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Match-fixing, the Macolin Convention and Swiss Law: An Overview

On September 1st, 2019, the European Convention on the Manipulation of Sport Competitions (also known as the Macolin Convention) entered into force. In Switzerland, its implementation led mainly to the adoption of Art. 25a of the Sport Promotion Act, which criminalizes the manipulation of sport events on which bets are offered. In this paper, we review the various criminal regulations in force in order to attempt an assessment of the scope and coverage of the current criminal law provisions on match-fixing in Switzerland.

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1. Introduction

[1] In 2012, a specific match-fixing[1] case attracted the Swiss lawmakers' attention. After an investigation which had begun in 2009 in the context of the wider «Bochum file»[2] (where more than two hundred football matches in nine European countries where suspected to be rigged, out of which twenty-two Swiss league matches and six friendly matches), the Federal Criminal Court's final verdict was to acquit the accused persons, although match-fixing had been largely proven (and even admitted by one of the players). In its decision of November 13th, 2012, the Court stated that Swiss criminal laws in force at this time were unsuitable to convict the accused persons[3]. Indeed, although the Swiss Criminal Code (SCC)[4] provides for crimes such as bribery (Art. 322ter to 322decies SCC) and fraud (Art. 146 and 147 SCC), it did not contain any specific criminal provision capturing match-fixing and the general offences mentioned above were considered unsuitable by the court in that case.

[2] Recognizing both the threat that match-fixing poses on society as well as the insufficient coverage provided at that time by Swiss criminal provisions and bearing in mind that Switzerland is home to the vast majority on international sport organizations, Swiss lawmakers decided to take firm action against this threat.

[3] Thus, Switzerland signed in 2014 and ratified in 2019 the Council of Europe's Convention on the Manipulation of Sport Competitions (CETS No 215, hereinafter, the «Macolin Convention»), which aims at combatting match-fixing worldwide.

[4] More importantly, a new criminal law provision tackling specifically match-fixing was introduced in the Sport Promotion Act (SpoPA)[5], at its Article 25*a*, and entered into force on January 1st, 2019.

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1 In this paper, the terms «manipulation of sports competitions» and «match-fixing» are used interchangeably, except when otherwise indicated.

2 Europe's largest match-fixing trial opens in Bochum, DW (Oct. 6, 2010), http://www.dw.com/en/europes-largest-match-fixing-trial-opens-in-bochum/a-6082391; Match-fixing trial kicks off, Swissinfo (Nov 8, 2012), https://www.swissinfo.ch/eng/sports-corruption_match-fixing-trial-kicks-off/33915494.

3 Swiss Federal Criminal Court, TPF 2013 46 (SK.2011.33), judgment of Nov 13th, 2012.

4 Swiss Criminal Code of 21 December 1937; CC 311.0.

5 Federal Act on the Promotion of Sport and Exercise of 17 June 2011; CC 415.0.

[5] This article describes the new legal framework applicable to match-fixing in Switzerland and addresses some of the questions that remain open after the introduction of this new offence.

2. A brief overview of the Macolin Convention

[6] Although initiated and adopted in the context of the Council of Europe, the Macolin Convention aims to have a global role as it is also open for signature and ratification by non-European states. To date (September 2019), the Convention has been signed by thirty-seven States (including by one non-European State, *i.e.* Australia) and ratified by six[6] of them. It entered into force on September 1st, 2019.

[7] The Macolin Convention is structured in nine main parts (chapters): Purpose, guiding principles and definitions, including the definition of a manipulation (Articles 1 to 3); Prevention, co-operation and other measures (Articles 4 to 11); Exchange of information, including the creation or the identification of a national platform (Articles 12 to 14); Substantive criminal law and co-operation with regard to enforcement (Articles 15 to 18); Jurisdiction, criminal procedure and enforcement measures, including the protection of reporting persons and witnesses (Articles 19 to 21); Sanctions and measures (Articles 22 to 25); International co-operation in judicial and other matters (Articles 26 to 28); Follow-up to the Convention (Articles 29 to 31); and final provisions (Articles 32 to 41).

[8] Match-fixing (or «Manipulation of sports competitions») is defined as an «intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others»[7]. Importantly, this definition covers not only manipulations altering the *result* of a match or competition, but also any manipulation which influences «the natural and fair course» thereof, notably through a foul, penalty or action on the field altering the intermediate result or phase of the game[8]. This is also called «micro-manipulation» or «spot-fixing»[9].

[9] It is important to mention that the Convention involves all relevant stakeholders, namely public authorities, sports organizations and sports betting operators. It establishes important mechanisms of information exchange through national platforms (Art. 13) and cooperation regarding law enforcement.

[10] National platforms are especially worthy of interest as they serve as information hubs that collect, analyze and disseminate relevant intelligence and information, as well as take on the role as coordinators of criminal and disciplinary investigations and proceedings related to sports manipulation[10]. The national platform is the place where the implementation of all the Convention's

6 Italy, Norway, Portugal, Republic of Moldova, Switzerland, and Ukraine.

7 Macolin Convention Art. 3.4.

8 Explanatory Report to the Council of Europe Convention on the Manipulation of Sports Competitions, Art. 3, Sep. 18, 2014, C.E.T.S. 215, at 54, p. 9.

9 Madalina Diaconu, The European Response to Match-fixing: A Legal Update, Columbia Journal of Transnational Law, to be published.

10 Marc Henzelin et al., Why «national platforms» are the cornerstone in the fight against match-fixing in sport: the Macolin Convention, LawInSport (June 18, 2018), https://www.lawinsport.com/topics/articles/item/why-national-platforms-are-the-cornerstone-in-the-fight-against-match-fixing-in-sport-the-macolin-convention.

provisions culminates. To date, 29 national platforms have been created and can function in a coordinated manner[11]. Such platforms have proven to be very effective, notably in a recent case involving match-fixing in tennis[12].

[11] According to its declared purpose, the Convention «seeks to make sure that manipulation of sports competitions may be *criminally* sanctioned when it either involves coercion, corruption or fraud, as defined by domestic law» (emphasis added)[13]. This recommendation towards the criminalization of the most significative aspects of match-fixing was followed by around thirty countries, which have adopted specific provisions penalizing match-fixing.

[12] Such countries include Argentina, Australia, Brazil, Bulgaria, People's Republic of China, Denmark, El Salvador, France, Germany, Greece, India, Italy, Japan, Republic of Korea, Latvia, Malta, New Zealand, Paraguay, Poland, Portugal, the Russian Federation, South Africa, Spain, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States of America[14].

3. Swiss criminal law provisions applicable to match-fixing

[13] The wrongdoing which consists of altering the result or the course of a sport competition, for pecuniary or non-pecuniary purposes (including for betting purposes), can potentially be captured by several Swiss criminal law provisions. Firstly, the Swiss Criminal Code (SCC) provides for crimes such as fraud, computer fraud and bribery (*i.e.* corruption); secondly, the newly amended Sport Promotion Act (SpoPA) includes, since January 1st, 2019, a specific penal offence on competition manipulation under the title «Measures to combat Competition Rigging». These penal offences are presented hereinafter.

3.1. Fraud (Art. 146 Swiss Criminal Code)

[14] Art. 146 SCC incriminates fraud (*Betrug; escroquerie; truffa*). It provides that:

> [1] Any person who with a view to securing an unlawful gain for himself or another wilfully induces an erroneous belief in another person by false pretences or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests, is liable to a custodial sentence not exceeding five years or to a monetary penalty.
> [2] If the offender acts for commercial gain, he is liable to a custodial sentence not exceeding ten years or to a monetary penalty of not less than 90 daily penalty units.

11 See Council of Europe, Network of National Platforms (Group of Copenhagen), https://www.coe.int/en/web/sport/network-of-national-platforms-group-of-copenhagen-.

12 In June 2018, Belgian authorities, through their national platform, cooperated with their Bulgarian, Dutch, French, German, Slovakian, and US counterparts in what has been described as one of the largest law-enforcement operations ever staged against tennis corruption, leading to simultaneous raids taking place in other countries across Europe and ending in the arrest of 13 people linked to organized crime.

13 Explanatory Report to the Council of Europe Convention on the Manipulation of Sports Competitions, Art. 15, Sep. 18, 2014, C.E.T.S. 215, at 130, p. 21.

14 See a detailed analysis in the UNODC-IOC 2017 Study, pp. 23 et seq, as well as Annex 1 («National Legislation Providing a Specific Match-Fixing Offence»).

> [3] Fraud to the detriment of a relative or family member is prosecuted only on complaint.

[15] As such, this provision would *prima facie* capture match-fixing as this wrongdoing is a form of cheating. However, the Swiss Federal Supreme Court's jurisprudence has long clarified that, in order for this article to apply, the victim must be a *physical* person, excluding legal entities or machines[15].

[16] Therefore, this provision cannot be applied to cases where the victim is a legal entity (such as a club or a federation) nor to cases such as the one described in the Introduction, where match-fixers rig a competition for betting purposes through the use of an automatic process (a system which registers bets, then delivers gains).

[17] Considering the fact that currently the vast majority of betting is performed online, through the use of automatic systems, we can safely assume that the practical importance of Art. 146 SCC for combatting match-fixing for betting purposes is very limited. Nonetheless, this provision can capture match-fixing for betting purposes if the betting process is human-controlled instead of automatic, as in this case, the frauded person (the bookmaker) is a physical person.

[18] This provision remains also useful to tackle manipulation of sport competitions outside of betting purposes, where the victim is a physical person (for instance, competition manipulation in individual sports, without any automated betting involved, could be captured under this provision).

3.2. Computer fraud (Art. 147 Swiss Criminal Code)

[19] As Art. 146 SCC applies only if the victim is a human being and does not apply to corporations or other legal entities, nor if the process has been automatized, the legislator introduced another provision to cover the automatized fraud[16]. Cosequently, Art. 147 SCC incriminates computer fraud (*Betrügerischer Missbrauch einer Datenverarbeitungsanlage; Utilisation frauduleuse d'un ordinateur; Abuso di un impianto per l'elaborazione di dati*). It reads as follows:

> [1] Any person who with a view to his own or another's unlawful gain, by the incorrect, incomplete or unauthorised use of data, or in a similar way, influences the electronic or similar processing or transmission of data and as a result causes the transfer of financial assets, thus occasioning loss to another, or immediately thereafter conceals such a transfer is liable to a custodial sentence not exceeding five years or to a monetary penalty.
> [2] If the offender acts for commercial gain, he is liable to a custodial sentence not exceeding ten years or to a monetary penalty of not less than 90 daily penalty units.

15 Swiss Federal Criminal Court, TPF 2013 46 (SK.2011.33), judgment of Nov 13th, 2012, at 1.4.6b and 2.1; Swiss Federal Criminal Court, SK.2012.21, judgment of Nov 13th, 2012, at 1.4.8 and 2.1; Swiss Federal Criminal Court, SK.2016.48, judgment of Feb 14th, 2017, at 2.3.3.4; Swiss Federal Supreme Court Jurisprudence 6B_544/2017, judgment of Dec 11th, 2017. These four cases are related to sport fraud, but the same rule applies more generally since 1970: only a human being can be the victim of a fraud (Swiss Federal Supreme Court Jurisprudence 96 IV 185, at 1 and 2).

16 Swiss Federal Supreme Court Jurisprudence129 IV 315, at 2.1.

> [3] Computer fraud to the detriment of a relative or family member is prosecuted only on complaint.

[20] Therefore, Swiss law provides for a special provision criminalizing fraud perpetrated through the use of a computer. Art. 147 SCC is similar to Art. 146 SCC, but differs from it because the author does not mislead a human being, but manipulates a machine to obtain an inaccurate result leading to a transfer of assets. In other words, instead of deceiving a person, the perpetrator distorts the conditions that determine the machine's reaction[17].

[21] However, this provision is not very useful in match-fixing cases as it only incriminates incorrect, incomplete or unauthorized use of data[18]. In the case of match-fixing, the data transmitted to bookmakers does not fulfil these conditions. Indeed, it is the match that is rigged, not the bet itself, which only relies on a rigged result or event.

3.3. Bribery (Art. 322 *octies* and 322 *novies* Swiss Criminal Code)

[22] Since 2016, Swiss law incriminates bribery (corruption) of and by private individuals, both in the active mode (giving bribes)[19] and in the passive one (accepting bribes)[20]. Those provisions read as follows:

> Art. 322^{octies}:
> [1] Any person who offers, promises or gives an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion is liable to a custodial sentence not exceeding three years or to a monetary penalty.
> [2] In minor cases, the offence is only prosecuted on complaint.

> Art. 322^{novies}:
> [1] Any person who as an employee, partner, agent or any other auxiliary of a third party in the private sector demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion is liable to a custodial sentence not exceeding three years or to a monetary penalty.
> [2] In minor cases, the offence is only prosecuted on complaint.

17 Swiss Federal Supreme Court Jurisprudence 129 IV 22, at 4.2.

18 As it is used in Art. 147 SCC, the word «data» has to be understood as the information processed, stored and transmitted by means of a computer. A «data» contains, on the one hand, information and, on the other hand, a technical component; it is therefore information converted into technical language (Michel Dupuis et al., Petit Commentaire – Code pénal (PC CP), 2nd edition, Bâle (Helbing & Lichtenhahn), 2017, pp. 973 s., ad Art. 147, at 3; Nicolas Queloz, Johanna Sadik, in: Commentaire Romand - Code pénal II, Alain Macaluso, Laurent Moreillon, Nicolas Queloz (eds), Bâle (Helbing & Lichtenhahn), 2017, ad Art. 147, at 5, p. 393.

19 Art. 322^{octies} SCC.

20 Art. 322^{novies} SCC.

[23] As revealed by the so-called «FIFA-Gate»[21], the new provisions are an important step forward in the fight to preserve sport's integrity. Indeed, under Swiss law, agents of national and international sport bodies are not considered as public agents and they are consequently not captured by the provisions criminalizing bribery or undue advantages concerning public officials (Art. 322ter to 322^{sexies} SCC). However, the new offenses contained in Art. 322^{octies}(giving bribe) and 322^{novies}(accepting bribe) of the Swiss Criminal Code, applicable to private individuals, are fully suitable in cases of match-fixing when the «external» fixer (often a member of a crime syndicate) bribes an «internal» fixer (typically, a player, coach, referee, etc.) in order to alter the result or course of a sport competition, irrespective of whether bets are proposed on such competition.

[24] Therefore, as it will be detailed under chapter 4.3 hereinafter, these provisions constitute a useful complement to the new offence introduced in Art. 25*a* Sports Act, as the latter only concerns match-fixing for betting purposes.

3.4. Match-fixing for betting purposes (Art. 25*a* Sport Promotion Act)

[25] Art. 25*a* SpoPA covers both indirect (in para. 1) and direct (in para. 2) rigging of a sports competition. Under the heading «Measures to combat Competition Rigging – Criminal provision», it provides that:

> [1] Any person who, for his own benefit or for the benefit of a third party, offers, promises or grants an undue advantage to a person who exercises a function at a sports competition at which sports betting is offered in order to falsify the outcome of that sports competition (indirect competition rigging) shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.
> [2] Any person who exercises a function at a sports competition at which sports betting is offered and who requests, secures the promise of or accepts, for his own benefit or for the benefit of a third party, an undue advantage in order to falsify the outcome of that sports competition (direct competition rigging) shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.
> [3] In serious cases, the penalty shall be a custodial sentence not exceeding five years or a monetary penalty; any custodial sentence shall be combined with a monetary penalty. A serious case arises in particular where the offender:
> a. acts as a member of a group that has been formed for the purpose of the continued conduct of indirect or direct competition rigging;
> b. achieves a large turnover or substantial profit by acting commercially.

[26] This new provision is clearly a sub-variant of the bribery offence[22]. Paragraph 1 provides for criminal liability in the context of a sports competition on which bets are proposed for whoever offers, promises or gives an undue advantage, with the aim of altering the course of that competition in favor of the corruptor or of a third party. The sanction provided for is up to three years of

21 Wikipedia, 2015 FIFA corruption case, https://en.wikipedia.org/wiki/2015_FIFA_corruption_case.

22 Message concernant la loi fédérale sur les jeux d'argent du 21 octobre 2015,FF 2015 7627 ss, 7746 ss.

imprisonment or a day-fine between 3 and 180 days[23]. Paragraph 2 provides for the same sanction for a person who, exercising a function in the context of a sports competition, asks a promise of or accepts an undue advantage in order to alter that sports competition. Paragraph 3 of the same article provides for aggravating circumstances, *i.e.* in particular when the offender acts as a member of a group that has been formed for the purpose of competition rigging, or if he or she acts commercially and achieves a large turnover or a substantial profit.

[27] In addition, Articles 25*b* and 25*c* SpoPA aim to associate the inter-cantonal authority for surveillance with the criminal proceedings (Art. 25*b*), and to provide for exchange of information procedures between the inter-cantonal authority for surveillance and the criminal enforcement authorities (Art. 25*c*).

[28] The ingredients of an offence under Art. 25*a* para. 1 SpoPA are[24]: an author (*i.e.* whoever); an incriminated behavior (*i.e.* offering, promising or granting an undue advantage); an undue advantage (*i.e.* an improvement of the beneficiary's situation by a material or immaterial advantage); a target (*i.e.* a person who exercises a function at a sports competition, *e.g.* an athlete, a referee, a coach, an organizer, etc.); a sport competition at which sports betting is offered (*i.e.* a ruled and competitive act of sports where a betting opportunity is offered[25]); a prior agreement between the parties[26]; a counterpart of the target (*i.e.* falsifying the outcome of a sports competition, or in other words a match-fixing); an equivalence between the undue advantage and the counterpart; intention of the author (*i.e.* consciousness and willingness).

[29] And the ingredients of an offence under Art. 25*a* para. 2 SpoPA are an author (*i.e.* a person who exercises a function at a sports competition, *e.g.* an athlete, a referee, a coach, an organizer, etc.); an incriminated behavior (*i.e.* requesting, securing the promise of an undue advantage or accepting such an undue advantage, for his own benefit or for the benefit of a third party); an undue advantage (*i.e.* improvement of the beneficiary's situation by a material or immaterial advantage); a sport competition at which sports betting is offered (*i.e.* a ruled and competitive act of sports where a betting opportunity is offered[27]); a prior agreement between the parties[28]; a counterpart of the author (*i.e.* falsifying the outcome of a sports competition, or in other words a match-fixing); an equivalence between the undue advantage and the counterpart; intention of the author (*i.e.* consciousness and willingness).

23 Art. 34 SCC.

24 For more details, see Miriam Mazou, Fabio Burgener, Manipulations de compétitions sportives, Plaidoyer 3/19, p. 38 – 41.

25 This element is hardly understandable because one would have expected that each sporting event would be protected, even if there is no competition and/or no betting opportunities. Therefore, it seems that this provision is not intended to protect fair play in sport, but rather sport as an object of bets (see Message, p. 7746).

26 This point is not directly apparent from the text of the provision, but from the Message (p. 7747). The Swiss Federal Supreme Court could therefore interpret it differently and sanction even without prior agreement.

27 On this point, see the remark made at footnote 25.

28 On this point, see the remark made at footnote 26.

4. Open questions after the adoption of the new match-fixing offence (art. 25*a* SpoPA)

4.1. Was criminalization of match-fixing necessary?

[30] The criminalization of match-fixing is not unanimously supported. In general, sport organizations as well as international governmental organizations consider that match-fixing is a form of corruption and, as such, must be sanctioned by criminal law[29]. Some scholars share this view and consider it «undisputable that the adoption of a criminal provision fighting against competition manipulation must be welcome»[30]. Other legal scholars doubt that such wrongdoing should have been criminalized and consider that the protected value (sports integrity) should be safeguarded by specific sports regulations, which are of a non-criminal nature[31].

[31] To date, the issue seems rather rhetorical in the context of match-fixing as Art. 25*a* Sports Act was adopted and is already in force but is still allive with respect to doping offences committed by athletes[32]. We are however of the opinion that criminalization of match-fixing is preferable, *inter alia* because it triggers for the accused person (notably, for the sportspersons) the application of all the fundamental principles and guarantees specific to criminal law. Indeed, one recalls the sanctioning policy for doping offences, where associative rules on doping have shown that sports associations seek to punish, but often without respecting the fundamental rules of criminal law, such as the necessity to determine if the accused person acted intentionally or not. Thus, in application of the strict liability doctrine[33], each athlete is strictly liable for the substances found in his/her body, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault[34]. But in criminal law, there is no place for an objective criminal liability. Thus, for the proper application of the fundamental rules of criminal law and in order to avoid the injustice to sportspersons, it is sometimes preferable to consider «confiscating» the right to punish and conferring it solely to judicial authorities.

4.2. Is «tactical loss» a crime?

[32] According to the Macolin Convention, the undue advantage sought by the «fixers» may take the form of financial gain (*e.g.* a bonus, a bribe or winnings from bets, etc.) but also of any

29 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Developing the European Dimension in Sport, COM (2011) 12 final (Jan. 18, 2011).

30 Miriam Mazou, Fabio Burgener, Manipulations de compétitions sportives, Plaidoyer 3/19, p. 41.

31 Nadja Capus, Escroquerie, fraude et blanchiment de fraude fiscale, in: Droit pénal – Evolutions en 2018, Anne-Sylvie Dupont, André Kuhn (eds), Helbing Lichtenhahn, 2017, p. 31. For a view on the non-criminalisation of other aspects of sports, such as doping, see André Kuhn, Un mode alternatif de lutte contre le dopage: la libéralisation ?, in: Aspects pénaux du droit du sport, Collection CIES, André Kuhn, Laurent Moreillon, Aline Willi-jayet (eds), Staempfli Editions SA Berne, 2002, pp. 293 ss.

32 See notably Alix De Courten, Le sportif dopé est-il un escroc ?, in : André Kuhn, Laurent Moreillon, Aline Willi-Jayet (eds), Aspects pénaux du droit du sport, Staempfli Editions SA Berne, 2002, pp. 281 ss; Olivier Bigler, Nicolas Zbinden, La nouvelle loi sur l'encouragement du sport : du sport utile à l'utilité du sport, in: Antonio Rigozzi, Dominique Sprumont, Yann Hafner (eds), Mélanges en l'honneur de Denis Oswald, Bâle (Helbing & Lichtenhahn), pp. 313 ss.

33 See World Anti-Doping Agency, Strict Liability in Anti-Doping, https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping.

34 See inter alia Salomeja Zaksaite, Hubert Radke, The interaction of criminal and disciplinary law in doping-related cases, Int Sports Law J (2014) 14: 115.

other tangible or intangible advantage, such as advancing to a higher level in the competition or simply the «glory» of winning[35]. Therefore, losing a game «tactically» in order to influence the team's standings and adversaries for the rest of a competition is a match-fixing offence under the Macolin Convention.

[33] However, criminalization of the «tactical loss» of a match is not unanimously supported and certain scholars have openly criticized it, as it goes beyond the Convention's scope and objectives[36].

[34] We are of the opinion that the new match-fixing offence introduced by Art. 25*a* SpoPA does not follow, on this issue, the approach taken by the Macolin Convention. In other terms, in the light of the Swiss Sport Promotion Act, we believe that the «tactical loss» of a match in order to ensure a purely sporting advantage, *e.g.* better standings for the rest of the competition, is currently not criminally sanctioned (and should not be, in the future). For example, the fact that a coach decides not to align his best team for a match, when the result of that match is not decisive for the rest of the competition (thus deliberately taking a great risk of losing the game), or even the fact that he instructs his team to lose a match with the sole purpose of facing an easier opponent in the next stage of the competition, is not criminally repressible under Swiss law. In our opinion, obtaining a purely sporting advantage through the «tactical loss» of a game does not meet the gravity necessary to criminalize the respective behavior and is even inherent in sport tactics. Moreover, from a pragmatic perspective, it is very difficult to prove the existence of an adequate causality between such a behavior and any material or immaterial advantages that may be obtained at the end of the competition, which would make criminalization particularly difficult.

[35] If really necessary in the eyes of the governing federation, such a behavior could however be sanctioned by the relevant sporting regulations (see, for example, Art. 10 of the IOC Code of Ethics, Art. 29 FIFA Code of Ethics, etc.) or, even better, lead to a change of the rules of the game and/or the conduct of a competition.

4.3. Overlaps and concurrent offences

[36] The concurrent application of the criminal law provisions listed in chapter 3 here above, which potentially capture match-fixing, is disputed[37] and has not yet been clarified by the jurisprudence. We will offer an interpretation and pinpoint the possible overlaps of the different penal provisions discussed above.

[37] First, we mentioned that Art. 146 SCC (fraud) only applies if a physical person has been misled in such a way as to determine him or her to acts prejudicial to his or her pecuniary interests or those of a third party.

[38] Secondly, Art 147 SCC (computer fraud) applies if one manipulates a machine in such a way as to obtain an inaccurate result leading to a transfer of assets or its concealment.

35 Explanatory Report to the Council of Europe Convention on the Manipulation of Sports Competitions, art. 3, Sep. 18, 2014, C.E.T.S. 215, at 55, p. 10.

36 See, *e.g.*, Jean-Loup Chappelet, The Olympic Fight against Match-Fixing, 18 Sport Soc'y 1260, 1263 (2015).

37 See notably Miriam Mazou, Fabio Burgener, Manipulations de compétitions sportives, Plaidoyer 3/19, p. 41.

[39] Art. 147 SCC is thus subsidiary to Art. 146 SCC; if the manipulation of a machine is not sufficient to obtain the result, but a person must still be deceived, fraud takes precedence over the fraudulent use of a computer[38]. In other words, there is no overlap of Art. 146 and 147 SCC for the same criminal behavior.

[40] The same is true for Art. 322^{octies} and 322^{novies} SCC which are strictly independent from each other[39]. In other words, a same fact cannot be both active and passive corruption for the same perpetrator. This does not mean that in an interaction between two people, it would not be possible for one of them to give bribes to the other and then accept bribes from the other, but these would be two different criminal behaviors, which could be tried simultaneously but which do not overlap.

[41] Between the two sets of rules (Art. 146 and 147 SCC on the one hand and Art. 322^{octies} and 322^{novies} SCC on the other hand), since the protected legal values are not identical (the victim's assets on the one hand and mainly loyalty in human interactions on the other), an overlap between these two pairs of offences is clearly possible when the elements of both have been achieved. They could be applied concurrently, for example if one wilfully induces an erroneous belief in another person (main element of fraud) by failing to inform him or her that, as a result of an act of corruption, one already knows that the belief is wrong.

[42] If one adds Art. 25*a* SpoPA in the set of applicable legal provisions, one notices that its main protected legal value is said to be the fair-play in sport[40]. However, we mentioned that if so, one would have expected that each sporting event would be protected, even if there is no competition and/or no betting opportunities. Therefore, it seems that Art. 25*a* SpoPA is not intended to protect fair play in sport, but rather sport as an object of bets. This remark complicates the question of the overlaps with the other provisions because 25*a* SpoPA becomes more difficult to distinguish from fraud or computer fraud as well as from corruption (as it is a sub-variant of bribery). In some circumstances it could cover the same acts but protect other values, whereas in other circumstances (*e.g.* if there is no financial loss by a victim) they cover different things and, therefore, we consider that an overlap and a concurrent application is possible if the elements of both provisions are realized.

5. Conclusions

[43] In conclusion, we can illustrate our point with the image of a three-petalled flower formed of the three categories of crimes explained under Part 3 of this article. In the center there is an overlap (and sometimes concurrent application of the different legal provisions), but at the periphery each provision covers situations that are specific to it. The question we still have to resolve, therefore, is whether this flower covers the entirety of what the Macolin Convention is intended to repress in terms of manipulation of sports competitions (match-fixing).

[44] Our «flower» captures all the match-fixers whose intention was to induce an erroneous belief in a human being by false pretences or concealment of the truth to cause that person to act to

38 Swiss Federal Supreme Court Jurisprudence 129 IV 22, at 4.2.

39 See CR CP II-Nicolas Queloz, Johanna Sadik ad Art. 146, at 111 and ad Art. 147, at 22.

40 Message, p. 7746. If it would be so, the question of the overlap with the other provisions would find a very easy answer. As the protected legal value is different, the overlap and the concurrent application would always be possible.

the prejudice of his, her or another's financial interests (through Art. 146 SCC); it also covers the case of a manipulation of a machine to obtain an inaccurate result leading to a transfer of assets (through Art. 147 SCC).

[45] If the match-fixing went through an act of corruption, the perpetrators (individuals as well as corporations[41]) would be sanctioned according to Art. 322^{octies} and 322^{novies} SCC.

[46] And finally, in between, in the cases of match-fixing by a bribery for betting purposes, Art. 25*a* SpoPA completes Art. 146 and 147 SCC, as well as 322^{octies} and 322^{novies} SCC by covering specifically the cases where bets are involved.

[47] In other words, the only cases of match-fixing that are not criminalized yet under Swiss law are those where a «fraud» would be committed against a collective entity such as a corporation, federation, a club or other corporate organizers of a sports event, without any betting opportunity. This could be the case of a tactical draw arranged (explicitly or implicitly) by two teams at the expense of a third team in a minor competition for which no betting possibility is offered.

[48] Even if such a behavior could be shocking if it happened, for instance, in a kids league, in our opinion it does not require a new criminal provision, but should be covered by a sense of ethics that federations should be able to instill in their members.

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41 Art. 102 SCC.