Enlarged Partial Agreement on Sport
epas
Accord Partiel Élargi sur le Sport

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 28 March 2011 EPAS (2011) 23

**Enlarged Partial Agreement on Sport (EPAS)**

Hearing on the draft Recommendation on "Manipulation of Sports Results"

# PROVISIONS OF INTERNATIONAL LEGAL INSTRUMENTS ON TREATING BRIBERY IN SPORT AS A CRIME

**Information document**
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## I. Introduction

On many different occasions in recent years it has been proven that sport is not immune from types of behaviour which attract enormous attention and sometimes even end in some form of criminal proceedings. Not so very long ago very few cases of crime in sports were reported and these mainly concerned the abuse of different types of drugs. Nowadays, however, we increasingly frequently find ourselves faced with the problem of so-called match-fixing - illegally influencing the course and/or the result of a sports match or competition. Beyond all doubt, the commercialisation of sport, which includes the very lucrative nature of some types of sport activities and the even more lucrative gains from sport-related betting, has led to the establishment of commercial structures whose main activities are concentrated in the area of sport. Some of those structures (i.e. lawfully established betting operators) are of a fully legal nature and some of them – at least according to the latest findings of law-enforcement agencies throughout the world - are not.

Fresh developments in this area have given rise to a new challenge for all those who are interested in ethical and objectively competitive sports, whose outcome is never a foregone conclusion. In view of these new threats, it would not be enough if sports organisations were the only ones fighting to maintain the real spirit of sport. They require the help of the wider public in the form of state institutions. In view of their enormous losses as a result of illegal betting it is also surmised that betting operators would also take part in these actions.

Normally, sports activities should be free from any state influence, but there are cases where the state could and should intervene, for example if the basic rules of society are breached. In such cases state intervention should be seen as an attempt to assist sportspersons to protect the basic nature of sport. In order to involve the state in these activities, it is necessary to identify basic – i.e. legal - norms, requiring state protection. Since the problem of match-fixing clearly has international dimensions, it is obviously necessary to establish international legal rules to deal with the problem.

In order to apply the law a factual situation has to be described, which then serves as a starting point for the application of legal rules. In the case of match-fixing the most common factual situation is the following: at least one person directly or indirectly incites another person (who has to be an active participant in the match) to illegally influence the course or result of the match and also incites other persons to place bets on the fixed match. This description of the factual situation will serve as a starting point for the identification of international legal rules that could be applied.

## II. Match-fixing as a form of corruption

The expression "match-fixing" is sometimes replaced in the relevant literature by the expression "sport bribery", covering four possible criminal offences: active and passive bribery and/or active and passive trading in influence. In attempting to achieve their ultimate aim, ie. to influence the course or result of a match, perpetrators will, as part of the incitement, most often offer, promise or give something to the person taking part in the match (players, sports officials, referees...) or to the person, who can influence active participants in the match.

The first problem arises if the active participant in the match or his/her intermediary is not being given, offered or promised anything. Obviously, in such instances there is no bribery.

Then there is an additional problem: perpetrators usually do not promise, offer or give anything to people who are betting on fixed matches although they are gaining a great deal since they know about the illegal nature of the match. In such a situation people who are betting, and thereby enabling the whole system of match-fixing, cannot be penalised for bribery and will be left out of any legal proceedings since they cannot be prosecuted as accessories and abettors or anything else in the context of bribery offences.

Offering or promising something to somebody for a specific sort of action or deliberate omission usually constitutes a criminal offence - bribery or trading in influence - but a problem arises owing to the specific nature of sport: should it be considered as part of the public or the private sector? In relation to other aspects of the criminal offences of bribery and trading in influence, there is no problem in match-fixing as described – with the exceptions mentioned above - since they are all covered by the provisions of international legal instruments.

### II.1. Sport as a public sector activity

If sport is considered to be a public sector activity, active participants in the match are considered to be "public officials". In such a case, international legal instruments cover the factual situation described above (but - as explained above - only with regard to the organiser, the intermediary and the active participant in the match). There are many different international legal instruments recommending that countries make national and international active and passive bribery and trading in influence in the public sector a criminal offence. For the purposes of this paper the two broadest international legal instruments will be taken into consideration: the UN Convention against Corruption (UNCAC), which is an international legal instrument, and the Council of Europe Criminal Law Convention on Corruption (ETS 173), which is a European legal instrument. There are some other international legal instruments in this area (i.e. the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the EU Convention on the Protection of the European Communities' Financial Interests with additional protocols, the EU

Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union,..) but they are much narrower in scope.

***a) United Nations Convention against Corruption:***

- Article 15 provides for (the Convention uses the words "State Party shall..") the mandatory incrimination of bribery of national public officials,
- Article 16, Paragraph 1 provides for (in the same manner as in Article 15) the mandatory incrimination of active bribery of foreign public officials and officials of public international organisations,
- Article 16, Paragraph 2 provides for the non-mandatory incrimination (the Convention uses the words "State Party shall consider..") of passive bribery of foreign public officials and officials of public international organisations,
- Article 18 stipulates, in a non-mandatory manner, (the Convention uses the words "State Party shall consider…") that State Parties should incriminate trading in influence of public official or any other person related to the undue advantage obtained from the "administration or public authority".

***b) Council of Europe Criminal Law Convention on Corruption:***

- Article 2 provides for the mandatory (the Convention uses the words "Each Party shall..") incrimination of active bribery of domestic public officials,
- Article 3 provides for the mandatory (the Convention uses the words "Each Party shall..") incrimination of passive bribery of domestic public officials,
- Article 5 provides for the mandatory (the Convention uses the words "Each Party shall..") incrimination of (active and passive) bribery of foreign public officials but according to Article 37 of the same Convention State Parties are allowed to enter reservations concerning the passive bribery offence of this Article,
- Article 9 provides for the mandatory (the Convention uses the words "Each Party shall..") incrimination of bribery of officials of international organisations,
- Article 12 provides for the mandatory (the Convention uses the words "Each Party shall…") incrimination of trading in influence in relation to national, foreign or international public officials but according to Article 37 of the same Convention State Parties are allowed to enter reservations concerning this Article.

To summarise, if sport is considered to be part of the public sector, a wider range of possible forms of corrupt misbehaviour relating to match-fixing already have to be covered by state parties to both conventions - but not all. Issues, which are not covered, are the following:

- betting on fixed matches (unless the people betting play no active role in the match-fixing),
- trading in influence, since, according to both conventions, countries have the option not to criminalise it,
- passive bribery of foreign public officials, since, according to both conventions, countries have the option not to criminalise it,
- passive bribery of officials of public international organisations outside Europe, since, according to the UNCAC, state parties have the option not to criminalise it.

The above-mentioned findings lead to the conclusion that match-fixing in countries where sport is part of the public sector is not necessarily completely covered by international legal instruments' provisions on bribery or trading in influence.

II.2. Sport as a private sector activity

In the majority of countries sport is not considered to be part of the public sector but part of a private sector. Under international legal instruments bribery in the private sector is incriminated separately from bribery in the public sector. Here again, the provisions of the UNCAC and the Council of Europe Criminal Law Convention will be taken into consideration.

***c) United Nations Convention against Corruption:***

- in Article 21 the "private sector" is described as "economic, financial or commercial activities",
- the same Article recommends, in a non-mandatory manner, (the Convention uses the words "the State Party shall consider") that countries incriminate active and passive bribery in the private sector.

***d) Council of Europe Criminal Law Convention on Corruption:***

- in Articles 7 and 8 the "private sector" is described as "business activity",
- in Article 7 countries are recommended, in a mandatory manner, (the Convention uses the words (Each Party shall..") to incriminate active bribery in the private sector, but according to Article 37 of the same Convention State Parties are allowed to express reservations concerning this Article,
- in Article 8 countries are recommended in a mandatory manner (the Convention uses the words (Each Party shall..") to incriminate passive bribery in the private sector but according to Article 37 of the same Convention State Parties are allowed to enter reservations concerning this Article.

To summarise, if sport is considered as part of the private sector several problems arise concerning possible forms of corrupt misconduct related to match-fixing:

- betting on fixed matches (unless the people betting play no active role in the match-fixing) is not covered – in the same manner as in the previous chapter on sport as part of the public sector,
- "private sector" is defined in different ways leaving the possibility open that in some countries sport would not "fit" into such definitions at all. If sport in those countries is also not considered as part of the public sector that would basically mean that the provisions of international legal instruments on bribery in such countries generally cannot be applied to corruption cases in sport,
- (active and passive) bribery in the private sector does not have to be criminalised since both conventions give countries the option not to do so.

The above-mentioned findings lead us to the conclusion that match-fixing in countries where sport is considered as part of the private sector is not necessarily

completely covered by international legal instruments' provisions on bribery in the private sector.

## III. Match-fixing as a form of organised crime

If international legal instruments do not satisfactorily cover bribery offences in sport, the question is whether other provisions could be applied. The United Nations Convention against Transnational Organised Crime (UNTOC) is the most viable option. The UNTOC recommends that its State Parties incriminate different types of conduct, sometimes by referring explicitly to specific types of offence (Article 6 – money laundering, Article 8 – corruption, Article 23 – obstruction of justice) and sometimes by referring to the context in which the offence is perpetrated (Article 5 – participation in an organised criminal group). While incrimination of money laundering covers the consequences of match-fixing, provision on the incrimination of corruption is even narrower than that set out in the UNCAC. It is obvious that Article 5 provides the widest possible options:

*UNTOC, Article 5: Criminalization of participation in an organized criminal group*

1. *Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

   *(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:*

   *(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;*

   *(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*
   *a. Criminal activities of the organized criminal group;*
   *b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.*

It is important to note that criminalisation of participation in an organised criminal group refers to "serious crime" and to "organized criminal group".

### III.1. "Serious crime"

In Article 2 of the UNTOC the term "serious crime" is described as "offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". In other words, in order to apply Article 5, match-fixing would have to include at least one criminal offence punishable by at least a four year prison sentence. The criminal offence, which first comes to mind in the context of match-fixing is the criminal offence of fraud, which in some randomly chosen countries is described as:

*"Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts"…..* (Germany);

*Whoever, with the intention of acquiring unlawful property benefit for himself or a third person by false representation, or by the suppression of facts leads another person into error or keeps him in error, thereby inducing him to perform an act or to omit to perform an act to the detriment of his or another's property"….* (Slovenia);

*If person by deception induces someone to commit or omit to commit some act which involves gain for the accused and loss for the deceived or someone represented by the latter.."* (Sweden).

Sentences for the given examples include at least four years' imprisonment (Germany up to 5 years) in cases of aggravated bribery (e.g. Sweden: gross fraud with imprisonment from 6 months to 6 years; Slovenia: fraud involving at least two persons, imprisonment from 1 to 8 years). Therefore, the only question which remains open is whether we can speak of fraud when we speak about cases of match-fixing? Definitions of fraud, as given in the cases of Germany, Slovenia and Sweden, allow us to come to such a conclusion. In some cases "the deceived" or "another person" or "another" will be the club, which has suffered a loss due to match fixing, but in all cases "the deceived", "another person" or "another" will be betters who lose their money as a result of the bets put on a fixed match without knowing that it has been fixed.

III.2. "Organized criminal group"

The term "organized criminal group" in Article 2 of the UNTOC is described as a "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". The "structured group" in the same Article 2 is defined as "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structured".

There are different forms of match-fixing: from a single case by an individual perpetrator (which in practice is very rare) to the most dangerous cases, which have been taking place for years and have a well-established and well-functioning structure of betting-operators, match-fixing organisers and active participants in the matches. The only case of match-fixing which is not covered by the UNTOC is the case of the individual perpetrator - active participant in the match – (alone or with one person assisting), but in such cases the social danger of the offence is minimal and does not cause any particular concern. Moreover, the basic criminal offence of fraud can be applied here, too.

All other cases, involving two or more persons, acting for the first time or already over a longer period of time, are at least theoretically covered by the provision of Article 5. The problem, which might emerge in practice, is the wording in Article 5.1.a -"either or both"- leaving State Parties the choice to decide what to

criminalise: criminal agreement as stipulated in Article 5.1.a.i or active participation in the organized criminal group as stipulated in Article 5.1.a.ii. Since the latter could also be understood in a sense that partly covers the first option also, the only problem which might emerge is the situation where State Parties would choose not to incriminate "criminal agreement" as stipulated in Article 5.1.a.i, leaving agreement of two persons on commitment of serious crimes uncovered. Here again, the social danger of agreement on match-fixing (not followed by concrete action) involving only two persons is not very great, especially if we bear in mind that the perpetrators could without any further doubt be punished for either bribery or fraud for their possible concrete actions.

## IV. Conclusion

On the basis of the above analysis, it can be concluded that there is no tailor-made legal solution in international legal instruments for cases of match-fixing, which would be a "one for all" solution. But there are different partial possibilities, which allow us to draw the conclusion that match-fixing is already covered by existing international legal provisions.

Firstly, in some cases the provisions on bribery and/or trading in influence can be applied but this might leave a large number of perpetrators (those who are "only" betting in the knowledge that the matches are fixed) unpunished. Within this limited scope, the provisions of the UNTOC on the criminalization of participation in an organized criminal group dealing in corruption might sometimes also be applied.

Secondly, the criminal offence of fraud exists in all national legislations and is defined in almost the same way in all countries. The definition of fraud corresponds to the actual behaviour of perpetrators in match fixing and covers all of them – those organising match-fixing and those exploiting match-fixing. Another advantage of applying the criminal offence of fraud is the fact that the penalties, at least for aggravated cases (which is usually the case in organised match-fixing), are high enough to apply the mandatory provisions of the UNTOC on the criminalization of participation in an organized criminal group. Other requirements of Article 3 of the UNTOC on the scope of application of the Convention are also fulfilled in cases of organised match-fixing.

Thirdly, the UNTOC and ETS 173 provisions on criminalization of the laundering of the proceeds of crime, in our case of fraud or bribery, can also be applied in cases of match-fixing.

Match-fixers can therefore be punished for the criminal offences of bribery, trading in influence, fraud, participation in an organized criminal group and money laundering; it all depends on their actions and intent.

Therefore, in order to effectively fight match-fixing internationally there is no need for changes in the area of criminal offences at the level of international legal instruments. Nor is there any need for radical changes at the level of national legislation. In a very limited number of countries some definitions – concerning the position of sport in the public or private sector - could be slightly adjusted and, also, in a very limited number of countries, the sentences provided for basic cases of fraud could be slightly increased. In comparison to the enormous proceeds gained by perpetrators from match-fixing world-wide over recent years, such an effort should not place too heavy a burden on countries.