des Spiels festgestellt werden. Anzahl und Verhalten dieser Zuschauer haben aus sicherheitsrelevanter Sicht jedoch keine Anhaltspunkte einer möglichen Sicherheitsgefährdung ergeben. Nach polizeilicher Einschätzung war kein negativer Einfluss auf die Flucht- und Laufwege in diesem Stadionbereich erkennbar".*

38. Which can be freely translated into English: *"The officer in charge of the police was able to detect persons in the area of the stairways also during the Match. The number and the behaviour of these spectators were not security-relevant and did not give concern to a potential security hazard. According to the assessment of the police, there was no negative influence regarding the escape routes in this area of the Stadium".*

39. The letter of the Gelsenkirchen fire department contained, in essence, the same statement, in German: *“Seitens der Einsatzleitung Feuerwehr wurden im Bereich der Treppenanlagen vereinzelt Personen/Zuschauer festgestellt. Anhand der Anzahl und dem Verhalten der Personen/Zuschauer wurden keine Anhaltspunkte einer möglichen Sicherheitsgefährdung festgestellt. Nach Einschätzung der Einsatzleitung der Feuerwehr war kein negativer Einfluss auf die Flucht- und Laufwege in diesem Bereich des Stadions erkennbar”.*
40. Which can be freely translated into English: *“The officer in charge of the fire brigade was able to detect isolated persons/spectators in the area of the stairways also during the Match. The number and the behaviour of these persons/spectators where not security-relevant and did not give concern to a potential security hazard. According to the assessment of the fire brigade, there was no negative influence regarding the escape routes in this area of the Stadium”.*
41. Further in the letter of 5 May 2015, the Appellant summarized the expected testimonies of its witnesses, M., head of the stewards of the Appellant during the Match, J., head of the security of the Appellant during the Match, C., officer-in-charge from Gelsenkirchen police headquarters during the Match, A., officer-in-charge from Gelsenkirchen fire service responsible during the Match, R., officer-in-charge from Gelsenkirchen fire service responsible during the Match and finally A., officer-in-charge from Gelsenkirchen fire service responsible during the Match. All witnesses would give testimony to the following facts:
 - *The photographs presented by the Appellant as Exhibit A 8 representatively show the state of the stairways and vomitories [sic] during the whole match on 30.09.2014.*
 - *During the match there were isolated spectators standing directly next to their seats. However, the stairways and vomitories [sic] were not blocked by the spectators. There was a free passageway at all times.*
 - *There was security personnel in the aisles during the entire match in order to ensure that the aisles were kept free.*
 - *At no point in time during the match was the smooth free flow of spectators endangered or in any way adversely affected by the isolated spectators standing in the staircases.*
42. Video recordings of the North Stand at the Match would no longer be available to the Appellant as in the meantime these had been deleted for reasons relating to German data protection-/privacy-law.
43. The Appellant submits that the Appealed Decision is to be altered and the First Decision is to be annulled because
 - UEFA is not entitled to sanction the circumstance that at a football match of the UEFA Champions League spectators stand in the aisles and stairways of the stadium;
 - No breach of Article 38 of the UEFA Safety and Security Regulation occurred at the Match;

- The decision of the Control, Ethics and Disciplinary Body of 16 October 2014 was unlawfully reached “*due to the absence of any exercising of discretion*”.
44. The Appellant is the organizer of the home matches of the UCL. According to German law, the Appellant bears the duty to ensure public safety for the venue, the Stadium. It is therefore liable under civil law in relation to the people attending home matches of the UCL in the event of breaches of its duty to ensure public safety. It is bound by German police and public order law to comply with the state statutory regulations at home matches of the UCL in the Stadium. In the event of any possible violation of German law, the Appellant can therefore be charged by the German authorities.
45. UEFA is an association within the meaning of Article 60 *et seq.* of the Swiss Civil Code (CC). Within the scope of association autonomy, UEFA is entitled to set out the basic legal rules and principles for the organized practice of sport in UEFA competitions. There are, however, restrictions to association autonomy. Sports clubs and associations must observe the mandatory statutory regulations and public morality with respect to the creation of the basic rules and principles for the organized practice of sport. UEFA’s sanction in question did not concern a breach of the rules of play or regulations of the practice of sport, but was imposed for an alleged breach of safety and security regulations adopted by UEFA.
46. These safety and security regulations do not refer to the way the sport is practiced in order to keep the sportsmen safe and secure. The Appellant asserts that it is not for UEFA to provide the safety and security regulations with regard to the spectators attending UCL matches in the Stadium. Therefore, the Appellant as the organizer of the home match in the UCL must ensure that it complies with the statutory safety and security regulations that exist in Germany and observe the existing duties to ensure public safety. If UEFA has the competence to create its own independent, additional safety and security specifications, there is a risk that state safety / security specifications may conflict with the UEFA’s safety and security specifications. Such a risk cannot be accepted. It also cannot be expected of the clubs taking part in the UEFA competitions that they should accept the risk of such a collision of regulations. The organizer of a football match must primarily observe the rules of the state; it is not the duty of a sport association to adopt general safety and security rules and regulations which are not intended to directly protect the players, helpers / assistants / doctors or other persons involved in the competition, for example referees. By creating its own safety and security specifications which have nothing to do with the course of the sport competition, UEFA has exceeded the limits of the club and association autonomy. The Appellant contends that by the adaption of general safety and security specific regulations, which are not related to the specific execution of the competition and the protection of sportsmen, UEFA assumed state competences which it does not have. The adaption of general safety and security regulations are exclusively a matter of the respective state.
47. Further, the Appellant submits that Article 38 of the UEFA Safety and Security Regulations does not envisage a continued obligation to keep the stairways free at all times. Rather, the stairways must be free from those obstacles “*which could impede the free flow of spectators*”. Therefore, there must be a causal link between possible obstacles in the aisles of the stands and the impeding of the free flow of spectators.

48. The authorities who were responsible for public safety and security, the police and the fire service, specifically confirmed that during the Match no negative influence of the escape routes and the passageways in the stadium was detected. The submitted photographs show that only few spectators stood in the stairways and the free flow of the spectators was possible at all times.
49. The Appellant submits that the Additional Report which contained the statement that “*no incident to be indicated (...)*” is the relevant report so that a reversal of the burden of proof pursuant to Article 38 of the UEFA Disciplinary Regulations cannot apply.
50. In its Appealed Decision, UEFA interprets its own rules and regulations wrongly. The Appellant submits that Article 38 of the UEFA Safety and Securities Regulations does not refer to “*any and all obstructions*” but only those obstructions “*which could impede the free flow of spectators*”. If UEFA’s interpretation, that all obstacles can impede the free flow of spectators were correct, the addition “*which could impede the free flow of spectators*” would be meaningless and superfluous. The Appellant holds that the rule maker of the UEFA safety and security regulations created this addendum particularly as a normative content that this rule is only violated, if possible obstacles in the aisles actively endanger the free flow of spectators requiring an individual analysis of each specific situation.
51. Such individual case analysis was not provided by UEFA. It merely states in item 25 of the First Decision that it is “obvious” that obstacles in the stairways impede the free flow of spectators. The Appellant asserts that it is unacceptable that the assessment of an UEFA inspector who may not have a safety or security specific training is given priority over the assessment by the responsible national public order authorities such as the police and the fire service.
52. The Appellant submits that, according to Article 17 of the Disciplinary Regulations of UEFA (the “UEFA DR”), the competent disciplinary instance determines the type and the assessment of the disciplinary measure in accordance with the objective and subjective circumstances. The Appellant submits that the application of Article 19 para. 1 lit. d of the UEFA DR, according to which the repetition of the offence is an incriminating circumstance, in the Appealed Decision is flawed. According to the Appellant, this is not in line with the way how Article 19 DR is to be construed. Article 19 paragraph 1 lit. a DR envisages offences that have resulted in a one-match suspension can only be considered as repeat offences to the extent that they had been committed no earlier than one year before the present offence. It follows, that in cases of sanctions of less than a one-match suspension - as in the present case - Article 19 paragraph 1 lit. a DR can be no legal basis to consider the Appellant as recidivist.
53. In its final pleadings, the Appellant asserted, that Article 38 of the UEFA Safety and Security Regulations contradicts the principle of free movement of services (Article 56 Treaty on European Union), but did not further specify why or to what extent this is the case.
54. The Respondent

In its answer, the Respondent requested that:

“Rejecting the reliefs sought by FC Gelsenkirchen-Schalke 04.

Confirming the decision under appeal.

Ordering FC Gelsenkirchen- Schalke 04 to pay all the costs of this arbitration.

Bearing in mind that UEFA has more financial resources than FC Gelsenkirchen- Schalke 04, Respondent honestly considers that no contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings must be paid by the Appellant”.

55. In its answer, UEFA submits that it has the competence, pursuant to the freedom of associations, on which it relies in order to adopt rules on safety and security applicable to any stadium where UEFA competition matches are held. UEFA refers to Article 2 of the UEFA statutes, describing its objectives which are, amongst others, to promote football in Europe in a spirit of peace, understanding and fair play without any discrimination on account of politics, to organize and conduct international football competitions and tournaments at European level for every type of football while respecting the players' health and to prevent all methods or practices which might jeopardize the regularity of matches or competitions or give rise to the abuse of football.
56. UEFA asserts that, according to Swiss law, associations enjoy a wide scope of autonomy to regulate their own affairs. Further, UEFA submits that the Appellant acts *contra factum proprium* since it signed the entry form for the 2014 / 2015 UEFA club competitions whereby the Appellant expressly agreed to be bound by UEFA regulations. Furthermore, the Appellant has never disputed the legality of the UEFA Safety and Security Regulations directed at the safety of spectators. In fact, the Appellant has in the past violated the rules regarding the blocking of stairs, without lodging any appeal before the UEFA appeals body.
57. Finally, UEFA refers to the risk that, as the Appellant tries to make belief, UEFA Safety and Security Regulations may lead to a potential conflict with the state law on safety and security requirements. UEFA purports that the Appellant did not provide a sole example that would allow such a conclusion in this particular case.
58. UEFA submits that, according to Article 38 of the UEFA DR, the facts contained in an official UEFA report are presumed to be true. UEFA then refers to the UCL Delegate Report submitting that the presumption of accuracy of UEFA' official reports reverses the burden of proof, which was recently confirmed by CAS 2013/A/3139, at para. 70. The statements which were given by the police and the fire authorities cannot be considered as proof which could possibly impair the presumption of accuracy of UEFA's official reports, since these letters were given only in a general and imprecise manner. Furthermore, the two pictures which were submitted as evidence in the appeal brief are not enough sufficient to refute the UCL Delegate Report which stated that fans were blocking the stairways throughout the Match. UEFA asserts that the UCL Delegate Report refers to an obstruction which impeded the free flow of spectators. The UCL Delegate Report used the term *“blocking the stairways”*. UEFA contends that this would have been a serious obstacle in case of an emergency with potentially grave consequences.

59. Finally, UEFA submitted video clips taken from the official footage of the Match which, according to UEFA, show that the stairways were clearly and heavily obstructed by Schalke supporters impeding the recurrent free flow of spectators. The videos showed primarily the game, but certain passages showed also the behaviour of the spectators. In particular a video clip which shows the game at minute 91, proves that the lower parts of the stairways behind the goal were completely blocked by spectators.
60. Regarding the proportionality of the sanction, UEFA claims that the sanction imposed by a disciplinary body in the exercise of its discretion allowed by the relevant rules may only be reviewed when the sanction is evidently disproportional to the offence. UEFA mentions a series of CAS cases which support its argument. UEFA maintains that the Appealed Decision took into account Article 17 and Article 18 of the UEFA DR. It noted that the blocking of stairs can, in case of an emergency, lead to an extremely dangerous situation. Further, the fact that the present security officials did not react to the violation of the rules was also considered as a relevant circumstance. Further, the Appellant is to be considered recidivist, according to Article 19.1 UEFA DR. Since Appellant had been sanctioned twice in the last five years for the same offence, first with a fine of EUR 5,000 then with a fine of EUR 7,500, the preventive effects of the sanction would be undermined if the Appealed Decision were to be annulled.

V. JURISDICTION

61. Article R47 of the CAS Code stipulates as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.

62. Article 62 para. 1 of the UEFA Statutes (Edition 2014) provides that:

“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”.

Both parties did not raise any jurisdictional objection and confirmed the jurisdiction of the CAS by signing the Order of Procedure. It follows that the CAS has jurisdiction to decide on the present dispute.

VI. APPLICABLE LAW

63. According to Article 63 para. 3 of the UEFA Statutes (2014 edition), *“...proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS”.*
64. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, the *“Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the*

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

65. According to Article 5 of the UEFA Disciplinary Regulations (2014 edition), *“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”.*
66. Therefore, the applicable law under which the Sole Arbitrator will decide the present dispute is to be found in the UEFA regulations, including the UEFA Disciplinary Regulations (2014 edition) and, subsidiarily, Swiss law.

VII. MERITS

67. The Appellant submits that UEFA is not entitled to adopt regulations with regard to the safety and security of the spectators present in the Stadium, since the organizer of a home match is only subject to comply to statutory and security regulations applicable in its state of residence.
68. UEFA refers to the constitutional freedom of associations on which it relies in order to adopt rules on safety and security at the Stadium. UEFA mentions Article 2 of the UEFA statutes, describing the objectives of UEFA which are, amongst others to promote football in Europe in a spirit of peace, understanding and fair play without any discrimination on account of politics, to organize and conduct international football competitions and tournaments at European level for every type of football while respecting the players’ health and to prevent all methods or practices which might jeopardize the regularity of matches or competitions or give rise to the abuse of football.
69. The association autonomy is enshrined in Article 23 of the Swiss Constitution, Freedom of association, which reads: *“Freedom of association is guaranteed. Every person has the right to form, join or belong to an association and to participate in the activities of an association”*. The Swiss law of private associations provides in Art. 60 *et seq.* Swiss Civil Code (CC) a very wide degree of self-determination, autonomy and independence. Private associations may issue rules concerning their governance, membership and their own competitions (HEINI ANTON/PORTMANN, in *Das Schweizerische Vereinsrecht*, Schweizerisches Privatrecht II/5, N 67; HEINI/SCHERRER in *HONSELL/VOGT/GEISER*, Basler Kommentar zum Zivilgesetzbuch I, Vor Art. 60-79 N 9). This association-autonomy has been recognized by the CAS in several cases (see CAS 2013/A/3139, at para. 86; CAS 2011/O/2422, at para. 55 *et seq.*; CAS 2007/A/1217, at para 11.1; CAS 2005/C/976 & 986, at para. 123 and 142).
70. The scope of the association autonomy is primarily defined by the objectives of the association in the articles of association, in the present case in Article 2 of the UEFA Statutes. Relevant in this case are the objectives of UEFA according to Article 2, *i.e.* to *“promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, race or any other reason”* (Article 2 lit. b), *“organise and conduct international football competitions and tournaments at European level for every type of football whilst respecting the players’ health”* (Article 2 lit.

d) and “ensure that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account” (Article 2 lit. j).

71. UEFA’s competence to adopt security regulations which protect the spectators is in particular foreseen in Article 2 of the UEFA Statutes in lit. d): “organise and conduct international football competitions” and lit. j): “ensure that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account”. Security regulations which protect the spectators are based on the objective to “organise and conduct international football competitions” and to “ensure that the needs of the different ... supporters ... in European football are properly taken into account”.
72. As regards the present case *in concreto*, the Sole Arbitrator deems it is proportional that the stairs in the Stadium have to be kept free of obstructions. It appears obvious to the Sole Arbitrator that if the stairways are kept free, the evacuation of spectators is easier. Standing or sitting on the stairways may not necessarily lead to an incident; in most cases it leads to no incident. But it may lead to an incident, with grave consequences, as the 1985 Heysel stadium tragedy has shown. People can be killed in crowd movements if escape ways are obstructed. To prohibit standing on the stairways is a very light intervention. It is easy to apply; all spectators have an assigned seat and can therefore stand in front of the assigned seat. If this light intervention is compared to its purpose, the safety of the spectators in an emergency-situation, these rules are obviously proportional.
73. UEFA is entitled based on the association autonomy to regulate for the benefit of the safety of the spectators a norm that requires the organizer of a football match to keep the stairways free.
74. The Appellant submits that there is a risk that the state security and safety regulations may conflict with the UEFA safety and security specifications. It cannot be expected of the clubs taking part in the UEFA competitions that they should accept the risk of such a collision of laws. This risk of a collision is, however, not given in the case at hand. It follows from the respective confirmation of the police and fire authorities that state and safety security regulations were not violated. However, UEFA has its own regulations regarding the stairways and this regulations require that the stairways have to be kept free. In terms of keeping the stairways free, Article 38 of the UEFA Safety and Security Regulations is stricter than the state regulations. The conflict which the Appellant is referring to would only be given, if the state regulations require that people stand or sit in the stairways, which is certainly not the case. The Appellant mentioned in the final pleadings that German provisions foresee that security personnel must stand on the stairways which, according to the Appellant, is in contradiction to UEFA-rules. However, this issue can be left open, since UEFA did not only sanction Schalke because security personnel were standing on the stairways, but also because many other persons were standing on the stairways as well.
75. The different scope of the state and the UEFA regulations is also confirmed by the two letters of the Gelsenkirchen police and the Gelsenkirchen fire department. Both refer to security-relevant behaviour. The security regulations of the state cover the minimal requirements which apply to all organizers of football matches in Gelsenkirchen or, for that matter, North Rhine-

Westphalia or Germany. UEFA has decided to apply a stricter standard regarding the safety of the spectators. The level of this standard is higher than the standard required by state regulations in relation to the building permit, the fire authorities and the police.

76. Article 38 of the UEFA Safety and Security Regulations reads in its English version: *“The match organizer must take measures to ensure that all public passageways, corridors, stairs, doors, gates and emergency exit routes are kept free of any obstructions, which could impede the free flow of spectators”*. The focus of this rule is clearly that the stairs must be kept *“free of any obstructions”* and not only obstructions, which could impede the free flow of spectators. If the rule would only apply to those obstructions which impede the free flow of spectators, the rule would be very difficult to apply, since the effect of the obstruction would always have to be considered when applying the rules.
77. A security regulation which would only be violated if it could be established that the free flow of spectators is impeded would be very impractical indeed. It would require a constant monitoring of the situation by security personnel. If only obstructions which could impede the free flow of spectators would be forbidden, then the security personnel would have, at a certain point in time when this level is reached, to request the number of spectators standing on the stairways which make the difference between the status of free flow of spectators and impediment of the same to leave. This is impractical and may lead to another security risk in that the persons on the stairs have to leave or in that not all persons standing on the stairways are treated equally. Further, who should be entitled to decide whether the obstructions impede the free flow of spectators, the head of security for the whole stadium or the security officer on site? These uncertainties show that such interpretation of the rule in question would be impractical and rather impede the security of the spectators instead of improving it. A rule which requires that all stairways must be free of any obstructions (even if they do not impede the free flow of spectators) is easy to use, practical and does not lead to different interpretations.
78. According to Article 38 of the UEFA Disciplinary Regulations *“facts contained in official UEFA reports are presumed to be accurate. Proof of the inaccuracy may, however, be provided”*. Article 38 of the UEFA Disciplinary Regulations creates a “regulatory assumption”, that the statements contained in official UEFA reports are correct. This regulatory assumption shifts the burden of proof to the Appellant in this case. The function of the burden of proof is to allocate who bears the risk that the proof of a specific fact is not possible. The regulatory assumption that the report of the UEFA inspector is correct results in a shift of the burden proof to the Appellant.
79. To assume a “regulatory assumption” in this case makes sense, because only the Appellant has the domestic authority (Hausrecht) and only the Appellant has the possibility to secure the evidence in this respect, for example to take pictures or video-recordings of the behaviour of the spectators (see also fig. 86). UEFA has not this possibility to secure evidence and for this reason UEFA depends on a regulatory assumption that the inspector’s report describes the event correctly. Without this assumption UEFA would not be able to proof violations of UEFA-regulations since it has no access to the respective evidence (UEFA provided video-

clippings of the game, which also showed the situation on the stairways, but the Appellant found them to be not conclusive).

80. The UCL Delegate Report and the Additional Report describe a violation of Article 38 of the Security and Safety Regulations. In the UCL Delegate Report it was stated that Schalke supporters were standing on the stairways and thereby blocking them with the Additional Report of 1 October 2014 describing more precisely that *“FC Schalke 04 supporters were standing in two aisles of the North Stands, behind the goal, throughout the match”*. As shown above, the statement in the UCL Delegate Report and Additional Report enjoy the regulatory assumption to be correct, thereby shifting the burden of proof on the Appellant. Both reports have to be analysed in a consolidated matter and they both describe a violation of Article 38 UEFA Safety and Security Regulations. The statement of the delegate that *“no incident to be indicated (...)”* does not nullify the statement regarding spectators on the stairways; it merely confirms that the fact that spectators stood on the stairways had no serious consequences.
81. Further, the Appellant had signed the entry form for the 2014 / 2015 UEFA club competitions and thereby explicitly agreed to be bound by UEFA’s regulations.
82. However, the fact that the Appellant did not appeal against the UEFA decisions rendered in relation to similar behaviour on 20 June 2011 (fine of EUR 5,000) and 17 October 2013 (fine of EUR 7,500) cannot be considered as *venire contra factum proprium*. UEFA could not assume that Schalke accepts the regulations in questions only on the circumstance that Schalke did not challenge these decisions.
83. As evidence that the Appellant complied with Article 38 of the UEFA Safety and Security Regulations, the Appellant filed two pictures which were taken at the Match. At the hearing, Mrs J., witness summoned by the Appellant, declared that the first photo shows sectors N 1 and N 2, the second photo the sectors N 5 and N 6 and that both photos show two stairways. In the N 1 / N 2 photo the stairways in sector N 1 and N 2 are more (N 1) or less (N 2) free of spectators. In the N 5 / N 6 photo the stairways in sector N 6 are more or less free of spectators, but the stairway in sector N 5 can only be identified by the orange vests of the security personnel. However, the free flow of spectators was undoubtedly impeded in the stairways of sector N 5.
84. The UCL Delegate Report and the Additional Report referred to Schalke supporters who were standing in two aisles of the North Stands, behind the goal. The sectors behind the goal are sectors N 3 and N 4. Photos of the sectors N 3 and N 4 were not provided by the Appellant.
85. At the hearing, J. further mentioned that the “Ultras” supporters of Schalke, do stand on the stairways, but that they organize themselves and that the security situation in these fan blocks is equivalent to other parts of the Stadium or even better. The Sole Arbitrator holds in the respect that the Safety and Security Regulations of UEFA (which are applicable to this situation) do not exempt a specific group of spectators, even if they are able to organize themselves.

86. The Appellant has deleted the video material which was taken at the Match. It claims that this video footage had to be deleted for reasons relating to German data protection / privacy law. Such video footage may have allowed a better analysis of what happened on the stairways. The Appellant knew right after the UCL Delegate Report was filed the same night that a potential fine by the UEFA could be handed down since the UCL Delegate Report described a violation of the UEFA rules. According to German scholars, German data protection and privacy-law (§ 6b para. 5 Bundesdatenschutzgesetz) allows to keep video recordings as long as these video recordings are required as proof in a criminal or civil case (SCHOLZ in SIMITIS, Bundesdatenschutzgesetz, § 6b, at para 78, 81 and 139; BRINK in WOLFF/BRINK, Datenschutzrecht in Bund und Ländern, § 6b, at para 48 and 113). The Appellant was aware that a violation of Article 38 of the UEFA Safety and Security Regulations may lead to sanctions by UEFA. In fact, there have been similar incidents in the last five years where a similar sanction was given.
87. At the hearing, UEFA asked J. to comment on the submitted video clips of the official footage of the Match. One clip shows sectors S 1 to S 6 which, according to J. is mirror-inverted to sectors N 1 to N 6. The clip shows that the stairways in sectors S 1 to S 6 are completely free of spectators, while in the clips which show sectors N 1 to N 6, the stairs in the lower part in sector N 3 to N 5 cannot be seen. The Appellant submits that the angle of the video clip is different; the clips showing the sectors N 3 and N 5 were taken from the side. However, the video clip in exhibit 14 (this exhibit was not shown at the hearing) was taken from the opposite sector, showing the Match at minute 91, demonstrates that the lower parts of the stairways were completely blocked by spectators.
88. As shown above, the burden of proof that spectators blocked the stairways lies not with UEFA. Indeed, the Appellant bears the burden of proof that spectators did not block the stairways. The Appellant submitted only photos which show sector N 1 and N 2 and sector N 5 and N 6. No photos were provided of the sectors N 3 and N 4, even though these are sectors that the UEFA delegate referred to. In the photo showing sector N 5 and N 6 the second stairway is so crowded that, if one looked only briefly at the photo, only one stairway can be seen. In the stairways in sector N 5, undoubtedly, the free flow of spectators was impeded.
89. UEFA has the competence to adopt regulations which protect the spectators, such as Article 38 of the UEFA Safety and Security Regulations. The focus of this rule is clearly that the stairs must be kept "*free of any obstructions*" and not only obstructions which could impede the free flow of spectators. A security regulation which would only be violated if it is established that the free flow of spectators is impeded would be impractical, it would require a constant monitoring of the situation by security personnel. For this reason, it must be concluded that the Appellant violated Article 38 of the UEFA Safety and Security Regulations.
90. The Appellant submits, that Article 19 para.1 lit. d) of the UEFA DR does not apply to this case, because of the methodology of Article 19. According to Article 19 para. 1 lit. a) UEFA DR, offenses which have led to a one-match suspension can be taken into account as repeat offenses if they have been committed within one year of the previous violation. The Appellant contends that for sanctions with less than a one-match suspension Article 19 para. 1 lit. d)

UEFA DR (consideration of a period of five years) cannot be applied. The Appellant assumes that the sanction in question, a fine of EUR 10,000, is inferior to a one-match suspension.

91. In Article 6, disciplinary measure, the UEFA DR divide disciplinary measures into disciplinary measures which may be imposed on member associations and clubs and disciplinary measures which may be imposed on individuals. The disciplinary measures in Article 19 para. 1 lit. a) and b) UEFA DR , *i.e.* a one-match or two-suspension, are sanctions which can only be imposed on individuals (*cf.* Article 6 para. 2 lit. d) UEFA DR. Only lit. c) and d) of Article 19 para. 1 UEFA DR apply to individuals, member associations and clubs. Therefore, Art. 19 Para. 1 lit. a and b are not relevant to interpret the content of Article 19 para. 1 lit. d) in this case. On an ancillary remark, it has to be noted that the offenses which are punished with a one or two-match suspension relate to field-of-play behaviour or actions which can often be explained (explained, not justified) by the heat of the game and the moment. For clubs and associations it is generally acknowledged that recidivism must be assumed if an offense of a similar nature is committed within five years. Only for corruption and match-fixing cases the time limit for recidivism is ten years. In view of the above, the Sole Arbitrator holds that the Appellant is to be considered recidivist.
92. The sanction contains two elements: the sanction which would have been imposed on the Appellant without recidivism, and an aggravating element for recidivism. The appellant has only contested the aggravating element (recidivism), but not the sanction as such (without recidivism). It is undisputed, that UEFA sanctioned the Appellant for similar behaviour on 20 June 2011 with a fine of EUR 5,000 (FC Schalke 04 vs. Valencia CF of 9 March 2011) and by decision of 17 October 2013 (FC Schalke 04 v. FC Steaua Bucharest of 18 September 2013) with a fine of EUR 7,500. UEFA, in handing down a fine of EUR 10,000, has considered the Appellant's recidivism as an aggravating element. The Sole Arbitrator comes to the conclusion that the Respondent has not exceeded its discretionary powers and deems the fine not disproportionate.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by FC Gelsenkirchen-Schalke 04 e.V. on 23 March 2015 against the decision of the UEFA appeals body of 2 February 2015 is dismissed.
2. The decision issued by the UEFA appeals body on 2 February 2015 is confirmed.
- (...)
5. All other motions or prayers for relief are dismissed.