

6.4 The role of Switzerland as host: moves to hold sports organisations more accountable, and wider implications

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Background

Switzerland is an attractive base for international sports organisations,² on account of its geographic location, highly qualified workforce, political stability, neutrality, security, quality of life and, most importantly, its very liberal legal code and attractive tax regime.³ It is no coincidence that these important bodies organising worldwide sports have all chosen the legal form of a Swiss association, granting maximum flexibility and autonomy to the organisation.⁴

Although the importance of Swiss law for international sporting associations is considerable, the importance of these organisations for Switzerland is also not to be underestimated. A recent survey by the International Academy of Sports Science and Technology (AISTS) showed that the 45 main international sporting associations headquartered in Switzerland contributed an average of CHF 1.07 billion (some US\$1.16 billion) annually to the Swiss economy between 2008 and 2013.⁵

These numbers show that sport and sporting associations have experienced significant professionalisation and commercialisation in recent years. In line with this growth, numerous measures are either in the process of being implemented or at the planning stage to combat the increased scope for corruption and betting manipulation in sport at the national and international levels. It is therefore incumbent on Switzerland, as a hub of international sporting associations, to rise to the challenge with a range of measures of its own. This article highlights out the most important changes under way in Switzerland regarding the investigation and prosecution of corruption in sport.

The current situation

Although Switzerland is perceived to be one of the countries least affected by corruption,⁶ regular amendments to the criminal law on corruption are necessary as it applies to international sport organisations.⁷ The seven-member Swiss Federal Council – which serves as the Swiss head of state – approves such amendments.

Bribery under Swiss criminal law

Article 332 of the Swiss Criminal Code punishes the active and passive bribery of Swiss or foreign public officials. These rules are special torts, which means that bribery is punishable under criminal law only if the individual bribed is a public official. A public official must be either a member of an authority or a court, an official, an officially appointed expert, a translator, an interpreter, a referee or a member of the army.⁸ Sports organisations as legal entities under Swiss private law and their officials cannot be categorised as public officials in the meaning of the Swiss criminal code.⁹ Therefore, according to the law at the time of writing, there is no criminal liability for the bribery of officials of international sports organisations.

Bribery under Swiss competition law

In addition to the criminalisation of the bribery of officials there also exists a legal basis against private bribery in Switzerland. Under the law at present, private corruption is a criminal offence only if it leads to a distortion of competition within the meaning of the Federal Act against Unfair Competition (UWG). Article 4a of the act covers both active (granting of an advantage) and passive (acceptance of an advantage) corruption, but it is pursued only if an individual who is affected files a complaint.¹⁰ An affected person can be a worker, a partner, an agent or an assistant of any other third person.¹¹ Private bribery is always based on a triangular relationship, whereas the bribed

individual (the agent) stands in a fiduciary relationship with the primarily damaged individual (the principal).¹²

The applicability of the Federal Act against Unfair Competition presupposes a competitive relationship between the participating parties in such an act, however.¹³ Therefore, it was unclear whether the act was applicable in the field of sport or not. In a ruling given in 2004, the Federal Council expressed the opinion that article 4a of the act did apply to non-governmental organisations (NGOs) – and therefore sports organisations – if they are in a competitive relationship.¹⁴ In the opinion of the authors, there can be no doubt that organisations such as the Fédération Internationale de Football Association (FIFA) and the International Olympic Committee (IOC) are in a competitive relationship. The Federal Council also said, however, that it doubted whether it would be ‘business conduct’ within the meaning of the act (UWG) if members of an association received financial benefits in preferring the bid of a city that was aiming to host a major sporting event.¹⁵ Otherwise, if an attempt was being made, with bribery payments to or from private companies, to influence a competitive relationship, such as the conclusion of sponsorship agreements, then such an act could already qualify as bribery under the current Federal Act against Unfair Competition.¹⁶

Box 6.1 Match-fixing and the law in Switzerland

One might have expected match-fixing to qualify as a crime under applicable laws in Switzerland. In 2012, however, the Federal Criminal Court held that football players allegedly involved in match-fixing could not be subject to criminal sanctions.¹⁷

The court came to its conclusion on the grounds that, under the Swiss Criminal Code (article 146), for the crime of fraud to have been committed it was necessary for a human being to have been misled, not an electronic betting system.¹⁸ In the case before the court,

however, three football players had been accused of manipulating, or trying to manipulate, football games and generate winnings on electronic betting platforms. As no specific individuals had been misled or manipulated, the court was of the opinion that it had no choice other than to discharge the accused players.¹⁹

There are other ways to approach this matter, however, as the example of the Swiss Association of Football Players shows; the association, as part of its 'Show Respect – Don't Fix It!' campaign, has implemented a match-fixing hotline, through which players and coaches can confidentially and anonymously report notices of alleged match-fixing.²⁰ State rules protecting whistleblowers are still absent in Switzerland, however, even though they are crucial to combating any kind of corruption.

Legal changes under way

Swiss Criminal Code

Improvement is in sight. There have been moves in the Swiss Parliament to change the law so that private bribery becomes an ex officio crime (meaning that such crime has to be prosecuted by the State prosecutor in case of any knowledge of such crime and without any intervention of any third party) in the future and punishable under the Swiss Criminal Code.²¹ Following the same recommendation from a Groupe d'États contre la Corruption (GRECO) report,²² the Federal Council therefore commissioned the Swiss Federal Department of Justice and Police to consider making private bribery an ex officio crime and transferring it from the Federal Act against Unfair Competition to the Swiss Criminal Code. Unlike the act, the Criminal Code does not have a requirement that a competitive relationship has to be proved.

The Commission for Legal Affairs of the Council of States adopted the outline proposal against private bribery unanimously on 25 April 2015. Contrary to the proposal of the Federal Council,

however, the majority of the Commission did not want ex officio prosecution in less serious cases. The majority of the Council of States followed the recommendation of the Commission and wanted to ensure that no criminal proceedings should be carried out in minor cases. One Member of the Council of States, Pirmin Bischof of the Christian Democratic People's Party of Switzerland (Kanton Solothurn) claimed that if for example the employee of a baker accepts a bribe to he buy a particular furnace for the bakery, his supervisor should decide on the conduct of criminal proceedings. This led to the decision by the Commission that private bribery should be prosecuted only on request, if by doing so no public interests were injured or endangered.²³ In the overall vote, held on 3 June 2015, the Council of States approved the new law by 23 votes to four, with 16 abstentions. At the time of writing the law still has to be approved by the House of Representatives.²⁴

New money-laundering rules

One of the major changes in Swiss law regarding the fight against corruption in sport associations has concerned the amendments to the money-laundering rules. In recent years the Organisation for Economic Co-operation and Development (OECD), through its Financial Action Task Force (FATF) on money-laundering (also known as the Groupe d'Action Financière: GAFI), has urged its member countries – including Switzerland – to tighten their money-laundering regulations.²⁵ On 12 December 2014 the Act on the Implementation of the Revised Recommendations of FATF was adopted by the Swiss Parliament.²⁶ In these amended recommendations the FATF has extended the definition of a politically exposed person (PEP) to include senior politicians and officials of international sports organisations based in Switzerland.²⁷

The most important amendments, which now also affect officials of sports organisations, are that cash transactions may not exceed CHF 100,000 (some US\$108,000) and that serious tax offences are considered as a predicate offence to money-laundering.²⁸ This means that a seller has to identify

and register any person who wants to pay more than CHF 100,000 in cash, or the money has to be transferred.

Conclusion

As the most important hub for the world's most important sports organisations, it is crucial that Switzerland lead by example in the fight against corruption in sport. It would seem that the country's legislature is now starting to see this; this may be why Switzerland is the first signatory of the Convention on the Manipulation of Sports Competitions.²⁹

Protecting the integrity and credibility of sport requires enhanced governmental regulation. The indictment by US authorities and arrest of 14 current and former FIFA officials in Zurich on 27 May 2015³⁰ clearly shows that sport organisations' corporate governance rules are insufficient. The fight against corruption in sport is primarily the task of the private sports organisations, but states' legal systems and their governments must provide these organisations with the necessary legal framework. In the past sport organisations in Switzerland always asserted their autonomy, and until now the state has granted this autonomy. With autonomy comes responsibility, however, and whether this responsibility has been lived up to or not in the past remains an open question. Given that an organisation of the stature of FIFA was apparently unable to do so, it seems the only logical consequence that the state should now try to intervene in a regulatory way.

Corruption in sport must be combated by all stakeholders joining forces, working together with the state authorities. Legal reforms are a first and important step in the right direction. It is clear that, in Switzerland at least, the force of criminal authority is required, to make use of compulsory measures, as the civil law is inadequate to deal with illegal activities carried out by the most powerful organisations, such as FIFA and the IOC.

Notes

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² These include the IOC, FIFA, the Union of European Football Associations (UEFA), the Union Cycliste Internationale and the International Federation of Gymnastics.

³ Swissinfo.ch, 'Swiss set to get tough over sports corruption', 2 October 2014, www.swissinfo.ch/eng/new-rules_swiss-set-to-get-tough-over-sports-corruption/40801520.

⁴ Pursuant to article 60 et seq. of the Swiss Civil Code: Lucien Valloni and Thilo Pachmann, *Sports Law in Switzerland*, 2nd edn (Alphen aan den Rijn, Netherlands: Wolters Kluwer, 2014), §1 N 1.

⁵ Amandine Bousigue and Claude Stricker, *The Economic Impact of International Sports Organisations in Switzerland 2008–2013* (Lausanne: International Academy of Sports Science and Technology, 2015), www.aists.org/sites/default/files/publication-pdf/aists_economic_impact_study-english-web.pdf. All but one organisation participated in the study.

⁶ See Transparency International, 'Corruption by Country/Territory: Switzerland', www.transparency.org/country#CHE.

⁷ See the press release of the Federal Council from 30 April 2014 about the amendments to the Swiss Criminal Code (criminal law on corruption).

⁸ See articles 322^{ter} and 322^{quater} of the Swiss Criminal Code.

⁹ Kommission für Wissenschaft, Bildung und Kultur des Ständerates, 'Korruptionsbekämpfung und Wettkampfmanipulation im Sport: Bericht in Erfüllung des Postulats 11.3754' (Berne: Kommission für Wissenschaft, Bildung und Kultur des Ständerates, 28 June 2011), p. 35, www.baspo.admin.ch/internet/baspo/de/home/aktuell/bundesrat_genehmigt_korruptionsbericht.parsys.83108.downloadList.8434.DownloadFile.tmp/28529.pdf.

¹⁰ Marco Balmelli and Damian Heller, 'Gutachten Sportbetrug und Good Governance' (Basel: Basel Institute on Governance, 5 December 2012), p. 25, N 81.

¹¹ *Ibid.*

¹² Deborah Hauser, 'Korruption im Sport', in Jusletter (Switzerland), 13 May 2012, N 9.

¹³ 'Message of the Federal Council concerning the Approval and Implementation of the Criminal Law Convention and the Additional Protocol of the Council of Europe on Corruption (Amendment of the Swiss Criminal Code and the Federal Law against unfair Competition)', BBI 2004 6983.

¹⁴ *Ibid.*, p. 7007.

¹⁵ *Ibid.*, pp. 7009 f.

¹⁶ *Ibid.*, p. 7010.

¹⁷ The judgement is available at

http://bstger.weblaw.ch/cache/pub/cache.faces?file=20121113_SK_2012_21.htm&query=Sport&ul=de.

¹⁸ Sportslawcircle.ch, 'Match fixing no crime', 16 November 2012, <http://sportslawcircle.com/sports-law/blog/match-fixing-no-crime>.

¹⁹ *Ibid.*

²⁰ Swiss Association of Football Players, 'Show Respect – Don't Fix It! Hotline Regeln', www.safp.ch/show-respect-dont-fix-it-hotline-regeln.

²¹ Federal Assembly of Switzerland, 'Parlamentarische Initiative 10.516, Fifa: Bestechung von Privatpersonen als Offizialdelikt', www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20100516.

²² Groupe d'États contre la Corruption, 'Council of Europe Group of States against Corruption calls for rules on political funding and increased effectiveness of certain anti-corruption provisions in Switzerland', press release, 2 December 2011, [www.coe.int/t/dghl/monitoring/greco/news/News\(20111202\)Eval3_Switzerland_en.asp](http://www.coe.int/t/dghl/monitoring/greco/news/News(20111202)Eval3_Switzerland_en.asp).

²³ See the media release of the Commission for Legal Affairs of the Council of States of the Federal Assembly of Switzerland, 'Einschränkung der Verfolgung von Amtes wegen', 24 April 2015, www.parlament.ch/d/mm/2015/Seiten/mm-rk-s-2015-04-24.aspx.

²⁴ Current status, 26 June 2015. See

www.parlament.ch/d/suche/seiten/legislaturrueckblick.aspx?rb_id=20140035.

²⁵ Swissinfo.ch, 'Switzerland tightens its money-laundering rules', 13 December 2014,

www.swissinfo.ch/eng/business/coming-clean_switzerland-tightens-its-money-laundering-rules/41168000.

²⁶ The Federal Council decided on 29 April 2015 to set the federal law into force in two steps. First, the autumn 2015 Peer Review of the Global Forum on transparency and exchange of information for tax purposes requires the enactment of the provisions on transparency of legal entities and bearer shares as

soon as possible, which is why these provisions are set in force on 1 July 2015. The remaining legislative amendments then require either the drafting of implementing regulations at ordinance level or certain implementation work by the affected norm addressees. With enactment planned for 1 January 2016, the necessary time should be given in particular to financial intermediaries and self-regulatory organisations according to the Money Laundering Act in order to arrange implementation. See www.sif.admin.ch/sif/de/home/themen/bekaempfung-der-finanzkriminalitaet.html.

²⁷ 'Message of the Federal Council concerning the Implementation of the Recommendations of the Financial Action Task Force, Revised in 2012, SR 13.106', BBl 2014 585, p. 620.

²⁸ Swissinfo.ch (13 December 2014).

²⁹ See Council of Europe, 'Convention on the Manipulation of Sports Competitions', <http://conventions.coe.int/Treaty/EN/Treaties/Html/215.htm>. This treaty, pledging better prevention and prosecution of match-fixing and corruption in sports, was discussed and signed by 30 European sports ministers in Magglingen/Macolin, Switzerland, in 2014, and according to the Swiss Federal Office of Sport (Bundesamt für Sport: BASPO) the Swiss sports minister, Ueli Maurer, led the meeting: www.baspo.admin.ch/internet/baspo/de/home/aktuell/sportminister_unterzeichnen_konvention_gegen_wettkaempfmmanipulation.html.

³⁰ This is the scandal surrounding FIFA regarding the arrests in Zurich on 27 May 2015 as well as the start of criminal proceedings in the United States against several FIFA officials: see, for example, Schweizer Radio und Fernsehen, 'Zum Nachlesen: Protokoll der Ereignisse um den Fifa-Skandal', 27 May 2015, www.srf.ch/news/international/zum-nachlesen-protokoll-der-ereignisse-um-den-fifa-skandal.