Protection of Integrity by Punishment of Breaches

Independent Review of Integrity in Tennis

05

1. The Independent Review Panel (the "Panel") sets out below its provisional conclusions in relation to the protection of integrity by punishment of breaches. This covers the basis for, methods of and practical effectiveness of protecting integrity by adopting rules prohibiting behaviour and then detecting, investigating, proving and sanctioning breach of the rules. It encompasses action both by a sports body itself, and by law enforcement agencies and regulators.

2. This chapter describes the punishment of wrongdoing after it has occurred, as opposed to its prevention in the first place, which is dealt with in the next chapter. The Panel deals with them in this order because it is important to understand the limitations on the effectiveness of punishment after the fact, in order to understand how important it is that all possible steps be taken in pursuit of prevention.

3. That being so, this chapter describes the complexity and interconnection of legal environments and actors that play a role in the detection, investigation, prosecution and punishment of breaches.

Q 5.1 Are there other matters of factual investigation or evaluation in relation to the types of integrity issue addressed below that are relevant to the Review and that should be addressed in the body of the Final Report, and if so which, and why?

Q 5.2 Are there any aspects of the Panels' provisional conclusions in relation to those types of integrity issue that are incorrect, and if so which, and why?

A THE STATUTORY AND CONTRACTUAL BASIS FOR PUNISHMENT

4. Responding to breaches by way of punishment may be founded on two different legal bases: a statutory basis or a contractual basis. The former is rooted in national criminal law and international public law, through legislation and treaties, while the latter is rooted in a contractual relationship between sports governing bodies and players, through sports rules.

(1) OBLIGATION TO COMPLY WITH NATIONAL CRIMINAL LAW

5. The pivotal role of national criminal law in punishing conduct aimed at manipulating sports competitions is of paramount importance, since law enforcement agencies have more far-reaching investigatory powers, and the sanctions available are more significant and carry greater deterrent effect. Moreover, sports investigatory bodies and sports justice can only sanction players and others bound by the relevant rules. They cannot punish external actors such as betting operators, bettors and criminals involved in the manipulation of sports competitions.

6. In light of this, the punishment of betting-related corruption must be understood and considered not only in the context of the sport's rules and the actors covered by them, but also in the context of the more general framework of national criminal law. Whilst the Panel does not purport to set out a comprehensive description of the relevant system in any given country or at any given time, it makes general observations below as to some of the different ways that national laws treat match-fixing.

7. The situations that may come within the concept of "*match-fixing*" for the purposes of various national criminal laws are diverse, and they may not fall easily under the various relevant criminal law provisions, most of which were not originally designed to prevent and repress this phenomenon. For this reason, some countries have felt that there is a need for tailor-made criminal provisions and have accordingly established match-fixing as a specific criminal offence. However, even if this is the case, definitions and conditions vary from one country to another.

8. As observed below, match-fixing may be considered, alternatively or cumulatively, as involving the constituents of the following broad offences: (a) corruption, whether active or passive, public or private; (b) fraud; and/or (c) specific offences aimed at protecting sports integrity.

9. The Panel describes in broad terms herein the different ways that national laws may approach conduct amounting to match-fixing. Where appropriate, the Panel has included examples that help to illustrate how certain countries punish such conduct. These descriptions of national law are not intended to be comprehensive and, of course, will not reflect any legislative or judicial developments that occur after the publication of this Independent Review of Integrity in Tennis Review (the "Review").

Corruption

10. The Panel observes that many jurisdictions distinguish between active and passive corruption, on the one hand, and public and private corruption, on the other hand.

11. "*Active corruption*" occurs when someone promises, offers or gives, directly or indirectly, an undue advantage to any person who directs, or works in any capacity for, a public or private sector entity, whether the advantage is for the person himself or herself or for another, in order that that person, in breach of duty, acts or refrains from acting in a particular way.

12. "*Passive corruption*" occurs when a person who directs, or works in any capacity for, a public or private sector entity solicits or accepts, directly or indirectly, an undue advantage from someone, whether the advantage is for the person himself or herself or for another, in order that that person, in breach of duty, acts or refrains from acting in a particular way.

13. Theoretically, a player taking a bribe or accepting an advantage in order to act in breach of his or her disciplinary obligations or by failing to act appropriately could therefore be considered guilty of passive, private, corruption, while the person bribing him could be considered guilty of active, private, corruption. Moreover, a player who receives a bribe in order to lose a match and then also fixes the match with his opponent would be considered guilty of both passive and active, private, corruption.

14. For "*public corruption*" to be involved, the match-fixing offences would have to involve persons exercising public authority or performing public duties. In most of the jurisdictions examined, players and referees/umpires are not considered to be public officials.

15. The Panel understands that France is one of the few countries that may apply public corruption provisions to sports events, where, even if players are not considered to be persons performing public duties, both sport associations organising competitions and umpires or referees may be categorised as such under certain conditions. The Panel also observes that French criminal law classifies umpires as persons rendering a public service in situations where they are the victims of criminal offences on the playing field; thus, bribing an umpire in order to alter the outcome of a sports competition may constitute public corruption.

16. Other than this particular instance of public corruption, match-fixing is generally likely to be addressed as private corruption. The Panel observes that private corruption is a criminal offence in most of the jurisdictions that it examined, with some variations. Some countries only protect commercial activities from private corruption, and do not extend the application of private corruption to all occupational and social activities, such as non-profit activities – i.e. the sports sector – whereas others do. For example, the Panel understands that:

    16.1 In France, match-fixing by a professional player falls within private-sector corruption and French prosecutors typically bring corruption charges together with charges for other criminal offences;

    16.2 In England and Wales, match-fixing is not criminalised in itself but may be charged as one or more of a number of criminal offences that target private corruption, for example, a person bribing or being bribed;

    16.3 In the United States, match-fixing and other integrity breaches are punishable under various laws addressing private corruption, such as those prohibiting mail and wire fraud;

    16.4 Certain countries, such as Egypt, do not prosecute private corruption at all;

    16.5 In other countries, such as Switzerland, passive and active private bribery were criminalised in 2016, but these offences have not yet been tested before the Swiss courts in cases of match-fixing; and

    16.6 By contrast, in other countries such as Germany, match-fixing does not fall within private corruption offences.

Fraud

17. In certain jurisdictions, match-fixing may currently be regarded as falling under the offence of fraud. In general terms, this offence entails dishonestly obtaining money or something valuable through misrepresentation or other deception. There are, however, several variations or limitations on the possible application of the offence to match-fixing. For example, the Panel understands that:

    17.1 In Germany, if the offender places his or her bet via the internet, he or she may be found guilty of computer fraud. The players, managers, or referees involved in fixing a match do not commit an independent criminal offence, but are still criminally liable for aiding and abetting the bettor;

    17.2 In England, if match-fixing is committed by two or more persons in agreement with each other, the individuals may either be charged with conspiracy, irrespective of whether money has changed hands or the fix has taken place;

    17.3 In the United States, match-fixing may constitute fraud under several different statutes;

17.4 In Switzerland, match-fixing may be prosecuted under fraud, but only in relation to fixed-odds-style betting and not exchange-style betting, where the operator does not incur any loss when a match is fixed, but the other bettors who have bet against the corrupt bettor do. Further, only human beings may be deceived, not computers. The standard of proof for this offence is onerous, making match-fixing difficult to prosecute in Switzerland. The Panel understands that the focus of the offences is to protect property rights, not the credibility and integrity of the sport. Consequently, in spring 2017, the Swiss Parliament debated the introduction of a new specific criminal provision for match-fixing; and

17.5 In Egypt, betting and gambling are illegal acts; therefore, betting-related fraud cannot be prosecuted because fraud cannot be committed in relation to something that is prohibited by the law. This prevents parties potentially aggrieved by match-fixing from claiming direct damages in Egypt on the basis of an illegal practice.

18. Finally, the described offences often require that the perpetrator brings about a direct transfer of a financial asset from the deceived party to the perpetrator or a third person. For that reason, those crimes are unlikely to apply to the manipulation of matches without a betting element.

Specific match-fixing offences

19. The Panel observes that several of the jurisdictions examined have recently adopted, or plan to adopt, provisions specifically dealing with match-fixing in their national criminal laws. However, differences from one state to the other remain. For example, the Panel understands that:

19.1 In Australia, there are separate specific offences for facilitating or concealing betting-related corruption. The Panel understands that the standard of proof for match-fixing is quite low in Australia. Players' behaviour is assessed against the objective level of integrity that the public expects of them and not by reference to their subjective knowledge, or otherwise, of the dishonesty of the conduct. Similarly, agreements to engage in match-fixing are criminalised, potentially rendering guilty players who enter into such arrangements but get cold feet and do not go through with it. Another Australian innovation is the prohibition, in some states and territories, of the transmission of inside information, as opposed to the transmission of information only about corrupt conduct;

19.2 In Brazil, the specific offence of match-fixing is committed from the moment the person becomes aware of the acceptance, solicitation, offer, or promise to give an advantage. The advantage, or promise of advantage, can be of any nature: monetary, sexual, sentimental, and so on. Actual enrichment is not necessary;

19.3 In France, the offence of match-fixing excludes competitions that do not give rise to sports bets. Furthermore, it requires proof that a modification of the outcome of the bets (as opposed to the fair and normal course of the competition) was intended, and do not apply where players bet on themselves to lose a match or part of it (in which case, the player may be charged with fraud);

19.4 In Russia, the specific offence of match-fixing is limited to "*official*" sports competitions;

19.5 In Italy, the specific offence of match-fixing is limited to the manipulation, or purported manipulation, of professional competitions organised by any association recognised by the Italian National Olympic Committee, the Italian Horse Breeding Union or any state-recognised sports body and its member associations. The crime is deemed to have been committed even if the result of the match is not altered, or undue advantage has not been obtained. It is unclear whether these offences extend beyond players, referees and officials to also encompass trainers, managers, doctors, physiotherapists, and so on; in any case, it seems that managers or trainers could be punished under the more general offences relating to "*fraud*";

19.6 In Spain, the specific offence takes place even if the attempt to alter the result is not successful, or the fixer does not obtain a benefit or advantage;

19.7 In Turkey, the specific offence targets not only match-fixing, but rather, a number of irregularities in the sports community, including hooliganism and violence. Offering a benefit for a fixed result will also constitute the offence, irrespective of whether the attempt was successful. Anyone who provides information to the relevant authorities regarding a match-fixing arrangement, before the match, shall not be punished under this offence; and

19.8 In the United States, there is a specific offence that targets match-fixing at the federal level, but it has been seldom used. The criminal laws of several U.S. states, such as New York, California and Florida, also specifically address match-fixing.

20. In conclusion, even though most of the jurisdictions examined allow the prosecution of match-fixing of professional sports events in one way or another, the offence varies considerably from one country to another. The differences are sometimes extreme. For instance, in some countries, match-fixing is expressly designated as a criminal offence and it is clear that such conduct can be prosecuted; while in other countries, like Egypt, match-fixing does not seem to be prosecutable at all, or only with difficulty.

21. The fact that different countries deal with the offence of match-fixing under different types of criminal laws may lead to some difficulties when prosecutors have to ask for mutual legal assistance from other countries, especially when such assistance is provided on the basis of bilateral treaties and these treaties establish a list of offences that would not cover sports offences.

(2) JURISDICTION OF STATES TO APPLY NATIONAL CRIMINAL LAWS

22. Match-fixing may implicate one or more criminal offences within the same legal system. In these cases, each system provides for its own rules to reconcile apparent internal conflicts.

23. Internationally, states usually recognise their jurisdiction over an offence under the principle of territoriality, according to which the courts of the place where the crime is committed may exercise jurisdiction. In the case of match-fixing, it is noteworthy that on occasion the place where the offence takes place may be difficult to determine, as match-fixing not only involves several actions (the agreement to play against the rules, the betting, the actual play against the rules, etc.), which may occur in various different countries, but it may also include online betting across borders. The use of electronic means of communication (such as emails or Skype) may also extend the territorial scope of the offence.

24. Generally, the country where the match takes place should have jurisdiction, as well as the country where the participants are or were at the time of their agreement to fix the match. Other states may also accept jurisdiction over a match-fixing offence, because:

24.1 States usually consider that the conduct of their nationals is always subject to their criminal law (under the active nationality principle). The active nationality principle is, in particular, provided for by legal systems in the civil law tradition, which usually also ban extradition of nationals. In Nordic countries, the active personality principle is usually approached according to residence rather than nationality.

24.2 Many states can also accept jurisdiction over acts committed abroad by foreigners against a national of the state claiming jurisdiction (under the passive personality principle). For example, in the case of match-fixing, this would possibly give jurisdiction to the state of incorporation of a betting operator.

24.3 States have also adopted other principles of jurisdiction by treaty or by law (for example, the transfer of proceedings from one state to another[1]), which may apply in certain circumstances.

25. The above criteria of jurisdiction may lead to situations whether there are either positive conflicts of jurisdiction (i.e., situations in which two or more states have jurisdiction to prosecute) irrespective of whether the different national authorities are in actual disagreement, or of negative conflicts of jurisdiction (i.e., situations in which member states have jurisdiction, but choose not to exercise it).

1 For example the European Convention on the Transfer of Proceedings in Criminal Matters, ETS No.073, 1972, of which 35 countries are parties.

26. In most cases, match-fixing will concern multiple jurisdictions and actors. In such situations, it is not clear if, and how, law enforcement agencies decide to proceed when informed that match-fixing allegedly took place. This is even more the case when the offence of match-fixing is not a priority in the countries which have jurisdiction, and when the player has left the country after the match in question. In the latter situation (which is very common), an investigation needs immediate and decisive coordination between states. However, states are usually slow to cooperate and (even where they do) face obstacles, such as the prerequisite of an applicable treaty, and lack of resource and communication issues (particularly language barriers). Therefore, it is not a surprise that many of the recent examples of successful match-fixing investigations and prosecutions, such as those in Spain and Australia[2], involved local players acting locally, as opposed to international players playing internationally.

27. Due to these issues, the application of national criminal laws in certain situations may lead to complications in investigating and prosecuting suspects, and in certain cases may even lead to their being able to act with impunity.

(3) INTERNATIONAL CRIMINAL LAW

28. As regards investigating and prosecuting players involved in international competitions under national criminal laws, specific or generic instruments of international law may help to overcome the complications set out above.

Specific international instruments in relation to sports integrity: the Macolin Convention

29. In 2014, the Council of Europe adopted the Convention on the Manipulation of Sports Competitions (CETS No. 215, "Macolin" or "CMSC" Convention) and opened it for signature by the Council of Europe member states, the other state parties to the European Cultural Convention, the European Union and the non-member states that participated in its development or that enjoy observer status with the Council of Europe, as well as by other non-member states.

30. Member states of the Council of Europe that signed the Macolin Convention are Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxemburg, Montenegro, the Netherlands, Norway, Poland, Portugal, Moldova, Russia, Serbia, Slovenia, Spain, Switzerland, Ukraine. Member states that still have not signed are Andorra, Bosnia and Herzegovina, Croatia, the Czech Republic, Ireland, Latvia, Malta, Monaco, Romania, San Marino, Slovakia, Sweden, Macedonia, Turkey and the United Kingdom. The non-European countries that have also participated in the development of the Macolin Convention and for which the Convention is open for signature and ratification are Australia, Belarus, Canada, the Holy See, Israel, Japan, Kazakhstan, Mexico, Morocco, New Zealand, and the United States. None of these states, nor the European Union itself, have yet signed the Macolin Convention.

31. The Macolin Convention will enter into force upon ratification by five states, including three member states of the Council of Europe. To date, the Macolin Convention has been signed by 32 states and ratified by three states (Portugal, Norway and Ukraine). The Commission of the European Union still seems reluctant to authorise the EU member states to ratify the Macolin Convention, as it may impact on the free movement of services. In particular, Malta appears to oppose ratification by EU member states, as it perceives that the Macolin Convention may limit the (otherwise relatively lightly regulated) betting operators located in Malta in their ability to deliver betting services throughout Europe[3].

2 Simon Briggs, 'Police arrest 34 people in large scale operation against tennis match fixers' (The Telegraph, 1 December 2016), available at http://www.telegraph.co.uk/tennis/2016/12/01/police-arrest-34-people-large-scale-operation-against-tennis/ [accessed 9 April 2018] (Spain); and 'Australian Boys champion Anderson charged with match fixing' (Reuters, 5 January 2017), available at http://www.reuters.com/article/us-tennis-corruption-australia/australian-boys-champion-anderson-charged-with-match-fixing-local-media-idUSKBN14P2KR [accessed 9 April 2018] (Australia).

3 It appears that what Malta takes issue with in particular is the following definition of the term "illegal sports betting" as contained in the Convention: "any sports betting activity whose type or operator is not allowed under the applicable law of the jurisdiction where the consumer is located." Several EU member states strictly regulate the industry, while Malta's regulation has been lighter, with the result that various betting companies operate in Malta in accordance with Maltese regulations, but in a way that runs counter to the approach in other EU member states where consumers may be located, in accordance with the proposition that EU suppliers should be governed by the law of their place of establishment or "Point of Supply". The difficulty from the Maltese point of view appears to be that the definition above contemplates a test measured at the "Point of Consumption" instead, potentially rendering betting with certain companies operating out of Malta "illegal", delivering a big blow to the island's economy. In this regard see also, 'Online gaming: Malta stands its ground against the rest of the European Union' (Malta Independent, 18 September 2016), available at http://www.independent.com.mt/articles/2016-09-18/local-news/Online-gaming-Malta-stands-its-ground-against-the-rest-of-the-European-Union-6736163926 [accessed 9 April 2018].

32. The Macolin Convention contains definitions of amongst other things, "*sports competition*", "*sports organisation*", "*competitions organiser*", "*manipulation of sports competitions*", "*sports betting*", "*illegal sports betting*", "*irregular sports betting*", "*suspicious sports betting*", "*competition stakeholder*", "*athlete*", "*athlete support personnel*", "*official*", "*inside information*"[4].

33. For example, the Macolin Convention provides that "*Manipulation of sports competitions*" means "*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.*"[5]

34. It also provides that "*Inside information*" means "*information relating to any competition that a person possesses by virtue of his or her position in relation to a sport or competition, excluding any information already published or common knowledge, easily accessible to interested members of the public or disclosed in accordance with the rules and regulations governing the relevant competition.*"[6]

35. The Macolin Convention provides that each party shall ensure that its domestic laws criminally sanction manipulation of sports competitions when such manipulation involves either coercive, corrupt or fraudulent practices, as defined by domestic law. Similarly, parties to the Macolin Convention must adopt legal or other measures criminalising the laundering of the proceeds of criminal offences relating to the manipulation of sports competitions[7].

36. The Macolin Convention also sets out certain principles designed to overcome limitations inherent in national criminal laws, as addressed in Section A(2) above. The state parties must establish their territorial and national jurisdiction over match-fixing offences. Additionally, each state must take the necessary legislative or other measures to establish jurisdiction over match-fixing offences in cases where the alleged offender is present on its territory and cannot be extradited to another state party on the basis of nationality[8]. Should more than one party claim jurisdiction over an alleged offence referred to in Articles 15 to 17 of the Macolin Convention, the parties involved shall, where appropriate, consult each other with a view to determining the most appropriate jurisdiction for the purposes of prosecution.

37. The Macolin Convention also aims to improve the process of preventing, detecting, punishing and disciplining the manipulation of sports competitions. As part of this goal, the Macolin Convention aims to enhance the exchange of information and national and international cooperation[9] between the public authorities concerned, sports governing bodies and sports betting operators. The Macolin Convention calls on governments to adopt measures, including legislation, aimed at:

    37.1 preventing conflicts of interest between sports betting operators and sports governing bodies;

    37.2 encouraging sports betting regulatory authorities to fight against fraud, if necessary by limiting the supply of sports bets or suspending the taking of bets; and

    37.3 fighting against illegal sports betting by allowing governments to close or restrict access to the betting operators concerned and block financial flows between them and consumers.

38. Sports governing bodies and competition organisers are also required to adopt and implement: (a) stricter rules to combat corruption; (b) effective sanctions; (c) proportionate disciplinary and dissuasive measures in the event of offences; and (d) good governance principles. Lastly, the Macolin Convention provides safeguards for informants and witnesses.

4 Council of Europe Convention on the Manipulation of Sports Competition, 18 September 2014, Chapter I, Article 3, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801cdd7e [accessed 9 April 2018].

5 ibid., Chapter I, Article 3.4.

6 ibid., Chapter I, Article 3.7.

7 ibid., Chapter IV, Article 15.

8 ibid., Chapter V, Article 19.

9 See below at paragraph 165.

39. The ratification of the Macolin Convention – or at least the incorporation of its principles into national laws – would undoubtedly be of great assistance in the fight against corruption and match-fixing in sports. Ratification would introduce an understanding amongst all law enforcement agencies, which is generally lacking, that they must play an active and significant role in addressing the problem. It would pave the way for greater cooperation between states. Its geographical scope, while not global, would be wide enough to have a significant impact, since it would comprise all Western European and Eurasian members of the Council of Europe (including Armenia, Azerbaijan, Georgia, Russia, Turkey and Ukraine) and be open for signature to countries of great importance for tennis (Australia, the United States) and others of significant importance (including Belarus, Israel, Japan, Kazakhstan, Mexico and Morocco, among others).

40. The Macolin Convention promises, if fully implemented, to be a unique tool since "*it promotes a risk- and evidence-based approach and allows commonly agreed standards and principles to be set in order to prevent, detect and sanction the manipulation of sports competitions [by] involv*[ing] *all stakeholders in the fight against manipulation of sports competitions, namely public authorities, sports governing bodies and sports betting operators. To ensure that the problem is addressed in a global context, it allows states which are not members of the Council of Europe to be become parties by the convention* [sic]"[10].

41. If the Macolin Convention is fully implemented, it might well prove to be a milestone in the fight against the manipulation of sports competitions at the international level.

42. In January 2016, the Council of Europe and the European Union launched a joint project called Keep Crime out of Sport (KCOOS)[11]. The project aims at promoting the Macolin Convention, as well as providing countries with technical assistance in implementing measures to combat match-fixing and to regulate sports betting. Further, the project aims to raise awareness as to the issues of match-fixing and sports betting, and to support countries in their transposition of the Convention into national legislation, if applicable.

43. It should also be noted that the cooperative arrangements under the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (1985), which has been ratified or adhered to by 42 states, may be of some use pending the ratification and implementation of the Macolin Convention. While the treaty does not cover match-fixing directly, several of its provisions may apply to some related activities, such as the obligation to exclude particular individuals from venues.

General international instruments in relation to corruption: Council or Europe, OECD and UNCAC conventions

44. There are several conventions dealing with the issue of corruption that are not of a global nature, but are confined to a particular region, such as the Council of Europe Criminal Law Convention on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[12].

45. The United Nations Convention against Corruption ("UNCAC"), can on the other hand be considered as providing a potentially global legal framework[13], and therefore the analysis below focuses on it.

10 Explanatory Report to the Council of Europe Convention on the Manipulation of Sports Competitions (2014), 18 September 2014 (the "Explanatory Report to the Macolin Convention"), paragraph 17, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383f [accessed 9 April 2018].

11 For more see http://pjp-eu.coe.int/en/web/crime-out-sport/about-kcoos [accessed 9 April 2018].

12 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) deals with active bribery of foreign public officials in international business transactions only.

13 Study by the International Olympic Committee and the United Nations Office on Drugs and Crime, 'Criminalization approaches to combat match-fixing and illegal/irregular betting: a global perspective', July 2013, pages 277-278, available at https://www.unodc.org/documents/corruption/Publications/2013/Criminalization_approaches_to_combat_match-fixing.pdf [accessed 9 April 2018].

46. The UNCAC imposes a mandatory requirement on state parties to criminalise bribery of national public officials[14]. Article 16 further establishes that state parties must criminalise the active bribery of foreign public officials and officials of public international organisations, while the passive bribery of those two groups is an optional criminal offence[15].

47. As regards the bribery of officials of public international organisations, that offence necessarily presupposes not only that the person is an international civil servant or a person authorised by the organisation to act on its behalf, but also that the international organisation is a public one. However, international sports governing bodies are not usually classified as public organisations[16].

48. As athletes do not hold legislative, judicial, administrative or executive office, they can only be considered as public officials if their sports activity in a specific country can be understood as a "*public function*", "*public service*" or if they are explicitly defined as public officials. Such cases do not appear frequently[17]. Therefore, these provisions are likely to have only limited applicability in cases of match-fixing.

49. Finally, under the UNCAC, the criminalisation of active and passive bribery in the private sector is not mandatory. Moreover, the private sector is described as "*economic, financial or commercial activities*", which suggests that, in some countries, sports may not fall within this definition[18]. That being said, in many cases, match-fixing may fit into the definitions of active and passive bribery in the private sector.

50. The UNCAC also establishes certain principles designed to overcome the limitations created by national criminal laws addressed in Section A(2) above. For example, state parties are required to exercise their own jurisdiction if they refuse to extradite a suspect on grounds of nationality[19].

51. By contrast, if a state party exercising its jurisdiction has been notified, or has otherwise learned, that any other state parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those state parties shall, as appropriate, consult one another with a view to coordinating their actions.

General international instruments in relation to organised crime: UNTOC

52. Match-fixing may also involve organised crime. In this respect, it has been observed by states themselves that "*the manipulation of sports competitions may be linked to transnational organised crime and poses a direct threat to public order and the rule of law*"[20].

53. The United Nations Convention against Transnational Organized Crime ("UNTOC") requires state parties to prevent, investigate and prosecute a number of different offences under international criminal law involving organised criminal groups[21].

54. The UNTOC requires state parties, in particular, to criminalise participation in an organised criminal group (Article 5(1)). Such participation is defined as follows:

> *"(a) (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;*

14 United Nations Convention against Corruption ("UNCAC"), 2004, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, Article 15 [accessed 9 April 2018].

15 'Criminalization approaches to combat match-fixing and illegal/irregular betting: a global perspective', pages 280-281.

16 ibid.

17 ibid., page 282. This study refers to one case from an Eastern European country which considered a soccer referee as performing a public function.

18 ibid., page 284.

19 UNCAC, Article 42.

20 Explanatory Report to the Macolin Convention, paragraph 17.

21 'Criminalization approaches to combat match-fixing and illegal/irregular betting: a global perspective', page 289.

(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;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group."

55. Article 2 of the UNTOC defines "*serious crime*" as "*conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty*." According to this definition, match-fixing can be seen as fulfilling the requirements of one or more offences. However, in order for Article 5 of the UNTOC to apply, criminal offences related to match-fixing would have to include at least one criminal offence that is punishable by at least four years' imprisonment[22].

56. An "*organized criminal group*" is defined under Article 2 of the UNTOC as 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* [the] *Convention, in order to obtain, directly or indirectly, a financial or other material benefit*." The same provision states that a "*structured group*" is 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 structure*."

57. The understanding of the Panel is that, outside the situation where only two players are acting, certain patterns of match-fixing may fall under the definition of "*organized criminal group*" and therefore allow the prosecution and cooperation by states within the framework of the UNTOC. In particular, three or more persons, acting for the first time or already for a longer period of time for the purpose of match-fixing may, theoretically at least, be considered as an organised criminal group[23].

58. Finally, it should be mentioned that the UNTOC requires state parties to establish corruption as a criminal offence, but it refers only to public corruption. Once again, the state parties have the freedom to establish other forms of corruption as criminal offences, but this is not mandatory[24].

(4) CONTRACTUAL OBLIGATION TO COMPLY WITH THE RULES OF THE SPORT AND RIGHT TO A FAIR TRIAL

59. In contrast to criminal law, which is state-imposed law, sports anti-corruption obligations at the disciplinary level are the result of contractual agreements between or submissions by (a) players and other participants (such as coaches, referees, and so on) and (b) the sports governing bodies, to comply with rules operated by those bodies. Players, and especially "*professional*" players, and others are effectively required to adhere to the rules if they wish to participate in the sport, and individually they have virtually no bargaining power. They will generally have expressly contractually accepted the obligation to comply with the rules, in return for access, and a contract may often be implied even if not express.

60. This "*take it or leave it*" obligation to adhere to the rules sometimes leads to criticism that insufficient regard is paid to the preservation of players' fundamental rights. In particular, the "*monopolistic self-governing*"[25] aspect of sports governing bodies and the legal status of sports enforcement bodies being "*between private and public*"[26] are identified as reasons why those organisations and bodies should pay more attention to the interests of those on whom the rules are imposed. In light of this, and in order to mitigate this perception, sports governing bodies need to create conditions in which the

22 ibid., page 290.

23 ibid., page 293.

24 Report by KEA European Affairs, 'Match-fixing in sport, A mapping of criminal law provision in EU 27', March 2012, page 17, available at http://ec.europa.eu/assets/eac/sport/library/studies/study-sports-fraud-final-version_en.pdf [accessed 9 April 2018].

25 K. Pijetlovic, Fundamental rights of athletes in the EU Post-Lisbon, in T. Kerikmäe (ed.), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, Berlin/Heidelberg 2014, pages 161-186, page 161.

26 ibid.

interests of their players and participants, as partners in the creation of the sporting product, are properly represented[27]. In particular, special care needs to be given to both (a) substantive and (b) procedural rules that may be the target of objections as to their incompatibility with public policy (including fundamental rights).

Substantive contractual obligations

61. Substantive contractual obligations are those that establish the sport's rules of conduct, disciplinary offences, and sanctions. This covers all the offences under the disciplinary rules of a sports governing body, including, for example, a breach of the secondary obligations to report match-fixing by others and to cooperate fully with investigations, as well as a breach of the primary obligation not to fix a match.

62. To be binding, substantive contractual obligations must comply with certain principles of law. Not all rules included in sports regulations are necessarily enforceable simply by virtue of their inclusion in the rules. The Explanatory Report to the Macolin Convention states that "*...adoption and implementation of disciplinary sanctions applied by sports governing bodies, such as the suspension from other sports activities, must be done in accordance with the national law. This includes, in particular, respecting human rights and the principle of proportionality.*[28]"

63. Along those lines, the Swiss Federal Supreme Court decided in the *Matuzalem* case that the economic development and privacy of a football player was violated by a disproportionate FIFA rule that precluded him from playing, pending payment of a sanction that was too large to be paid without his being able to play, and therefore annulled a CAS award which had applied the rule, as being against public policy. Consequently, CAS must be careful not to enforce similar rules or to impose disproportionate fines, as discussed further below in Section E(2).

Procedural contractual obligations

64. Procedural contractual obligations are those that bind players and others to non-judicial dispute resolution, or disciplinary, mechanisms under the relevant sport's rules. As those obligations are usually included in the rules of the sports governing body (which determines who may compete in that sport) the player has little choice but to accept them.

65. However, since states have sole responsibility for the determination of civil and criminal rights and obligations, a sports governing body's power to punish players, or deny them access to a sport, or to fine them, is in effect only exercised on the state's (express or implied) delegation or toleration. Last instance disciplinary decisions (such as CAS decisions) are therefore all subject to a possible supervisory appeal before national courts (such as the Swiss Federal Supreme Court for CAS decisions), which are themselves subject to the scrutiny of the European Court of Human Rights, as public authorities. Accordingly, the requirements (or some of the requirements) of instruments such as the European Convention on Human Rights also apply to sports governing bodies. The courts will ensure that that sports governing bodies operate a dispute resolution system in which civil rights and obligations are determined independently, fairly and impartially.

66. In order to be binding, procedural contractual obligations must therefore observe certain formalities. However, these vary from jurisdiction to jurisdiction. For example:

    66.1 In England and Wales, it has been held that a requirement that a player enter into a procedural contractual obligation, such as compulsory arbitration, is enforceable because the requirement "*is not a constraint in any relevant sense*"[29].

27 ibid., page 174.

28 Explanatory Report to the Macolin Convention, paragraph 86.

29 Stretford v The Football Association Ltd & Another, Chancery Division [2006] EWHC 479 (Ch), published in I.S.L.R. SLR39-48, 46-47 paragraphs 42, 45, 48.

66.2 In Switzerland, adopting a practical approach, the Swiss Federal Supreme Court found that procedural contractual obligations, such as compulsory arbitration, are enforceable because (a) on the one hand, such obligations favour "*the prompt settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality*..." and, (b) "*on the other hand,* [they ensure] *that the parties, and specifically professional players, do not lightly waive their right to challenge final arbitral awards before the highest court of the country in which the arbitration has its place*"[30].

66.3 In France, the courts have taken a different approach based on the assumption that players' right to have access to state justice cannot be unilaterally denied by a sports governing body. Indeed, the Tribunal de Grande Instance de Paris stated that *"since the right of any person to proceed before the state courts is an issue of public policy, the athlete shall not be deprived of this right through regulations issued by sports governing bodies*"[31]. Thus, such contractual procedural obligations are void under French law since "*the dispute resolution systems provided for in sports regulations cannot exclude the members' (in other words players' and clubs') right to have access to a judge*"[32].

66.4 In the United States, players can generally be bound to non-judicial settlement mechanisms, as long as the players have consented in advance[33]. As described in Chapter 7, a U.S. court applied this general rule in upholding the suspensions of five professional tennis players issued by an Anti-Corruption Hearing Officer ("AHO"), certain of which were affirmed in whole or in part by CAS, pursuant to the then procedures of the ATP Tennis Anti-Corruption Programme in the ATP's Rulebook[34]. The U.S. court concluded that the arbitration provision in the ATP's Rulebook was enforceable against several players "*because* [the players] *accepted the benefits of the bargain of playing ATP events (including accepting prize money) after signing an agreement to be bound by the Rulebook*"[35]. Also, U.S. courts have enforced arbitration provisions contained in collective bargaining agreements in cases involving several professional sports, including American football[36], hockey[37], and baseball[38].

67. Procedural contractual obligations have been challenged often. The long-running *Pechstein* case is a paradigm example in this respect, since it cast doubt over the validity of an arbitration agreement contained in the rules of the International Skating Union ("ISU"). Pechstein sought to challenge a CAS decision[39] upholding a suspension against Pechstein. In doing so she argued that the arbitration agreement which gave CAS its jurisdiction violated competition law and her fundamental rights and, as such, her consent to the arbitration agreement was vitiated. These arguments were however dismissed by the Swiss Federal Supreme Court[40], and, although a subsequent decision by the Regional Court of Münich[41] revived the debate[42], the most recent decision by the German Supreme Court[43] also rejected Pechstein's claims. Proceedings before the European Court of Human Rights remain pending[44].

30 Decision by the Swiss Federal Supreme Court of 22 March 2007 published in BGE 133 III 235, paragraph 4.3.2.3, 25 ASA Bulletin 2007, pages 592 et seq., pages 603-604, translated in 1 Swiss Int'l Arb. I. Repage 65, 88-89 (2007).

31 Decision by the Tribunal de Grande Instance de Paris of 26 January 1983, published in Recueil Dalloz, 1986, page 366, translated in A. Rigozzi, F. R. Tissot, "Consent" in Sports Arbitration: Its Multiple Aspects, E. Geisinger, E. Trabaldo de Mestral (eds), Sports Arbitration: A Coach for Other Players?, ASA Special Series No. 41, New York 2015, pages 59-94, page 65.

32 A. Rigozzi, F. R. Tissot, '"Consent" in Sports Arbitration: Its Multiple Aspects', E. Geisinger, E. Trabaldo de Mestral (eds), Sports Arbitration: A Coach for Other Players?, ASA Special Series No. 41, New York 2015, pages 59-94, page 65.

33 This is true both under applicable federal law, see Federal Arbitration Act, 9 U.S.C. Section 2, and under applicable state law, see Uniform Arbitration Act, Del. Code tit. 10, Section 5701.

34 Luzzi v. ATP Tour, Inc., 2011 WL 2448918 (M.D. Fla. Mar. 1, 2011).

35 ibid., page 6.

36 For example, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016).

37 For example, E. Coast Hockey League, Inc. v. Prof'l Hockey Players Ass'n, 322 F.3d 311 (4th Cir. 2003).

38 For example, Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) (per curiam).

39 CAS 2009/A/1912 & 1913 (Claudia Pechstein & Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union).

40 Claudia Pechstein v International Skating Union und Deutsche Eisschnelllauf Gemeinschaft eV, Swiss Federal Supreme Court, Decision, 4A_612/2009, 10 February 2010,ASA Bull 3/2010, 612; Swiss Federal Supreme Court, Decision 4A_144/2010, 28 September 2010, ASA Bull 1/2011, 147.

41 LG München I, judgment dated 26 February 2014 – 37 O 28331/12.

42 H. Kahlert, '(In)voluntary submission to arbitration in Germany, Switzerland and beyond, in European International Arbitration Review 2014', pages 175-190.

43 English translation of the German Supreme Court decision of 7 June 2016 available at https://www.isu.org/claudia-pechstein-case/2082-german-supreme-court-decision/file [accessed 9 April 2018].

44 As at 9 April 2018.

68. It is therefore important that limitations on the ambit of the substantive and procedural contractual obligations that can be imposed by a sport be considered in setting the substantive and procedural legal framework to combat match-fixing and other integrity breaches.

69. The discussion above focuses on the forum for resolving a dispute, and the need to obtain players' consent to adjudicate disciplinary disputes outside national court. However, sports governing bodies' rules must also take into serious consideration the wider aspects of players' right to due process and a fair trial. There are, in particular, limitations imposed by Article 6 of the European Convention on Human Rights ("ECHR"), which provides for the following basic rights: the right of access to the courts; the right to an independent and impartial tribunal; the right to a public hearing; the right to a public judgment; the right to a judgment within a reasonable time; and the right to a fair trial. [45]

70. Some of these rights are deemed alienable or waivable by the very act of executing an arbitration agreement: these include waiver of direct access to courts, the right to a public hearing, and the right to a public judgment. Apart from these, however, the rights under Article 6 are also widely recognised to form part of international public policy, especially the right to a fair trial, which has been described in the Explanatory Report to the Macolin Convention as follows: "*... disciplinary procedures must respect the general principles of law recognised at international level and guarantee the fundamental rights of the suspected athletes. According to these principles, ...the investigating body must be separate from the disciplinary body, those suspected have the right to a fair trial and the right to be assisted or represented and there must be clear and enforceable provisions allowing for a right of appeal before a court or an arbitration body.*"[46]

71. Sports governing bodies have therefore usually guaranteed these fundamental rights, or provided for them to be waived validly in their rules:

    71.1 The right of direct access to court is generally waived validly and replaced with, in the first instance, a disciplinary process and right of appeal before an arbitration body. Most sports governing bodies' rules provide for a player's right to appeal the disciplinary decision of sports governing bodies before CAS (or an equivalent) since "*an appeal to the CAS against a decision adopted by a sports organization entails a de novo review on the merits of the case*", which means that the CAS panel will make "*its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision*"[47].

    71.2 In addition, players are also afforded the right to challenge an appeal decision before a national court for breaches of fundamental principles and essential procedural guarantees. CAS, or any other appellate arbitral body, is subject to supervisory review by the courts of its seat. For instance, in the *Cañas* case the Swiss Federal Supreme Court held that a purported waiver of the ability to seek to set aside proceedings before national courts was void on the basis that, in the context of sports, the consent to such waiver "*will obviously not rest on a free will, as a general rule*"[48]. In other words, since players and others are forced to accept a defined dispute settlement mechanism in order to participate, they cannot also be prevented from challenging such proceedings on the basis that procedural guarantees under that dispute resolution mechanism have been violated.

45 For a detailed analysis of the fundamental rights under Article 6(1) of the ECHR see the "Guide on Article 6 of the European Convention on Human Rights" available at http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [accessed 9 April 2018].

46 Explanatory Report to the Macolin Convention, paragraph 87.

47 M. Coccia, 'International and Comparative Sports Justice, in European Sports Law and Policy Bulletin 1/2013', page 39, where the author makes reference to the Final Award CAS 2009/A/1880-1881 (FC Sion & El-Hadary v. FIFA & Al-Ahly SC), paragraph 146.

48 Decision of the Swiss Federal Supreme Court, 22 March 2007, published in BGE 133 III 235. The Court further concluded that "by accepting in advance to abide by any future awards, an athlete deprives himself forthwith of the right to complain in due course of subsequent breaches of fundamental principles and essential procedural guarantees which may be committed by arbitrators called upon to decide in this case... Therefore, having regard to its consequences, a waiver of the right to bring setting aside proceedings should not, in principle, be raised against an athlete to dispute the admissibility of an application to have an award set aside even if the formal requirements set out in article 192(1) FPILA are met."

Separation of investigating body from the disciplinary body, and independence and impartiality

72. The choice of CAS as an appellate body also resolves the issue that the investigatory arms of sports governing bodies may not be sufficiently independent from their disciplinary arms, since "*the CAS appeal arbitration procedure cures any infringement of the right to be heard or to be fairly treated committed by a sanctioning sports organization during its internal disciplinary proceedings*"[49]. In assessing independence and impartiality, the entire disciplinary process must be addressed. The nature of the CAS hearing (involving a full merits review by the appellate body) does, on the current state of the *Pechstein* litigation, satisfy the requirements of independence and impartiality, and so overrides any element of lack of independence below[50]. Other independent and impartial arbitral bodies can fulfil a similar appeal role to CAS. In addition there are alternative methods of ensuring an Article 6 compliant process, including the use of independent and impartial arbitral bodies as the first instance disciplinary decision maker[51]. That ensures the appropriate separation between the disciplinary decision-maker and the sport's investigatory arm, because the independent and impartial body resolves sports disciplinary actions brought before it by the sport's investigatory arm.

73. The right to a public hearing and a public judgment may be validly waived. The issue of the publication of decisions is however often approached differently in that it is usually the player (rather than the governing body) who wishes to prevent publication.

74. The right to a fair opportunity to be heard is protected by most sports rules. The player or other participant is generally to be fully informed of the case against it and is generally afforded an oral hearing at which to address it.

75. It has been suggested that "*unless there is an effective system of legal aid, an athlete who cannot afford the arbitration because of her or his indigence can therefore validly terminate the arbitration agreement and bring her or his claim before state courts (where legal aid is available)*"[52]. Because of this risk of unenforceability of players' procedural obligations, arbitral institutions such as CAS provide, under certain conditions[53], legal aid for players to have *pro bono* counsel and be released from the obligation to pay any costs of the arbitration[54]. More recently, some sports governing bodies have committed to guaranteeing the rights of individuals who lack the financial means to defend themselves in a similar manner for internal disciplinary proceedings as well[55].

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49 M. Coccia, International and Comparative Sports Justice, in European Sports Law and Policy Bulletin 1/2013, page 38, where the author makes reference to the following Final Awards CAS 2009/A/1545 (Anderson et al. v. IOC), paragraph 78; CAS 2003/O/486 (Fulham FC v. Olympique Lyonnais), paragraph 50; CAS 2008/A/1594 (Sheykhov v. FILA), paragraph 109.

50 Very recently, in its decision 4A_260/2017 dated 8 March 2018, the Swiss Federal Supreme Court confirmed, again, CAS' independence. In this respect, it has been observed that "whereas the previous leading cases on CAS' independence (Gundel, Lazutina, Pechstein) were primarily focused on the closed list of arbitrators and the (then) predominant position of the international federations and the role of international institutions in promoting arbitrators to such a closed list, the present case focuses primarily on the alleged financial dependence of CAS on FIFA (and the IOC)"; Hansjörg Stutzer, Michael Bösch and Simon M. Hohler, 'Switzerland: The Independence Of CAS Confirmed' (Mondaq, 6 April 2018), available at: http://www.mondaq.com/x/689702/Sport/The+Independence+Of+CAS+Confirmed, [accessed 9 April 2018].

51 For example. this function could be carried out by Sport Resolutions, an independent, not-for-profit, dispute resolution service for sport based in the United Kingdom

52 '"Consent" in Sports Arbitration: Its Multiple Aspects' page 74, making reference also to the decision by the Hamburg Hanseatisches Oberlandsgericht of 15 November 1995, paragraph 9, published in Yearbook Commercial Arbitration 2013 – Vol. XXI -1996, pages 845-848 and the references: "... termination of an arbitration agreement is possible where circumstances arise under which no effective legal protection can be guaranteed in the arbitral proceedings ...".

53 Guidelines on Legal Aid before the Court of Arbitration for Sport (2013, as amended in 2016), Article 5, available at http://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Rules_2016_English.pdf [accessed 9 April 2018]: "Legal aid is granted, based on a reasoned request and accompanied by supporting documents, to any natural person provided that her/his income and assets are not sufficient to allow her/him to cover the costs of proceedings, without drawing on that part of her/his assets necessary to support her/him and her/his family. Legal aid will be refused if it is obvious that the applicant's claim or grounds of defence have no legal basis. Furthermore, legal aid will be refused if it is obvious that the claim or grounds of defence are frivolous or vexatious".

54 Guidelines on Legal Aid before the Court of Arbitration for Sport (2013, as amended in 2016) are available at http://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Rules_2016_English.pdf [accessed 9 April 2018].

55 UEFA for instance offers Legal aid and pro bono counsel. See https://www.uefa.com/insideuefa/disciplinary/news/newsid=2522381.html#/, Wednesday 1 November [accessed 9 April 2018].

The range of contractual obligations in sports rules designed to protect integrity

76. The integrity issues described in Chapter 4 arise in varying forms in different sports, and different sports adopt varying approaches to the content of the rules designed to tackle them, both in terms of the substantive obligations, and in terms of the appropriate procedures. Those approaches and rules will of course be adapted to the particular needs and circumstances of the relevant sport, including the nature and extent of the problem faced by that sport[56], and the extent to which the issue has yet been addressed[57]. The Panel has considered and taken into account the approaches and rules of many sports on a comparative basis in its assessment of the appropriate way forward for tennis[58]. The Review does not however attempt comprehensively to set out the rules or approaches in those other sports, the circumstances of each of which are different to those of tennis.

The "Olympic Movement Code on the Prevention of the Manipulation of Competitions"

77. To the extent that there is commonality, it is perhaps to be found in the recent attempt by the International Olympic Committee ("IOC") to identify a set of minimum non-exclusive rules as a template for sports. On 17 December 2015[59], the IOC published the *"Olympic Movement Code on the Prevention of the Manipulation of Competitions"*[60]("the Code"). The Preamble specifically states[61] that sports cannot act alone and will have to cooperate with public authorities; that the rules contained in the Code comply with the Macolin Convention[62]; that *"this does not prevent Sports Organisations from having more stringent regulations in place"*; and that those covered by the Code such as international sports federations must implement, and must require their national members to implement, regulations consistent with or more stringent than the Code.

78. Again, without purporting to set out an exhaustive description of the Code, a number of points are to be noted. The Code extends to a wide range of participants, grouped under athletes, athlete support personnel and officials[63]. In relation to the minimum substantive behavioural obligations to be imposed on a sport's participants, the Code prohibits[64]:

    78.1 Betting not only on the competition (including multisport competitions) in which the person is participating, but also on the participant's sport more widely. The rule does not extend to sports betting generally.

    78.2 Manipulating a competition, meaning *"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 sports competition, with a view to obtaining an undue benefit for oneself or for others"*. A *"benefit"* may be[65] money, but may also be *"gifts and other advantages"*. The focus is therefore, on its face, on deliberate action for monetary reward rather than the contrivance of an event for other reasons[66], unless those reasons could be described as an advantage.

56 For the nature and extent of the problem faced by tennis, see Chapter 13. It is clear that for many sports, the problem faced is not of the same degree.

57 For the process by which tennis came to address the problem from 2003 onwards, see Chapters 7, 8 and 9. For the current system see Chapter 10.

58 The Panel's conclusions are set out in Chapter 14.

59 Press release at https://www.olympic.org/news/ioc-publishes-unprecedented-olympic-movement-code-for-preventing-competition-manipulation [accessed 9 April 2018].

60 Olympic Movement Code on the Prevention of the Manipulation of Competitions, 2016, available at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Ethics/Good-Governance/olympic_movement_code_on_the_prevention_of_the_manipulation_of_competitions-2015-en.pdf#_ga=2.185190957.562736708.1519384504-1419240358.1519384504 [accessed 9 April 2018].

61 "(a) Acknowledging the danger to sports integrity from the manipulation of sports competitions, all sports organisations, in particular the International Olympic Committee, all International Federations, National Olympic Committees and their respective members at the Continental, Regional and National level and IOC recognised organisations (hereinafter, 'Sports Organisations'), restate their commitment to safeguarding the integrity of sport, including the protection of clean athletes and competitions as stated in Olympic Agenda 2020; (b) Due to the complex nature of this threat, Sports Organisations recognise that they cannot tackle this threat alone, and hence cooperation with public authorities, in particular law enforcement and sports betting entities, is crucial; (c) The purpose of this Code is to provide all Sports Organisations and their members with harmonised regulations to protect all competitions from the risk of manipulation. This Code establishes regulations that are in compliance with the Council of Europe Convention on the Manipulation of Sports Competitions in particular Article 7. This does not prevent Sports Organisations from having more stringent regulations in place; (d) In the framework of its jurisdiction as determined by Rule 2.8 of the Olympic Charter, the IOC establishes the present Olympic Movement Code on the Prevention of the Manipulation of Competitions, hereinafter the Code; (e) Sports Organisations bound by the Olympic Charter and the IOC Code of Ethics declare their commitment to support the integrity of sport and fight against the manipulation of competitions by adhering to the standards set out in this Code and by requiring their members to do likewise. Sports Organisations are committed to take all appropriate steps within their powers to incorporate this Code by reference, or to implement regulations consistent with or more stringent than this Code."

62 Paragraphs 29 to 43 above.

63 Olympic Movement Code on the Prevention of the Manipulation of Competitions, Article 1.4.

64 ibid., Article 2.

65 ibid., Article 1.1.

66 Chapter 4, Section B.

78.3 Providing, requesting, receiving, seeking, or accepting a benefit related to the manipulation of a competition or any other form of corruption.

78.4 The misuse of *"inside information"*, which is defined[67] as *"information relating to any competition that a person possesses by virtue of his or her position in relation to a sport or competition, excluding any information already published or common knowledge, easily accessible to interested members of the public or disclosed in accordance with the rules and regulations governing the relevant competition"*. Participants are prohibited from: (a) using inside information for the purposes of betting, any form of manipulation or any other corrupt purpose; (b) disclosing inside information "*with or without benefit*" in circumstances where the participant knew or should have known might lead to it being used for those purposes; or (c) giving or receiving a benefit for the provision of inside information. This imposes an important obligation on the participant to be careful not to disclose information, even where no benefit is provided, and sets a broad ambit for what is inside information.

78.5 Failing to report approaches or knowledge of *"conduct that could amount to a violation of this Code"* by others. This imposes an important obligation on participants not only not to breach the core rules themselves, but to also report what they know about breaches by others.

78.6 Failing to cooperate, including by providing information, documents, access and assistance, and obstructing an investigation, including by tampering with evidence.

78.7 Attempting or aiding and abetting breaches of any of the above obligations. The Code also specifically rejects a number of arguments that might be made by a participant as to limitations on the ambit of those obligations.

79. The Code sets out *"minimum standards"* for any disciplinary procedure[68]:

79.1 In relation to an investigation: (a) the participant should be informed of the provision alleged to have been breached, by what acts, and with what consequences; (b) the participant must provide requested information including hard drives and electronic information storage devices; and (c) the participant must provide a statement.

79.2 The participant has the rights: (a) to be informed of the charges; (b) to a fair timely and impartial hearing either in person and/or in writing; and (c) to be represented.

79.3 The burden of proving a violation is on the sports governing body and the standard of proof *"shall be the balance of probabilities, a standard that implies that on the preponderance of the evidence it is more likely than not that a breach of this Code has occurred"*.

79.4 *"The principle of confidentiality must be strictly respected by the Sports Organisation during all the procedure; information should only be exchanged with entities on a need to know basis. Confidentiality must also be strictly respected by any person concerned by the procedure until there is public disclosure of the case"*.

79.5 *"Anonymous reporting must be facilitated"*.

79.6 Each sport's governing body *"shall have an appropriate appeal framework within its organisation or recourse to an external arbitration mechanism (such as a court of arbitration)"*.

80. The Code specifically contemplates that *"provisional measures, including a provisional suspension"* may be imposed "*where there is a particular risk to the reputation of the sport*"[69].

67 Olympic Movement Code on the Prevention of the Manipulation of Competitions, Article 1.3.

68 ibid., Article 3.

69 ibid., Article 4.

81. The Code specifically contemplates: (a) that *"the range of permissible sanctions... may range from a minimum of a warning to a maximum of life ban"*; (b) that aggravating and mitigating circumstances must be taken into account in setting the sanction; (c) that there be a written decision; (d) that *"substantial assistance"* provided by the participant may reduce any sanction[70].

82. The Code also requires mutual recognition of decisions taken by sports governing bodies bound by the Code[71]. It also requires sports governing bodies to recognise the decision of other bodies or courts of competent jurisdiction[72].

83. Several sports have followed quite closely the IOC's approach, although adding to varying degrees their own additional provisions. A recent example is the International Amateur Athletics Association ("IAAF"), which in 2017 introduced its *"Integrity Code of Conduct"*[73] requiring a widely defined group of participants[74] in athletics to comply with *"Integrity Standards"*[75], one of which is to "*to ensure the integrity of, and not to improperly benefit from, Athletics competitions"*[76] by complying with *the "IAAF Manipulation of Sports Competitions Rules"*[77], which take as their starting point and follow closely the IOC Code. The IAAF also set up in 2017 an *"Athletics Integrity Unit"*, (a) the composition and operation of which is governed by *"IAAF Athletics Integrity Unit Rules"*; and (b) the investigatory process of which is governed by the *"IAAF Athletics Integrity Unit Reporting, Investigation and Prosecution Rules"*[78]. Lastly the IAAF in 2017 established the *"IAAF Disciplinary Tribunal Rules"*[79], which define the procedure that should apply to breach of integrity cases.

The approach taken in other sports

84. Other major international sports have however long had their own approach to addressing breaches of integrity. While there is self-evidently a good deal of overlap in approach and, in particular, in relation to the nature of the behaviours prohibited and the rights to be protected, those sports have moulded their rules to suit their own circumstances.

85. For example, in the context of international football, UEFA's rules extend not only to prohibitions of the kind covered in the IOC Code, but also to rather more onerous *"eligibility"* criteria:

    85.1 UEFA's 2017 Disciplinary Regulations[80] include an obligation[81] *"to refrain from any behaviour that damages or could damage the integrity of matches and competitions"*, which includes: (a) acting in a manner likely to exert an unlawful or undue influence on the course or result of a match with a view to gaining an advantage; (b) participation directly or indirectly in betting; (c) using or providing others with inside information which could damage the integrity of a match or competition; and (d) failing to report approaches or possible breaches by others.

70 ibid., Article 5.

71 ibid., Article 6.

72 ibid., Article 4.

73 The IAAF Integrity Code of Conduct ("ICC"), 22 April 2017, available at https://www.iaaf.org/about-iaaf/documents/rules-regulations [accessed 9 April 2018]. The IAAF ICC replaces the IAAF Code of Ethics formerly in operation.

74 ibid., paragraph 3.

75 ibid., paragraph 6.

76 ibid., paragraph 6.3(d).

77 Still, it appears, Appendix 2 of the IAAF Code of Ethics "Rules against Betting, Manipulation of Results and Corruption"., available at https://www.iaaf.org/about-iaaf/documents/rules-regulations

78 These rules are available at https://www.iaaf.org/about-iaaf/documents/rules-regulations.

79 These rules are available at https://www.iaaf.org/about-iaaf/documents/rules-regulations.

80 UEFA Disciplinary Regulations, 2017, available at http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/UEFACompDisCases/02/48/23/06/2482306_DOWNLOAD.pdf [accessed 9 April 2018].

81 UEFA Disciplinary Regulations, Article 12.

85.2 In addition, UEFA's 2017/18 Season Champions League Regulations[82] include a requirement[83] that *"to be eligible to participate in the competition, clubs must: ...g. not have been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level and confirm this to the UEFA administration in writing"*. If *"on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its comfortable satisfaction that a club has been directly or indirectly"* so involved, it will declare the club suspended for one season[84]. UEFA *"can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court"*.

85.3 The application of the ineligibility rule does not preclude disciplinary action[85] .

85.4 This casts the net wide, as a club may have become "*indirectly*" involved in such activity without actually being directly culpable for it.

86. Football also employs a different investigatory and disciplinary structure than, for example, the IAAF. Within the UEFA framework, its organs for the administration of justice are the Control, Ethics and Disciplinary Body ("CEDB"), the Appeals Body ("AB"), the Ethics and Disciplinary Inspectors and the Club Financial Control Body[86]. Members of these bodies are independent and cannot sit on any other UEFA body or participate in matters where there is a conflict of interest[87]. The CEDB is competent to address all disciplinary matters within its jurisdiction according to the UEFA Statutes and other UEFA Rules.

87. A distinctive feature within the UEFA disciplinary system is the role of the Ethics and Disciplinary Inspectors who represent UEFA in legal proceedings before the CEDB and the AB. They may initiate disciplinary proceedings, investigate, lodge appeals and offer other support in the process[88].

88. Beyond football, several other sports also adopt different approaches to addressing breaches of integrity:

88.1 In horseracing, it is noticeable that the relevant rules prohibit contrivance of a result irrespective of any proof that it is done for betting or other corrupt purposes. For example, it is a breach of the British Horseracing Board's Rules of Racing simply to *"intentionally* [fail] *to ensure that* [the horse] *is run on its merits"*[89]. This is in addition to and separate from the obligation not to bet[90]; the obligation not to accept any reward in relation to a race other than for riding[91]; and the obligation not to communicate inside information for reward[92].

88.2 In cricket, access to the players' and match officials' area ("PMOA") will be restricted only to those individuals whose presence in that area is absolutely essential for operational purposes[93]. This helps to combat the fact that nine players from one of the teams are not on the field of play at any one time and may therefore be susceptible to approaches from members of the public seeking to engage in corrupt behaviour. Further, subject to certain exceptions, landline telephones, mobile phones and laptops (with or without internet access) are forbidden from being brought into the PMOA.

82 Regulations of the UEFA Champions League 2015-2018 Cycle, 2017/18 Season, available at http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/46/71/38/2467138_DOWNLOAD.pdf [accessed 9 April 2018].

83 Regulations of the UEFA Champions League, Article 4.01 (g).

84 ibid., Article 4.02.

85 ibid., Article 4.03.

86 UEFA Statutes (US, 2018 ed.), Article 32.

87 US, Article 32. UDR, Article 32.

88 UDR, Article 31.

89 BHA Rules of Racing Race Manual (B) Part 4 – the Race – (B)58 and (B)59, available at: http://rules.britishhorseracing.com/Orders-and-rules&staticID=126359&depth=3 and http://rules.britishhorseracing.com/Orders-and-rules&staticID=126360&depth=3 [accessed 9 April 2018].

90 BHA Rules of Racing Rider Manual (D) Part 5 – general Duties of Riders – (D)53, available at: http://rules.britishhorseracing.com/Orders-and-rules&staticID=126110&depth=3 [accessed 9 April 2018].

91 BHA Rules of Racing Rider Manual (D) Part 5 – General Duties of Riders – (D)55, available at: http://rules.britishhorseracing.com/Orders-and-rules&staticID=126112&depth=3 [accessed 9 April 2018].

92 BHA Rules of Racing General Manual (A) Part 4 – General Requirements as to Conduct – (A)36, available at:http://rules.britishhorseracing.com/Orders-and-rules&staticID=126201&depth=3 [accessed 9 April 2018].

93 PMOA Standards, Article 3.1.1.

88.3 There is an increasing focus in a number of sports on education as a means to prevent match-fixing. For example, in golf, the PGA Tour has worked with Genius Sports to develop an educational program that will "*help players, caddies and officials to identify, resist and report incidents of potential betting corruption*." The PGA Tour has also announced that it plans to introduce "*educational workshops* [that] *will reinforce the PGA TOUR's regulations and highlight the potential consequences related to betting corruption*" and "*custom-made e-learning modules* [that] *will be available on a worldwide basis to all PGA TOUR players in multiple languages*."[94] The only aspect of the educational program that has been rolled out thus far is a 15-minute video about gambling. All PGA Tour players were required to view the video and to complete an accompanying questionnaire by 31 December 2017[95].

94 Press Release, 'PGA Tour, PGA Tour implementing new Integrity Program in 2018',Sept. 18, 2017, available at: https://www.pgatour.com/company/2017/09/18/pga-tour-implementing-new-integrity-program-in-2018.html [accessed 9 April 2018].

95 Dave Sheloski, 'Players begin to familiarize themselves with the PGA Tour's new 'Integrity Program'' (Golfworld, 10 January 2018), available at https://www.golfdigest.com/story/players-begin-to-familiarize-themselves-with-the-pga-tours-new-integrity-program [accessed 9 April 2018].

B DETECTION OF BREACHES OF INTEGRITY

89. A breach of integrity can only be punished if it is first detected. Such detection may take place in a number of different ways, each of which usually involves the action and cooperation of a number of different actors.

(1) REPORTING OF, AND INTELLIGENCE AS TO, BREACHES OF INTEGRITY

90. The primary basis for detection is reports made about, and the intelligence amassed as to, breaches of integrity. All information reported over the years becomes part of the intelligence of the various bodies involved in dealing with breaches of integrity, including international and national governing bodies, event organisers, betting operators, and state authorities. The intelligence is composed of information amassed by means of these organisations' regular operations and investigations, as well as through reporting to them.

Building and exploiting intelligence, in particular through focused investigation

91. A number of sports governing bodies (in addition to the tennis governing bodies) have created dedicated anti-corruption or integrity units[96] and have devised strategies to achieve a better flow of information to assist in the detection of breaches. When information related to breaches of integrity is insufficient or cannot be used as evidence on which to mount successful legal proceedings, it may nevertheless become part of the intelligence of the sports governing body, and be put to use in order to focus or facilitate future investigations.

92. Care must however be taken. Over-reliance on some types of internal intelligence as a trigger for focusing disciplinary investigations may lead to selective investigation based on preconceptions and may also raise potential issues regarding data protection.

93. Whilst such issues must be guarded against, a report produced by external advisors to the International Cricket Council on the anti-corruption arrangements in cricket in 2012 went so far as to suggest that an investigation should only ever be commenced on the basis of an external allegation being made, and should not be commenced on the basis of internal intelligence[97]. It was suggested that this was appropriate in order to avoid the appearance of selective investigation and so to maintain the trust of those under the jurisdiction of the rules.

94. While much will turn on the facts, it seems to the Panel that the reality, at least in tennis, is that intelligence is very rarely solely "*internal*", and generally has numerous "*external*" elements, including allegations of breach. It may however be that the precise allegation or allegations in the past could not be made the subject of disciplinary proceedings. It seems to the Panel that for an investigation to be focused on particular players who have, for example, been the subject of a number of allegations in the past, none of which have been capable of being proved, is legitimate, and is a far cry from what cricket's external advisors appear to have had in mind as inappropriate, which appears to have been investigation prompted without any external impetus. Furthermore, if a breach of integrity has been committed, and is uncovered by an investigation, the possibility that the investigation was commenced in part as a result of an investigator's experience built up over years, arguably does not affect the desirability, and validity, of the disciplinary conviction. It seems to the Panel that while a sports governing body must be astute to make decisions objectively, the accumulation of information and intelligence, whether involving "*internal*" or "*external*" elements, can generally form a basis for focusing an investigation, and ultimately even disciplinary prosecution.

96 Examples include the Athletics Integrity Unit or AIU and the Anti-Corruption Unit ("ACU") in cricket. The AIU is governed by "IAAF Athletics Integrity Unit Rules" and "IAAF Athletics Integrity Unit Reporting, Investigation and Prosecution Rules", each of which are available at https://www.iaaf.org/about-iaaf/documents/rules-regulations. The ACU is the department within the International Cricket Council that is mandated, amongst other things, to monitor compliance with and investigate potential breaches of cricket's Anti-Corruption Code for Participants.

97 Report by B. de Speville, A review of the anti-corruption arrangements of the International Cricket Council, 2012, page 14: "a policy of investigating allegations should mean that the ACSU does not initiate investigations from its own intelligence resources. As its intelligence database develops, the unit will be able to initiate an investigation from the intelligence it has accumulated about an individual. It must resist the temptation to do so. It must stick to its policy of investigating an individual only when an allegation against him has been received, and it must make that policy as widely known as possible. It must be seen to be responsive. Otherwise the unit will be accused of picking on an individual for the wrong reasons. If that perception spreads, trust in the ACSU's impartiality and independence will be lost. Without that trust, the support of constituents cannot be developed or retained. The ICC cannot overcome the problem of corruption without the support of its constituents". Available at http://icc-live.s3.amazonaws.com/cms/media/about_docs/518b7096b002c-Bertrand%20de%20Speville%20Report%20-%20A%20Review%20of%20the%20Anti-Corruption%20Arrangements%20of%20the%20ICC.pdf [accessed 9 April 2018].

Various types of reporting of breaches as a basis for detection

95. Usually, breaches are detected with the aid of sources inside and outside the sport, who report a breach either pursuant to an obligation to do so, or voluntarily.

96. One of the main bases for detection is a report made by a person who has witnessed a breach of integrity by another, and who can demonstrate the presence of the relevant constituents of the offence. Detection on this basis ought to afford good evidence in legal proceedings, with the reporter as a live witness, or ought at least to amount to good intelligence which as described above can be used in order to focus and facilitate further investigations.

97. Another source of information for detecting breaches of integrity is reporting by betting operators through suspicious betting pattern alerts. While the report of the suspicious betting pattern may not reveal a breach of integrity[98], still less by whom, it sometimes can do so, and it on any basis warrants the starting of an investigation unless obviously explainable from the start[99].

98. A further source of information about potential breaches is reporting by participants who are approached, but refuse, to breach integrity. Direct reporting by referees or by players who are solicited to fix a match or otherwise to breach integrity is compulsory under many disciplinary rules such as Section D(2) of the TACP. In addition to this duty, in some sports, such as football, other tools have been developed to permit the reporting by players and the public at large[100]. In sports such as rugby[101], golf[102] and cricket[103], the failure to report corrupt activity is itself an offence.

99. Compliance with the duty to cooperate under many disciplinary rules, such as Section F(2)(b) of the TACP, can also lead to the effective detection of breaches of integrity, since it allows investigators to demand, and eventually to obtain, access to direct evidence regarding the alleged corruption offence, including, without limitation, itemised telephone billing statements, text of SMS messages received and sent, banking statements, internet service records, computers, hard drives and other electronic information storage devices.

100. The use of anonymous reporting as a basis for detection has been considered, and implemented by the International Olympic Committee[104]. This approach:

    100.1 Has the advantage of encouraging people to come forward who might not otherwise do so due to peer pressure or fear of organised crime[105]. In this respect, the Macolin Convention observes that anonymous reporting "*may include, for example, a telephone helpline, a mobile application, an independent place, an independent and trustful ombudsperson with the obligation of secrecy or the possibility of remaining anonymous when reporting an activity or during proceedings*"[106].

98 Chapter 3, Section F and Section B(2) below.

99 An example of this can be seen in rugby union, where the South African Rugby Union ("SARU") cooperate with Sportradar, who are the non-exclusive collector, processor and distributor of data from almost 300 matches played in South Africa. The SARU release the full potential of their data to Sportradar to protect their teams from the threat of match-fixing.

100 Statement of Emilio García and Graham Peaker (UEFA). UEFA has developed a mobile app that permits online reporting directly to the integrity division. According to Mr. García and Mr. Peaker, the app has been downloaded 12,000 times in the past two years and the information received is sometimes useful. See also Article 4.5 of the Rules for the application in the Rio Olympic Games (2016), Articles 7, 9 and 10 of the International Olympic Committee's Code of Ethics (2016) and the Olympic Movement Code on the Prevention of the Manipulation of Competitions (2016). The latter provision establishes a duty to report to the IOC Integrity and Compliance Hotline approaches or invitations to engage in conduct in violation of the Code, failure to do so amounting itself to a violation of the Code.

101 World Rugby Regulation 6.3.5(b).

102 PGA Tour Integrity Manual, Article 12.

103 The Anti-Corruption Code for Participants, Article 2.4.5.

104 "Olympic Movement Code on the Prevention of the Manipulation of Competitions", Article 3.

105 UNODC Resource Guide on Good Practices in the Investigation of Match-Fixing, 2016, (the "UNODC Resource Guide"), page 60, available at: https://www.unodc.org/documents/corruption/Publications/2016/V1602591-RESOURCE_GUIDE_ON_GOOD_PRACTICES_IN_THE_INVESTIGATION_OF_MATCH-FIXING.pdf [accessed 9 April 2018].

106 Explanatory Report to the Macolin Convention, paragraph 82.

100.2 Has the disadvantage, however, that an anonymous report may not be able to be used in disciplinary proceedings and, even if it can, is not as persuasive as first-hand witness evidence. Furthermore, anonymous evidence may sometimes be of poor quality and dubious reliability, and may generate significant workload in checking the information received (which may ultimately be fruitless). Moreover, if there is provision for anonymous reporting, it may create difficulties in terms of monitoring players' compliance with their duty to report. In order to preserve the advantage of reporting without the disadvantages flowing from affording full anonymity, it is possible that confidentiality and partial anonymity can be secured up to and including the disciplinary hearing, via the admission of protected witnesses.

101. A further basis for detection of breaches of integrity is the action of whistle-blowers, also listed as a possible source of information under the Macolin Convention[107]. Although incentives to report could be considered, such as establishing monetary benefits for whistle-blowers, sports governing bodies have yet to develop this basis for detection within a more solid strategy of gathering information (similar to what has happened in the fields of foreign corruption and public corruption in many countries)[108]. In particular, it should be kept in mind that the handling of whistle-blowers is expensive and time-consuming for the sports governing body or other authority, in particular due to the regular contact that needs to be kept with whistle-blowers who need to be protected and may expect to be rewarded. In international sport, whistle-blowers are also likely to travel extensively, which further adds to the issues. In addition, the relationship between a sports governing body handling a whistle-blower and national law enforcement agencies might be sensitive, especially in countries where there is a duty to report crimes to those national authorities.

102. Lastly, another useful and common tool of intelligence and information, and indeed a basis for detection, is the media – particularly the sports media, including journalists who are in contact with players or even undertake their own investigations[109]. Sports governing bodies may even learn through the media that criminal investigations are taking place.

Integrity tests as a basis for detection

103. A sensitive issue is the extent to which sports governing bodies' anti-corruption or integrity units may or should usefully conduct "*integrity tests*" on players. Integrity tests generally involve someone in the unit, or commissioned by it, asking a player or other participant to fix a match, or to provide inside information, or to bet on a match, or to commit some other breach of integrity. If the player or other participant declines then their integrity is intact, but if they agree, then they have committed an integrity offence, which can on the face of it be charged. When players and others have a duty to report if and when they are approached to fix a match or breach integrity in some other way, they may be caught by an integrity test even if they have in fact declined an offer but failed to report it. Further, an integrity test on a player arguably does not lead to the incontrovertible conclusion that the player is corrupt, as the test may well be the first and only time that the player has agreed to fix a match.

104. The potential benefits of integrity testing include:

104.1 First, there may be sufficient evidence to bring and succeed on a disciplinary charge. If for example there have been allegations in relation to a player in the past, but there has been insufficient evidence, a failed integrity test may form a sufficient basis for a disciplinary conviction.

107 ibid.

108 Notwithstanding certain sports governing bodies that have implemented progressive systems for gathering information (such as UEFA), the Panel is not aware of any concrete steps taken to include monetary incentives for whistle-blowers (statement of Emilio García and Graham Peaker (UEFA). In Italy, the idea of creating incentives for tennis actors to step forward and blow the whistle is under consideration, particularly the introduction of a premium to be granted to those who cooperate. However, the debate is controversial, as, "when it comes to sports ethics, it is difficult to accept that players and coaches in violation of rules of integrity (such as by aiding the perpetrators of a sports fraud) could be benefitted" (statement of Guido Cipriani (Italian Tennis Federation) and Enrico Cataldi (National Olympic Committee).

109 The UNODC Resource Guide, page 60.

104.2 Second, even if it is decided not to charge on the basis of a failed integrity test, it adds to the intelligence available to the relevant unit.

104.3 Third, the prospect that an approach may be an integrity test may deter players and others from accepting genuine corrupt approaches they would otherwise have accepted, and may encourage them to report such corrupt approaches that they would otherwise have stayed quiet about.

105. However, integrity tests may be difficult to provide for, to undertake, and to rely upon:

105.1 Due to the contractual nature of the integrity rules of a sport, players should be clearly informed in the rules, and should clearly accept by their agreement to be bound by the rules, that such procedures are in use.

105.2 In order to carry evidential value, integrity tests have to be proportionate so that they do not constitute an overwhelming incitement for the player to breach the rules. The test must not offer so much in return that players who would never otherwise succumb, nevertheless do so. It must be aimed at the level of return that is likely offered by the real corruptors, so that the test is what the player would do if he or she were approached by such a real corruptor, rather than if he or she were offered an overwhelming amount of money that such a real corruptor would not offer.

105.3 Perhaps most difficult of all is the fact that because match-fixing is a criminal offence in many, if not most, countries, it must be carefully assessed country by country: (a) whether integrity tests amount to prohibited "*entrapment*"; and (b) whether integrity tests would require those carrying them out to themselves commit the criminal offence of incitement.

The need to operate in compliance with data protection law

106. The issue of data protection in respect of the handling of information, intelligence and evidence as to breaches of integrity, both by sports governing bodies and law enforcement agencies is complex. In particular, there is a risk that the data gathered and shared includes data that goes beyond the intended purpose, or that is kept longer than necessary. This is before specific national legislative limitations on exporting data to third countries or on the right of individuals to access data are even taken into account. Another risk is that Covered Persons ask for access to their file in order to control the content. Lastly, the exchange of data from one country to another is often problematic; for example, it is often difficult for the USA to cooperate in this context with EU countries. This risk can be alleviated or diminished by carefully framing the Covered Persons' rights and duties in the sport's contractual documents, but the end result will depend on relevant national legislation and judicial decisions.

107. The Explanatory Report to the Macolin Convention, observes that *"given that the organization of sports competitions and the activities of sports betting operators generate a large volume of personal data, there is a risk that the data shared includes data that goes beyond the purposes pursued or of the data being kept longer than necessary.* [The states] *must pass legislation so that the stakeholders* [including, for instance, sports governing bodies] *ensure that data are exchanged solely for the purposes of the convention and that the data sharing does not go beyond the strict minimum needed for the pursuit of the stated objectives of the sharing.* [The states] *might wish to consider the setting up of consultation committees involving the various stakeholders at national level and personal data protection experts to agree to the type of data to be shared and the time they should be preserved, as one of the means of addressing these requirements for security and integrity and, more broadly, improving the effectiveness of co-operation between stakeholders and ensuring greater protection in terms of how personal data are used*"[110].

110 Explanatory Report to the Macolin Convention, paragraph 127.

108. In establishing the structures and rules needed to combat match-fixing and other breaches of integrity, sports governing bodies, as well as betting operators and public authorities, must therefore take into account their obligations to comply with the relevant national and international personal data protection laws and standards. As to the exchange of personal data between them, the framework put in place by the Macolin Convention[111] provides appropriate guidance on how to address these issues and to create a coordinated approach.

(2) SUSPICIOUS BETTING PATTERNS AS INDICIA OF BREACHES OF INTEGRITY

Suspicious betting patterns as a trigger for investigation

109. Since match-fixing generally has as its aim as the securing of advantages in the betting markets, unusual and suspicious betting patterns are likely to be especially effective in identifying at least potential breaches of integrity. They should therefore be investigated when reported to a sports governing body or its integrity unit. The value and weight of unusual and suspicious betting patterns for the purposes of proving a breach of integrity will however vary from case to case.

110. As explained in Chapter 3[112], unusual betting patterns may be caused by a variety of factors including, but not limited to, a bettor's error, "*piling in*", unexpected poor performance by a player, faster receipt of information or score data due to courtsiding, inadvertent or deliberate provision or leakage of inside information as to form or injury of a player, or an agreement to fix the match for betting purposes. Many unusual betting patterns may not therefore be related to match-fixing at all.

111. While suspicious betting patterns are those where, upon investigation, there is no legitimate explanation that justifies why the unusual betting occurred, they still do not generally establish in themselves that a particular person fixed a match, or committed a related breach of integrity. Indeed, other factors may have intervened to trigger such a suspicious betting pattern, such as – and especially – inside information. The absence of a clear justification for an abnormality does not generally create a presumption of match-fixing. Therefore, in most cases of suspicious betting patterns additional circumstantial or direct evidence should be collected through investigation. That is not to say that the suspicious betting pattern is not evidence: it is evidence, and useful evidence, but it generally will not be sufficient on its own.

112. However, in some instances, on the particular facts, suspicious betting patterns may carry substantially more evidential weight:

    112.1 Some fixes, such as spot-fixes, are so specific that the betting evidence combined with events on the court or pitch may clearly demonstrate bettor knowledge of what would happen in advance. In these circumstances, the inevitable inference is that it was contrived by the player, because it could not otherwise be explained.

    112.2 On occasion, there is a repeated pattern of the same behaviour giving rise to similar suspicious betting patterns, or similar betting activity by similar accounts. The cumulative effect of the evidence may be sufficient to establish a breach of integrity.

113. In any case, the existence of a suspicious betting pattern is certainly an element that should be considered as triggering the need for a thorough investigation, especially if the same player has been involved in several successive matches raising suspicious betting patterns or if certain tournaments give rise to an above-average number of such patterns.

111 The Macolin Convention, Article 14.

112 Chapter 3, Section F.

Assistance of betting professionals and memoranda of understanding

114. Effective interpretation of and reliance on suspicious betting patterns and betting data requires the assistance of an expert betting analyst with experience in assessing sports betting markets and the related statistics. Such an analyst can identify: (a) what the betting could be expected to have been; (b) what it in fact was, and why; and (c) the accounts that bet differently to how they might be expected to have done in the normal course, absent some sort of knowledge of the result in advance, or of inside information indicating a probable result different to expectation. Such expert betting analysts usually work at a betting operator, or a private betting syndicate or company, or for a betting monitoring company, although some sports governing bodies have such expertise within their organisation, such as the British Horseracing Authority and UEFA. UEFA, for instance, has 15 independent disciplinary inspectors (2 to 3 specialized in match-fixing, including a betting expert[113]) and has developed its own detection system: the Betting Fraud Detection System ("BFDS")[114], which is referred to as UEFA's main source of information[115]. At the least, a sports governing body must have in place someone with sufficient experience and expertise to engage with the expert betting analyst elsewhere to understand what the betting data demonstrates.

115. The data must be available to the sports governing body in the first place, before it can be analysed and used. It is important that sports governing bodies and integrity units should develop good relationships, and execute memoranda of understanding, with betting operators and monitoring companies. This is useful in two chief ways: (a) first, under such agreements sports governing bodies secure a viable source of information on unusual and suspicious betting patterns, which are provided automatically every time an unusual or suspicious event is identified; and (b) second, sports governing bodies can seek access, upon request, to information regarding account holders (including covered players who hold betting accounts) to facilitate investigation of potential match-fixing or other integrity breaches[116], unless the applicable data protection law provides otherwise.

(3) PLAYING PERFORMANCES AS INDICIA OF BREACH OF INTEGRITY

116. Significantly divergent or atypical performance (in other words, performance significantly different from that to be anticipated from the player, or other participants, taking into account his or her ranking, level, experience, track record, temperament) may be another indicator of a potential breach of integrity. The detection of such significantly divergent or atypical performance, and the potential confirmation of suspicions, generally depends on video footage (which, at times, can constitute direct evidence of match-fixing) coupled with statistical analysis.

117. Video footage has proved to be helpful in investigations targeting unusual behaviour in both players[117] and referees[118]. However, in many cases, the footage does not permit solid conclusions, due to the permissible margins of error even for skilled participants in high-level sport. Moreover, video footage taken in isolation may be misleading and lead the public at large to believe that many players are involved in match-fixing[119].

113 Statement of Emilio García and Graham Peaker (UEFA).

114 BFDS runs in close cooperation with Swiss-based company Sportradar. If an irregularity is found with regards to a specific match, a report is generated by the system, including detailed information on betting activities as well as the match itself (such as on-field action, players, match officials, etc).

115 Statement of Emilio García and Graham Peaker (UEFA).

116 A good example of such a mechanism is the Integrity Betting Intelligence System ("IBIS") of the International Olympic Committee. The system operates as a platform for collection and distribution of information and intelligence related to sports betting for use by all stakeholders of the Olympic Movement. See the IBIS factsheet, available at https://stillmed.olympic.org/Documents/Reference_documents_Factsheets/Integrity_Betting_Intelligence_System_IBIS.pdf [accessed 9 April 2018].

117 E.g. in the investigations of allegations made against former Motherwell player Steve Jennings in 2010 as reported in the UNODC Resource Guide, page 37.

118 E.g. in a Nigeria v. Argentina international football friendly in 2011 as reported in the UNODC Resource Guide, page 37.

119 Statement of Emilio García and Graham Peaker (UEFA).

118. Moreover, a player's poor performance may be connected to personal reasons entirely unrelated to match-fixing, such as hidden injuries, illness, jet lag or down morale. In addition, as addressed in Chapter 4[120], tennis players may decide to throw, or "*tank*" a match due to a variety of reasons arising out of the player incentive structure, such as amongst others: (a) conflicting schedules with club "*money*" matches (which may pay more and are often preferred by lower-level players as a greater source of income); (b) the need to play a match while ill or injured in order to avoid withdrawal fines; and (c) a desire to cut financial losses, especially in doubles matches after the player has lost in the singles, in order to avoid hospitality and boarding expenses.

119. The combined analysis of video footage of a player's performance at a particular minute of the match and the variation of betting patterns in the market can however provide strong circumstantial evidence of match-fixing in some circumstances. Such combination is common in football cases, as explained by Mr. García and Mr. Peaker of UEFA. Significantly, the combined analysis of betting data and video footage of a player's performance was considered a sufficient legal basis to conclude that match-fixing took place in the CAS case *Vsl Pakruojo FK et al. v. LFF*[121].

120 Chapter 4, Section A(5).

121 CAS 2015/A/4351 (Vsl Pakruojo FK et al. v. LFF), paragraph 92.

C INVESTIGATION

120. Once potential match-fixing or other breach of integrity has been detected, the question then arises as to how it can best be investigated, whether by a law enforcement agency or a sports governing body in order to ascertain whether or not a breach did indeed occur and to collect evidence for a criminal or disciplinary prosecution, if appropriate.

121. The dividing line between the amassing of information and intelligence on the one hand, and the gathering of evidence on the other hand is of course often not a clear one, as information and intelligence can become evidence in the light of other material, and evidence in relation to one matter may also be intelligence in relation to others. Generally, the difference is in the use to which the material can be put. Evidence is a collection of different usable and provable facts of various evidential values that, if sufficient to satisfy the applicable evidential standard, will prove an offence. While some information and intelligence may be usable and provable, it may also include material that cannot be used, and material the accuracy of which is unknown.

122. Investigations may involve parallel action by different sports governing bodies, for example at the national and international level. Since match-fixing may be connected with wider criminal activities, or may of itself be dealt with as a crime under local law, investigations may also be conducted in parallel by sports governing bodies and law enforcement agencies[122]. Further, it is possible that multiple law enforcement agencies may each be running their own investigation, with or without the knowledge of one another, or of the relevant sports governing bodies, at the national or international level.

123. Below, the Panel addresses the characteristics of investigations conducted by sports governing bodies and by law enforcement agencies and then turns to how and when investigations may be conducted together or independently by sports governing bodies and law enforcement agencies.

124. A successful match-fix likely involves four stages: planning, placing of bets, execution and collection of profit[123]. As a result, the investigation of a match-fixing offence will focus on these stages, whether conducted by a sports governing body or a law enforcement agency. However, due to the different investigatory powers enjoyed and the different standard of proof in disciplinary and criminal proceedings, investigations by sports governing bodies are different from those conducted by law enforcement agencies.

(1) INVESTIGATION BY SPORTS GOVERNING BODIES

125. A sports governing body's powers to investigate a potential breach of integrity, like the substantive obligations not to breach integrity, are contractual and arise out of the agreement of those under investigation to abide by the rules of the sport. Those rules will include provisions in relation to the investigative steps that can be taken. They will likely also contain an obligation on those bound to cooperate and assist in an investigation, breach of which will be an offence in itself.

126. A sports governing body's investigation of a breach of integrity involves then using its contractual powers to examine each of the four stages set out above, or such of them as apply in the case of a breach of integrity other than match-fixing. It will seek to identify documentary or witness evidence of the contact between player and fixer and what was said during that contact, of the betting that occurred on a particular outcome and how it differed from what might have been expected, of what happened on the pitch or court and how it differed from what might have been expected, and of the passing of reward. As part of this process, the sports governing body may interview the actors involved (e.g., the player, bettor, or betting operator) and any other witnesses of their actions, including opponent, coach and the officials at the event. It may also seek to obtain access to documentary records and electronic devices, in case they contain any evidence as to any of the four stages.

122 According to the United Nations Office on Drugs and Crime, "this is because almost all match-fixing cases involve the manipulation of a sporting event for the purposes of illegitimate financial gain from betting markets" (UNODC Resource Guide, page 26).

123 UNODC Resource Guide, page 26.

127. Sports governing bodies seeking to investigate breaches of integrity in this way may face significant difficulties in certain jurisdictions, where, for example, individuals or entities are not allowed to conduct, or are restricted in conducting, private investigations. In such jurisdictions individuals or entities may, for instance, be forced to act in cooperation with local police or through a licensed detective. As a consequence, in order to conduct a legal and fruitful investigation, it is sometimes preferable, or even essential, to obtain external help from local betting regulatory authorities, local law enforcement agencies or local sports governing bodies, not least in order to understand the local legal framework.

128. For most sports governing bodies, an important part of their investigation strategy will involve the use of betting intelligence. In this respect, relationships with betting operators and monitoring companies are particularly relevant in investigations. In some jurisdictions, betting operators are under a legal obligation to cooperate with match-fixing investigations[124]. This cooperation may include "*sharing the personal details (e.g. name, address and date of birth) of the person(s) placing bets and any other evidence connecting them to the bets, such as voice recordings or computer intelligence, as well as their past betting history*"[125]. Cooperation will have to be agreed with betting operators through memoranda of understanding in jurisdictions where no statutory duty to cooperate exists. In addition to the betting operators, assistance may be obtained from specialist betting monitoring companies, which are capable of providing technological and human resources to identify suspicious betting. Further, cooperation is not confined to after a suspect match has occurred: early warning systems have been set up in a number of instances[126]. Where there is neither a statutory requirement nor agreement to cooperate, judicial assistance is likely to be required to obtain information. The advantages and disadvantages of such assistance are discussed in Section C(4) below.

(2) COOPERATION AMONG A SPORT'S VARIOUS GOVERNING BODIES

129. Cooperation among a sport's different governing bodies or even among governing bodies of different sports can be productive. In most sports, there are different levels of governing bodies, such as national federations, regional confederations, and the international federation – or even an inter-sports governing body, such as the IOC. There may also be a number of league organisations in a country as well as the national federation, or even cross border leagues. Each of these organisations may have or perceive itself to have a role in investigating breaches of and enforcing its rules in this context. This raises issues of competing jurisdictions between governing bodies, which must be resolved. Furthermore, the methods and quality of investigation will vary across the sport (and across different sports) between the international and the national level. And the means and resources to investigate and enforce integrity breaches, not to speak of the appetite and political influence, at the national level may differ greatly from one country to another. Lastly, certain national federations are either run or controlled to a greater or lesser extent by the state or are at least organised by the state within a statutory framework (such as in France or in Italy). In some instances, the State may limit, or dictate, the way federations should run investigations and enforcement procedures (such as in Italy)[127]. This wide variety of situations makes it impossible to set down any firm account of how cooperation can occur. However, the ideal is obviously to have a system within a sport that is well integrated and does not involve duplication – or even worse conflict – between the investigation and enforcement actions at each level.

124 For example, the relationship between SARU and Sportradar, outlined at footnote 97 above

125 ibid., at page 36.

126 For instance: (a) Sportradar Integrity Services (SIS) supplies monitoring, prevention and educational solutions to sports governing bodies and state authorities. It monitors odds movements and patterns worldwide to identify suspicious activities through its Fraud Detection System; (b) the Global Lottery Monitory System (GLMS), developed by the World Lottery Association and the European Lotteries (and powered by Sportradar), monitors betting markets offered by government-authorised lotteries and for-profit only betting operators; (c) the European Sports Security Association ("ESSA") provides an early warning system with the specific aim of detecting and deterring the corruption of ESSA members' betting markets through the manipulation of sporting events. The system works in a two-tier fashion: (i) the Internal Control System (designed for ESSA members who detect an unusual betting pattern to report to the ESSA Security Team and Head Bookmaker for a first checking); and (ii) the ESSA Early Warning System (which is activated if the first tier control is deemed substantiated, in which case the alert is issued in the ESSA's Advanced Security Platform requesting members to confirm similar patterns in other markets); (d) the FIFA Early Warning System GmbH ("EWS"), FIFA's own warning system company. Launched in 2007, the EWS aims at protecting football matches in all FIFA tournaments by monitoring and analysing the international sports betting market and through comprehensive reporting to FIFA, although it also carries out match monitoring on behalf of third parties both within and outside of football; (e) the Integrity Betting Intelligence System ("IBIS") has operated since the 2014 Olympic Winter Games in Sochi under the initiative of the International Olympic Committee and collates alerts and information on manipulation through betting on sport by means of a network of memoranda of understanding signed with betting operators and national regulators, as well as a cooperation agreement with Interpol. The system remains operational between editions of the Olympic Games for the benefit of international federations to use at their major international events and other multisport events. In the event that an international federation suspects one of its events has been jeopardised, the international federation may ask IBIS for information on the betting market.

127 Statement of Guido Cipriani (Italian Tennis Federation) and Enrico Cataldi (National Olympic Committee).

130. One instance of apparently fruitful cooperation among different governing bodies of the same sport has been that of UEFA and national associations. UEFA has invested heavily in the creation of a cooperative network to combat match-fixing[128]. The network has been developed through the use of local integrity officers in national associations who are in charge of supervising national competitions. The local integrity officers, although financed by UEFA, are selected and employed by the national associations or together by UEFA and the national associations. If a case arises under UEFA regulations, the local integrity officers assist UEFA's integrity officers in local aspects of the investigation[129]. Although the Panel's interviewees reported some difficulties with almost one-fifth of the local integrity officers of some national associations[130], the system seems to broadly be producing good results. One further tool to encourage cooperation among sports governing bodies is to invest in the spread of information. In that regard, UEFA holds periodical regional meetings of local integrity officers and heavily invested in building relationships with, and lobbying, strategic stakeholders[131].

(3) INVESTIGATION BY LAW ENFORCEMENT AGENCIES AND REGULATORS

131. Unlike sports governing bodies, law enforcement agencies possess statutory coercive powers such as arrest, search and seizure, phone tapping, witnesses compulsion and the ability to call on mutual assistance from foreign states[132]. However, law enforcement agencies may lack the legal conditions or the appetite to investigate and prosecute match-fixing or other integrity offences, especially since they usually occur in complex international environments and can be expected to require substantial time and resources to pursue – but are punishable with only a relatively light sanction. Furthermore, national law enforcement agencies are unlikely to have a full understanding of either the rules and nuances of the sport in question or the betting markets, and will require the assistance of specialist experts in both areas[133].

132. In light of the above, it is difficult to see how investigations into match-fixing by law enforcement agencies can be effective without the assistance of the sports governing bodies and betting companies that have been the subject of the potential match-fixing, as addressed further below[134]. Also, as addressed below[135], it is important to avoid duplication and potential conflict between parallel investigations. In an ideal world agreement would be reached as to how an investigation is most effectively pursued and by which organisation.

133. Although the investigation and prosecution of match-fixing are separate functions, they both seek to establish or to disprove an individual's involvement in a match-fixing incident. To facilitate this, it is essential to have regular cooperation and communication between investigators and prosecutors, and indeed regulators, on the general nature and scope of an investigation and on particular avenues of investigation[136]. This exchange can obviously be facilitated in the frame of task forces or platforms as advocated in the Macolin Convention (though the police may prefer working within smaller organisations) or even at the bilateral or interpersonal level.

128 According to Emilio García and Graham Peaker (UEFA), UEFA invests between 5 and 7 million euros a year in its networks (in the past the investment reached 10 million euros a year). Statement of Emilio García and Graham Peaker.

129 Statement of Emilio García and Graham Peaker (UEFA).

130 ibid.

131 ibid.

132 UNODC Resource Guide, page 26.

133 ibid.

134 Section C5.

135 ibid.

136 UNODC Resource Guide, page 56.

(4) COOPERATION BETWEEN LAW ENFORCEMENT AGENCIES AND REGULATORS

134. Furthermore, in the light of the cross-border nature of the problem, it is appropriate that criminal law investigative and enforcement bodies from different states should also cooperate.

International organisations facilitating cooperation among different states' investigative and enforcement bodies

135. The first basis for such cooperation is through the international organisations specifically established to provide a framework for it.

136. The International Criminal Police Organization, ICPO or INTERPOL, is an intergovernmental organisation facilitating international police cooperation. The role of INTERPOL is to ensure and promote the widest possible mutual assistance between all police authorities and law enforcement agencies within the legal systems of different countries, as well as to establish and develop all institutions likely to contribute effectively to the prevention and suppression of crime. INTERPOL is not itself an international law enforcement agency and has no agents who are able to make arrests. Instead, it is an international organisation that functions as the focus for a network of criminal law enforcement agencies from different countries around the world.

137. INTERPOL has created the Match-Fixing Task Force ("IMFTF"), which brings together law enforcement agencies from around the world to cooperate in tackling match-fixing and corruption in sports[137]. The IMFTF supports member countries in their investigations and law enforcement operations across all sports, and provides a forum for a global network of investigators to share information, intelligence and best practices.

138. An example of INTERPOL's activities in integrity matters is Operation SOGA (short for Soccer Gambling), through which INTERPOL's members aim to identify and dismantle international criminal networks behind illegal soccer gambling, especially during major football tournaments such as the FIFA World Cup or UEFA European Cup[138]. In five operational waves carried out between 2007 and 2014, Operation SOGA resulted in more than 8,400 arrests, the seizure of almost US$40 million in cash, and the closure of some 3,400 illegal gambling dens which handled bets worth almost US$5.7 billion. The operations have successfully removed a major source of proceeds for organised crime syndicates[139].

139. At the regional level of the European Union, EUROJUST is in place to set up centres for the coordination of simultaneous operations between judicial, police and, if need be, customs authorities. EUROJUST helps facilitate coordination meetings at which national authorities can reach agreement on the conduct of joint actions and on the setting up of a EUROJUST coordination centre for a particular purpose. Coordination centres provide a structure for real-time exchange of information and centralised coordination of the simultaneous execution of, amongst other things, arrest warrants and searches and seizures in different states. Coordination centres expedite the timely transmission of additional information that is urgently needed to execute such measures and newly issued Mutual Legal Assistance ("MLA") requests[140].

137 http://www.interpol.int/Crime-areas/Crimes-in-sport/Match-fixing-and-illegal-gambling [accessed 9 April 2018].

138 ibid.

139 ibid.

140 http://www.eurojust.europa.eu/Practitioners/operational/Pages/eurojust-coordination-center.aspx [accessed 9 April 2018].

140. In addition, Europol[141] is able to set up joint investigation teams ("JIT"), which are made up of judges, prosecutors and law enforcement agencies from different states, established for a fixed period and for a specific purpose pursuant to a written agreement between the states involved, to carry out criminal investigations in one or more of the involved states. Through grants from the European Commission under the programme for the Prevention of and Fight against Crime (ISEC[142]), EUROJUST is also able to support the operational activities of JITs both financially and logistically[143].

141. The Network of National Experts on Joint Investigation Teams (JITs Network) was established in July 2005 with the aim of "encouraging the use of JITs and exchanging experience on best practice"[144]. Since 2011, the JITs Network has had a Secretariat – hosted by the institutional body, EUROJUST – that promotes the activities of the JITs Network and supports the National Experts in their work. The aim of the JITs Network, consisting of at least one National Expert per member state, is to facilitate the work of practitioners in the member states. The JITs Network primarily does this by encouraging the establishment and use of JITs to deal with specific problems. In addition, the JITs Network facilitates the establishment of teams, helps in the sharing of experience and best practice and assists practitioners in its member states with legislative, administrative and operational aspects relating to the establishment of JITs. The National Experts are mainly representatives from law enforcement, prosecutorial and judicial authorities. Institutional bodies such as EUROJUST, Europol, OLAF[145], the European Commission and the European Council have also appointed contact points to the JITs Network. Since 2005, the JITs Network has met at an annual meeting organised jointly by EUROJUST and Europol. This meeting is a forum where both the Member states and Institutions share questions and problems and propose solutions from a practitioner's point of view. Each year, the meeting is built around a "*central topic*"[146].

142. Sports corruption and match-fixing has been identified by Europol as a specific crime area of interest[147]. This has led to the taking of a wide range of concerted steps pursuant to the powers described above, in order to address the problem:

142.1 Experts at Europol work with law enforcement agencies across the EU to identify links between suspicious matches and suspects, and to uncover the organised crime groups orchestrating multi-million euro frauds in sports. In addition, since 2011, Europol has assisted EU law enforcement agencies with analysing data from investigations into sports corruption, primarily in relation to football matches.

142.2 Europol supports the EU's and the Council of Europe's KCOOS project, referred to above, giving effect to the Macolin Convention. The project publishes a practical how-to guide on how to fight sports manipulations. Overall, Europol's key contributions to ending these manipulations lie in: (a) analysing criminal intelligence; (b) producing analytical reports; (c) hosting operational meetings; and (d) deploying mobile offices and experts to provide on-the-spot assistance during law-enforcement operations.

142.3 In relation to match-fixing, Europol set up a JIT (codenamed Operation VETO) involving Europol and police teams from 13 European countries in order to uncover a criminal network involved in widespread football match-fixing. A total of 425 match officials, club officials, players, and serious criminals, from more than 15 countries, were suspected of being involved in attempts to fix more than 380 professional football matches. The activities formed part of a sophisticated organised crime operation, which generated over €8 million in betting profits and involved over €2 million in corrupt payments to those involved in the matches. The JIT ran between July 2011 and January 2013. Led by Europol, Germany, Finland, Hungary, Austria and Slovenia, it was also supported by EUROJUST,

141 Europol is the European Union's law enforcement agency, https://www.europol.europa.eu/ [accessed 9 April 2018].

142 https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/prevention-of-and-fight-against-crime [accessed 9 April 2018].

143 http://www.eurojust.europa.eu/about/background/Pages/history.aspx [accessed 9 April 2018].

144 http://www.eurojust.europa.eu/Practitioners/operational/Pages/eurojust-coordination-center.aspx [accessed 9 April 2018].

145 European Anti-Fraud Office; https://ec.europa.eu/anti-fraud/home_en [accessed 9 April 2018].

146 http://www.eurojust.europa.eu/Practitioners/JITs/jitsnetwork/Pages/JITs-network.aspx [accessed 9 April 2018].

147 https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/corruption/sports-corruption [accessed 9 April 2018].

INTERPOL and investigators from eight other European countries. The investigation coordinated multiple police enquiries across Europe and was facilitated by intelligence reports from Europol, based on the analysis of 13,000 emails and other material, which identified links between matches and suspects and uncovered the nature of the organised crime network behind the illegal activities. The investigation has since led to several prosecutions in the countries involved, including Germany where 14 people have already been convicted and sentenced to a total of 39 years in prison[148].

142.4 Europol also teamed up with UEFA in 2014, when the two organisations signed a memorandum of understanding aimed at bolstering the fight against match-fixing in European football. At Euro 2016, Europol and UEFA formed a working group with the French police and the French Ministry of Justice, France's online gambling regulatory authority ARJEL, UEFA's monitoring partner Sportradar and the French state lottery. The result was reportedly positive, with no concerns about integrity arising in relation to any matches[149].

Cooperation between different states' investigative and enforcement bodies pursuant to international treaty or national law

143. Outside the cooperation framework of the international bodies INTERPOL and EUROJUST / Europol discussed above, states have the duty and ability to cooperate with other states under multilateral or bilateral international treaties, or national legislation.

144. Most multilateral treaties on specific offences contain an obligation on state parties to cooperate at the level of their judicial authorities. For example, the Macolin Convention provides that state parties should cooperate with each other in criminal matters "to the widest extent possible"[150]. The UNCAC also provides for "cooperation between national investigating and prosecuting authorities and entities of the private sector"[151]. There are similar provisions in the OECD anti-bribery Convention[152] and in the Council of Europe Criminal Law Convention on Corruption[153]. The same applies to conventions on organised crime, such as the UNTOC[154].

145. Besides the "*offence-oriented*" conventions, multilateral regional conventions also provide for specific mechanisms for mutual cooperation in criminal matters, such as the Council of Europe Convention on Mutual Assistance in Criminal Matters, to which 50 countries are parties, including non-European states such as Chile, Israel and Korea. The Schengen Agreement[155] also provides for assistance in criminal matters between state parties (including EU states as well as Iceland, Norway, and Switzerland). In addition, the EU's European Council Act of 29 May 2000[156] provides the basis for broad and in-depth mutual assistance between EU states.

146. Certain states are also bound by bilateral agreements on mutual legal assistance[157]. There are also bilateral agreements such as the EU-USA MLA Agreement[158] and the EU-Japan MLA Agreement[159]. Although, since they bind all EU countries

148 https://www.europol.europa.eu/newsroom/news/update-results-largest-football-match-fixing-investigation-in-europe [accessed 9 April 2018].

149 https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/corruption/sports-corruption [accessed 9 April 2018].

150 Macolin Convention, Article 26.

151 ibid., Article 39.

152 ibid., Article 9.

153 ibid., Articles 25-26.

154 ibid., Article 13, 14 and 18.

155 OJ L 239 of 22.09.2000.

156 Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member states of the European Union, OJ L 176, 10.7.1999, page 36.

157 Mutual Legal Assistance Treaties in force between states can be found on https://mlat.info/ [accessed 9 April 2018].

158 OJ L 181 of 18.7.2003.

159 OJ L 39 of 12.2.2010.

with the USA and Japan, they could be considered to be multilateral conventions.

147. Lastly, states may also assist other states with no international treaty in place binding them to do so, on the basis of national laws contemplating mutual legal assistance. Some states restrict their assistance to countries that would provide the same assistance to them, on the basis of the principle of reciprocity, but others would assist even on a unilateral basis[160].

148. Direct assistance at the police level, without the involvement of judicial authorities, is not common in civil law countries, but is quite widely practised in common law countries or between countries with close connections, such as the states parties to the Schengen Agreement[161]. The practice in many countries is that police can exchange information but cannot exchange evidence, as evidence can only be transmitted through the procedure of judicial mutual legal assistance, which usually provides aggrieved parties with some right of appeal to the courts.

(5) COOPERATION BETWEEN SPORTS GOVERNING BODIES AND LAW ENFORCEMENT AGENCIES AND REGULATORS

The goal of cooperation

149. Cooperation among sports governing bodies and national law enforcement agencies and regulators in the pursuit of their respective investigations is particularly useful as the bodies possess different and complementary investigative tools and expertise[162]. At the same time, however, parallel investigations should not ideally duplicate work or give rise to conflict.

150. While law enforcement agencies have a broader range of investigative tools than the contractual tools available to sport governing bodies, some of those contractual tools may allow for additional steps to be taken that are not open to the law enforcement agencies. In addition, law enforcement agencies are not specialised in sports or betting and require the insights and evidence that can be gathered by sports governing bodies' disciplinary and investigative arms.

151. For instance, where players are subject to a duty to cooperate with investigations and there are evidence gathering tools agreed in the sport's rules (such as the surrender of electronic information devices and mobile phones and access to records), material may often be obtained more rapidly by the sports governing body, than it might be by a law enforcement agency, which might well need to make a prior request for a search warrant from a judicial body in order to comply with privacy rights, or to ask for mutual legal assistance from another country.

152. From the sports governing bodies' point of view, support from local law enforcement agencies may provide information and evidence that they could not otherwise obtain, or ease the path to their gathering information and evidence that they would have difficulty in obtaining. For example, the provision of a mobile phone by a player under the sport's rules might reveal messages and list the phone numbers of addressees or senders of messages, but it would not reveal who held a number, or the content of telephone calls. The assistance of local law enforcement agencies might in appropriate circumstances allow the use of intercepts of telephone communications. It might allow the disclosure of the holders of the numbers from or to which calls or messages were received or made. Local law enforcement agencies may also assist in the geolocation of mobile phones at a certain time, or the remote access of computers or other electronic devices. Additionally, the assistance of local law enforcement agencies provides an extra layer of legitimacy to the investigation, which is of special relevance in countries where investigations by private actors are prohibited or restricted.

Significant limits in practice on cooperation

160 For example, for Australia, https://www.legislation.gov.au/Details/C2016C00952 [accessed on 9 April 2018].

161 Article 30.

162 In golf, for example, if there is a parallel criminal investigation of a code violation, the PGA Tour may coordinate with the relevant law enforcement and other authorities in the PGA TOUR discretion. Similarly, the PGA TOUR may continue to conduct, or suspend, the Investigation hereunder during the course of a criminal investigation or similar proceeding in its discretion, subject to applicable law. See PGA Tour Integrity Manual, Article 6.

153. Nonetheless, it appears that there are significant limits to the cooperation that actually takes place between sports governing bodies and law enforcement agencies. There are a variety of possible reasons for this.

154. First, it appears that law enforcement agencies often decide not to start or follow through with investigations. This may be because there is no legal basis for a prosecution, for example in the absence of a specific or applicable provision on match-fixing. It may be due to a lack of jurisdiction, or due to a decision by the law enforcement agency that another country has superior jurisdiction (usually territorial jurisdiction). Alternatively, it may be due to the law enforcement agency's operational priorities, or management of limited human, material or financial resources.

155. Secondly, sports governing bodies generally wish to expedite investigations and resolution of disciplinary proceedings, often because they wish to avoid the continued presence in the sport of potentially corrupt participants[163]. It is therefore possible that some sports governing body investigations and disciplinary proceedings are regarded by law enforcement agencies as hampering parallel state law enforcement agency investigation and prosecution because (a) they remove any element of surprise and (b) an acquittal at disciplinary proceedings, for example on the basis of insufficient evidence, may prejudice the prospects of success in subsequent criminal proceedings.

156. Third, law enforcement agencies may perceive investigations carried out by certain sports governing bodies as being biased or at least subject to conflicts of interest, since the sport governing bodies may be perceived as concerned with the wider reputational repercussions on the sport of successfully disciplining a player for match-fixing.

157. Fourth, law enforcement agencies may perceive certain sports governing bodies as being unlikely to be able to keep information confidential, potentially prejudicing investigation.

158. Lastly, while law enforcement agencies may be interested in investigating integrity offences, they may put the emphasis on other priorities than sports integrity when it comes to deciding when and whom to prosecute, such as when an organised criminal group is acting behind the scenes or when money laundering is involved.

159. As a result, even though cooperation between sports governing bodies and local law enforcement agencies is a goal to be pursued in addressing match-fixing and other related breaches of integrity, it may not be always feasible or appropriate. And even when it is possible, such cooperation generally requires high levels of communication, coordination and confidence between the law enforcement agency and the sports disciplinary body, especially considering the impact a possible leak of information or publicity of disciplinary decisions may have on the success of the criminal investigation.

An increasing appetite to cooperate

160. Historically, for the various reasons referred to above, law enforcement agencies have had little appetite for, and have refrained from, investigating match-fixing matters. Such matters have been regarded primarily as a sporting issue and have not been strictly considered to be a "legal" one[164].

161. This is now changing, with states increasingly adapting their legislation to allow for prosecution of match-fixing, as addressed above in paragraphs 19 to 21. Law enforcement agencies are also now appearing to realise that they should be more active in prosecuting match-fixing as a method of addressing organised crime or money laundering, since match-fixing is considered by such criminal organisations to be a more attractive and lower-risk investment when compared to other criminal enterprises that are more severely sanctioned.

163 As stated by the arbitral tribunal in Besiktas Jimnastik Kubülü v. UEFA: "an effective fight to protect the integrity of sport depends on prompt action. In this context, CAS, or UEFA, cannot wait until states proceedings are over, i.e. after all internal remedies have been exhausted, to take its decision". (CAS 2013/A/3258 (Besiktas Jimnastik Kubülü v. UEFA), paragraph 148).

164 UNODC Resource Guide, page 27.

162. Local law enforcement agencies' appetite to commence criminal investigations of potential match-fixing varies considerably from country to country. For example, it is understood that in certain jurisdictions prosecutors are overloaded with criminal matters that take priority over match-fixing, while in other jurisdictions, such as France and Australia the state expresses higher interest in this issue and supports local enforcement agencies in their investigations and prosecutions of match-fixing allegations.

163. It unfortunately remains a general trend that national law enforcement agencies dedicate very limited resources to combating match-fixing. Some countries, like Australia, Belgium, France, and Italy, have created special units to fight corruption in sport. Sometimes, these units focus more on the betting market or other areas – but the fact is that more units are now able to understand and deal with sports issues in relation to match-fixing.

Is increased cooperation between sports and national law enforcement agencies possible?

164. At one level, the police and the criminal prosecution authorities of a state, which are both bound to enforce their own national criminal law, may in many circumstances have little choice but to proceed with an investigation and a prosecution if they consider that an offence, especially a serious offence, has been committed. They will in those circumstances disregard any concurrent or contemplated sports disciplinary proceedings.

165. However, the pre-eminence and autonomy of criminal law proceedings do not mean that no collaboration can exist between sports governing bodies and state law enforcement agencies. On the contrary, the Macolin Convention, for example, expressly provides that its state parties cooperate with sports governing bodies. Article 12 provides that the states must offer, "*in compliance with the law, … the maximum assistance to the other* [states] *and the* [sports] *organizations concerned, by allowing the spontaneous exchange of information where there are reasonable grounds to believe that offences or infringements of the laws referred to in this convention have been committed, and providing, upon request, all necessary information to the national, foreign or international authority requesting it*"[165].

Status as an aggrieved party in criminal proceedings

166. It is understood that in most European and South American states, as well as in Russia and in Australia, specific match-fixing offences (either as a specific sports-related offence or a general offence of fraud and corruption) are usually prosecuted without requiring a complaint by an individual or a legal entity to trigger the proceedings. On the other hand, certain minor offences may only be prosecuted, in certain jurisdictions, if a criminal complaint is filed.

167. Individuals or legal entities may trigger the proceedings by filing a report and / or file a criminal complaint. Whether those individuals or legal entities have a right to participate in the criminal proceedings which follow will depend on the legal system of the country involved. Under some countries' procedures, such individual or legal entities can claim the status of "*aggrieved party*", and join in the proceedings. Usually, continental European countries may be more open to allowing sports governing bodies to be considered as aggrieved parties, and therefore to have access to the file and to participate in the proceedings. Countries of the Anglo-American common law tradition on the other hand do not allow for this right. There is however the slightly different institution of a private prosecution, for example in England and in Australia[166], under which an individual or legal entity can under some circumstances bring a criminal prosecution if the state authorities decide not to do so.

168. In France, the status of "*aggrieved party*" can be granted to a sports governing body. In particular, the Panel understands

165 Explanatory Report to the Macolin Convention, paragraph 112.

166 So-called "private prosecutions" are permitted for the vast majority of offences, including the match-fixing offences recently introduced into the crimes legislation of the vast majority of Australian jurisdictions (see, e.g., Criminal procedure Act 1986 (NSW), sections 47-49 with Crimes Act 1900 (NSW), Part 4ACA). Private prosecutions permit any individual to act as the "informant" in lieu of the police and therefore to initiate and run criminal proceedings against a person suspected of a crime in the relevant jurisdiction.

that this was recognised in the *VA-OM* case, where the French Supreme Court overturned the Appeal Court's decision to reject the claims of Fédération Française de Football and the Ligue Nationale de Football to such status, holding: "*Corruption of professional sports players potentially causes direct damage to sports federations to which they are affiliated and to its controlling authorities, as it is their mission to ensure the regularity of the sport competitions they organize and the compliance with technical and ethical rules of the sport they are concerned with*"[167].

169. It is understood that in Germany, conversely, sports governing bodies cannot participate in proceedings for fraud in relation to the placing of bets on fixed matches. Indeed, under the German Code of Criminal Procedure, only the direct "*victim*" of a crime can become a party to the proceedings, and then only in limited circumstances. It appears that sports governing bodies would not be considered direct victims of a match-fixing offence, which is considered to have been committed against the betting operator taking the relevant bet. In any event, the circumstances in which a victim can be involved in criminal proceedings as a party are further confined to certain offences involving a personal element, and fraud is not considered one of the offences with a personal element that would justify even the involvement of the direct victim as a party[168].

170. In South American states, such as Brazil and Argentina, it appears that sports governing bodies are similarly unlikely to be allowed to participate, either on the basis that they would not be considered to be a direct victim and so would lack a direct legal interest to participate in the proceedings, or on the basis that the offence had an insufficient personal element.

171. In many countries, such as Switzerland, the position appears to be unclear:

171.1 Sports governing bodies would usually be precluded from filing an official and binding criminal complaint (in contrast to a denunciation or a report, which they could file) and precluded from participating in proceedings for fraud. This is because it is unlikely that they would be considered to have suffered a financial loss consequent upon the fraud (in contrast to the betting operator who takes the relevant bet).

171.2 If on the other hand, an incident of match-fixing qualifies as private corruption, which is plausible, it could be argued that a sports governing body is an "*aggrieved party*" because under the rules, players and other participants owe a duty to the sports governing body not to match-fix or breach integrity.

172. Where sports governing bodies are not recognised as "*aggrieved parties*" or where the country does not recognise the status of "*aggrieved party*", they may still report the offence but have no right to request its prosecution or partake in the ensuing proceedings, if any (as for example in Brazil, Germany, or Argentina). In other countries such as Turkey, it appears that a sports governing body that is impacted by the outcome of a case concerning match-fixing could apply to join the proceedings as an aggrieved party (at the discretion of the relevant criminal prosecution authorities).

173. If a sports governing body is recognised as an "*aggrieved party*", it may have the right to participate in the proceedings, including the right to access the file of the proceedings. Or it may have this right, but only after a certain delay. For example, in Switzerland, the parties may inspect and even copy the file following the first interview with the suspect and the gathering of the most important evidence by the public prosecutor[169]. The parties to the procedure who have access to the file may even use the documents that it contains for another procedure, such as a parallel civil procedure or disciplinary procedure. Under Russian law, it appears that access to the file is granted only at the end of the criminal investigation.

167 Decision by the Cour d'Appel de Douai of 28 November 1995; Decision by the Cour de Cassation, Chambre criminelle of 4 February 1997.

168 Sections 374 and 395 of the German Code of Criminal Procedure.

169 Article 101 of the Swiss Code of Criminal Procedure.

174. The Panel understands that under certain national laws (for example French law[170]), investigations are covered by secrecy requirements and the information obtained during them cannot be used for any other purpose. Domestic legislation may also impose other restrictions. For instance, it appears that a prosecutor investigating a criminal case, even based on information communicated by private organisations, would not be able to pass on other information about the case to those organisations, because of investigation or prosecution confidentiality[171].

175. Finally, even if a sports governing body is not recognised as an "*aggrieved party*", in some jurisdictions it may still request access to the file if certain requirements are met (as is the case in Germany[172]). The sports governing body may however only use such information for the purpose for which the access to the file was granted.

Why and how to cooperate: the creation of Platforms

176. Against the background described above, the need for increased cooperation among law enforcement agencies and other competent public authorities, sports governing bodies and sports betting operators is becoming more and more apparent. In the light of some of the difficulties under some existing national criminal procedures, it is also apparent that a separate structure for facilitating such cooperation may be desirable. This has been recognised by the state parties of the Macolin Convention[173]. The Macolin Convention specifically recommends the use of national "*Platforms*" (which already existed in some countries in form if not in name) where law enforcement agencies, sports governing bodies, regulators and betting operators can meet, exchange information and coordinate their efforts to fight the manipulation of sports competitions[174].

177. While the contemplation is that all state parties should have such national Platforms, no standard way by which to organise the functioning of the Platforms has been established. Each country is free to set up its national Platform as it deems appropriate under local conditions, so long as all relevant stakeholders (public and private) are able to contribute appropriately. Public stakeholders include law enforcement agencies, prosecutors, betting regulatory authorities, and all relevant ministries (sport, finance, interior, customs, and so on). Private stakeholders include various sports bodies federations, associations, player unions and so on, and the betting operators themselves. The precise structures of Platforms will vary. For instance:

170 Under French law (articles 114(6) and 114-1 of the French Code of Criminal Procedure), during the investigation phase the only documents that may be transmitted to third parties are expert reports, and their use must be restricted to the defense of a party in the concerned proceedings. Transmitting any document in violation of these provisions may result in a fine of €10,000.

171 Explanatory Report to the Macolin Convention, paragraph 114.

172 A sports governing body can access the case file if it can show a legitimate interest to do so, the suspect or accused does not have an overriding interest in keeping the information contained in the file confidential (Section 475(1) of the German Code of Criminal Procedure), and there is no interference with ongoing investigations (Section 477(2) of the German Code of Criminal Procedure).

173 The Macolin Convention, Article 12.1 "... each Party shall facilitate, at national and international levels and in accordance with its domestic law, exchanges of information between the relevant public authorities, sports organisations, competition organisers, sports betting operators and national platforms. In particular, each Party shall undertake to set up mechanisms for sharing relevant information when such information might assist in the carrying out of the risk assessment referred to in Article 5 and namely the advanced provision of information about the types and object of the betting products to the competition organisers, and in initiating or carrying out investigations or proceedings concerning the manipulation of sports competitions.

[12.2] Upon request, the recipient of such information shall, in accordance with domestic law and without delay, inform the organisation or the authority sharing the information of the follow-up given to this communication.

[12.3] Each Party shall explore possible ways of developing or enhancing co-operation and exchange of information in the context of the fight against illegal sports betting as set out in Article 11 of this Convention."

174 The Macolin Convention, Article 13.1 "...identify a national platform addressing manipulation of sports competitions. The national platform shall, in accordance with domestic law, inter alia: serve as an information hub, collecting and disseminating information that is relevant to the fight against manipulation of sports competitions to the relevant organisations and authorities; co-ordinate the fight against the manipulation of sports competitions; receive, centralise and analyse information on irregular and suspicious bets placed on sports competitions taking place on the territory of the Party and, where appropriate, issue alerts; transmit information on possible infringements of laws or sports regulations referred to in this Convention to public authorities or to sports organisations and/or sports betting operators; co-operate with all organisations and relevant authorities at national and international levels, including national platforms of other states".

177.1 In Norway, one of the few places where the Macolin Convention has already been ratified, a national Platform has been formally constituted in accordance with the Convention and, as a consequence, the Norwegian Government has put in place two full-time employees to run and coordinate the Platform out of the Ministry for Sport. The national data protection agency has authorised the Platform to treat and use personal data as a public authority;

177.2 In Finland and Denmark, the national Platforms deal not only with the manipulation of sport competitions, but also with doping;

177.3 In France and the UK, betting regulators (ARJEL and the Gambling Commission) have taken the lead in running the national Platforms so far in place; and

177.4 In Belgium, law enforcement agencies lead the national Platform[175].

178. The success of a national Platform depends on clarity about the role of each stakeholder's representative. It is also extremely important to establish who hosts these meetings, as this may give rise to advantages or to disadvantages, depending on what is established under the national legislation. The next challenge is to have the national Platforms cooperating with each other at the international level[176]. Lastly, the size and constitution of some Platforms may lead law enforcement agents to restrain from sharing their own intelligence and evidence too broadly within the Platforms, hence the necessity to scale down the Platforms into smaller units in order to allow the sharing of intelligence at a confidential level.

175 Statement of Cassandra Matilde Fernandes (KCOOS), Stanislas Frossard (Executive Secretary, Enlarged Partial Agreement on Sport) and Mikhael de Thyse (Secretary, the Macolin Convention).

176 ibid.

D EVIDENCE AND PROOF

179. After a potential match-fixing incident or other breach of integrity has been detected and investigated, the next question, addressed in this section, is how it can be proved in criminal or disciplinary proceedings. Criminal proceedings are under the jurisdiction of national courts, whereas disciplinary proceedings are dealt with by the relevant sports governing body. While criminal proceedings are subject to the statutory evidentiary rules provided in the criminal procedural code of the jurisdiction where the criminal proceedings take place, disciplinary proceedings are subject in principle to the evidentiary rules (or absence of them) contractually agreed by and between the players and the sports governing bodies. As criminal and disciplinary proceedings are different in nature, the evidentiary rules of those legal proceedings are different and fall to be addressed separately.

180. In light of the limited extent to which match-fixing and other breaches of integrity are dealt with through criminal proceedings, in comparison to disciplinary proceedings, the focus below is on the rules governing disciplinary proceedings. Such disciplinary proceedings are in the context of tennis, and many other sports, currently subject to appeal before CAS, seated in Switzerland, and subject to the supervisory review of the Swiss Federal Supreme Court. If the result from the first instance proceeding (before an AHO) is appealed, it is currently CAS that finally decides whether the disciplinary offence has been proven. As a consequence, in order to address the disciplinary evidentiary rules, arbitral awards of CAS must be taken into account. Moreover, since CAS arbitral tribunals are seated in Switzerland pursuant to the CAS rules, it is essential to also take into account the jurisprudence of the Swiss Federal Supreme Court in order to assess whether the CAS case law stands up to the scrutiny of a national court.

(1) ADMISSIBILITY, RELEVANCE AND MATERIALITY OF EVIDENCE IN DISCIPLINARY PROCEEDINGS

181. The admissibility of evidence in arbitral proceedings is not governed by domestic rules of evidence unless the parties to the dispute expressly provide so. Pursuant to Article G(3)(c) of the TACP, the decision-maker in tennis disciplinary proceedings is not bound by any jurisdiction's judicial rules governing the admissibility of evidence. Along the same lines, under Article 184(1) of the Swiss Private International Law Act, international arbitral tribunals sitting in Switzerland have the power to rule on the admissibility of evidence and to decide on their relevance. As such, and provided that evidence production does not fall under one of the narrow supervisory grounds for annulment of arbitral awards under Article 190(2) of the Swiss Private International Law Act (in particular the violation of equal treatment or the right to be heard, or incompatibility with public policy), the decision of the CAS arbitral tribunal on the admissibility and relevance of the evidence shall be final.

When to start proceedings, and late evidence

182. Investigating bodies often face the question of at which point in time they should start disciplinary proceedings against a player suspected of match-fixing. They may want to start disciplinary proceedings as soon as possible since the continued participation of a player suspected of match-fixing may be inimical to the integrity of the sport, as he or she may continue to commit corrupt acts which might distort the outcome of further matches. Investigators may, however, want to gather as much evidence as possible, and start disciplinary proceedings only when they are confident that there is a solid basis on which to convict the suspected player.

183. Article R57(3) of the CAS Rules provides that the "*Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered*." In accordance with CAS case law, the exclusion of evidence should be confined to exceptional circumstances

in order to ensure that parties do not engage in abusive procedural conduct[177]. As a result, there would not appear to be any need to postpone the commencement of disciplinary proceedings until all possible relevant evidence is collected. Under CAS jurisprudence[178], if new and relevant evidence comes up during the course of the disciplinary proceedings, it will generally be considered admissible; only in exceptional cases, such as those involving negligence or bad faith, would the evidence be excluded. That said, it is apparent that there may be some uncertainty as to this question in the context of tennis, at least insofar as first-instance proceedings before AHOs are concerned. Specifically, the TIU gave evidence to the Panel that *"once the Notice has been issued, no fresh evidence can be collected and relied upon"*[179]. However, this appears to be based on a statement of AHO Richard McLaren regarding a narrow set of facts, whilst the Panel notes the flexibility afforded to the AHO regarding procedure under the TACP (and as such the scope for adduction of new evidence). This is addressed in full in Chapter 10, Part 3.

Admissibility of evidence

184. Under section G(3)(c) of the TACP, "*facts relating to a Corruption Offense may be established by any reliable means, as determined in the sole discretion of the AHO*." This wording suggests that the investigative bodies may take account of any reliable means to prove that a disciplinary offence took place. However, certain evidence (such as evidence which has been illegally or otherwise illegitimately obtained) might be precluded before national courts. As such, investigative bodies often face the question of how they should gather evidence in order for it to be admissible in disciplinary proceedings, as the validity of a disciplinary decision can ultimately be challenged before national courts. Moreover, the evidence gathered during a disciplinary investigation might also be used in criminal proceedings if the player's alleged disciplinary violation is also prosecuted as a criminal offence.

185. In criminal court proceedings, illegally obtained evidence presents an extra risk to investigations, because such evidence can contaminate the entire investigation process and render other pieces of evidence obtained, as a consequence of the originally inadmissible evidence, also inadmissible. This is sometimes known as the "*fruit of the poisonous tree*" doctrine. However not all legal systems preclude the use of such evidence under all circumstances; rather, some prefer to assess the reliability of the potentially tainted evidence in the light of the circumstances in which it was obtained. Moreover, even where the "*fruit of the poisonous tree*" doctrine is recognized, there are often significant exceptions that may still permit the evidence in question to be used.

186. The approaches that different jurisdictions take to the admissibility of evidence do not necessarily apply in the non-criminal context of sports disciplinary proceedings. CAS arbitral tribunals have consistently decided that national rules on the admissibility of evidence are not applicable in arbitration, as "*the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy*"[180].

187. However, neither the CAS Code nor the Swiss Private International Law Act provide for rules on the admissibility of evidence in sports arbitration. As such, CAS arbitral tribunals will look for guidance in the specific provisions of the sport regulations in question, and, where none is provided, may decide on the admissibility of evidence according to their discretion. In any case, CAS tribunals have stressed that *"the Panel will endeavour to comply with all facets of Swiss procedural public policy"*[181].

177 CAS 2014/A/3486 (MFK Dubnica v. FC Parma), paragraph 53: "the Panel is of the opinion that Article R57.3 of the Code should be construed in accordance with the fundamental principle of the de novo power of review. As such the Panel also considers that the discretion to exclude evidence should be exercised with caution, for example, in situations where a party may have engaged in abusive procedural behavior, or in any other circumstances where the Panel might, in its discretion, consider it either unfair or inappropriate to admit new evidence." See also E. de La Rochefoucauld, 'The Taking of Evidence before the CAS' in CAS Bulletin 2015, pages 37-38.

178 CAS 2014/A/3486 (MFK Dubnica v. FC Parma), paragraph 53.

179 Statement of Nigel Willerton (TIU).

180 CAS 2011/A/2425 (Ahongalu Fusimalohi v. FIFA), paragraph 80.

181 CAS 2011/A/2426 (Amos Adamu v. FIFA), paragraph 68.

188. In 2014, the issue was addressed by the Swiss Federal Supreme Court in two actions to set aside CAS awards relating to a match-fixing incident involving Football Club Metalist and the Karpaty Football Club. It was argued that the CAS awards violated public policy in many respects, particularly on the basis that the arbitral tribunal relied on a conversation recorded on video without the player's consent. The Swiss Federal Supreme Court held that illegally obtained evidence is not always inadmissible under Swiss procedural public policy: "*the interests at hand must instead be balanced; they are, on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence*"[182]. As the arbitral tribunal had thoroughly examined the video and other evidence in the file and had determined that the balance of interests weighed in favour of admitting that evidence, the Swiss Federal Supreme Court held that the Claimants had failed to establish that there had been a violation of public policy.

189. CAS has also held that polygraph tests, which are often not admissible in criminal proceedings, can be admitted in disciplinary proceedings. In *UCI* and *WADA v. Alberto Contador Velasco & RFEC*, the CAS arbitral tribunal found, contrary to previous CAS awards involving prior proceedings, that polygraph evidence is admissible, provided that it is "*reliable*". In that case, the arbitral tribunal found that the polygraph evidence under review was reliable because the test was: (a) conducted by a "*highly experienced polygraph examiner*" (in other words professionally conducted); (b) in accordance with professional associations and organisational standards; (c) in a manner supported by empirical research; and (d) reviewed by an "*experienced polygraph credibility consultant*"[183]. The arbitral tribunal stressed, however, that the weight to be attached to the evidence "*must be verified in light of all the other elements of proof adduced*"[184].

Waiver of legal defences

190. As sports governing bodies have no statutory coercive powers, players and other participants are often required (under the rules to which they are asked to agree) to cooperate with sports investigative bodies and to waive any ability under national law to withhold any information on the basis of legal defences[185].

191. For example, Section F(2)(d) of the TACP states that: "*By participating in any event, or accepting accreditation at any event, a Covered Person contractually agrees to waive and forfeit any rights, defence, and privileges provided by any law in any jurisdiction to withhold information requested by the TIU or the AHO. If a Covered Person fails to produce such information, the AHO may rule a Player ineligible to compete, and deny a Covered Person credentials and access to events, pending compliance with the Demand.*"

192. In the CAS case *Guillermo Olaso de la Rica v. TIU*[186], a tennis player argued that he was not advised of his right to remain silent during his interviews with the TIU, and, as a consequence, the TIU had violated his constitutional rights. The arbitral tribunal disagreed with the player for three reasons: (a) a player who agrees to be bound by the TACP has a duty to cooperate with investigations led by the TIU under Section F(2)(b) of the TACP; (b) the player was advised at the beginning of each interview that he had a right to legal counsel (representation that the player did not request); and (c) under Florida law, private parties may contract in a way that waives constitutional protections.

193. As a result, the arbitral tribunal held that the player validly waived any right to remain silent and admitted the evidence[187].

182 Decision by the Swiss Federal Supreme Court No. 4A_362/2013 of 27 March 2014; Decision by the Swiss Federal Supreme Court No. 4A_448/2013 of 27 March 2014.

183 CAS 2011/A/2384 (UCI v. Alberto Contador Velasco & RFEC) and CAS 2011/A/2386 (WADA v. Alberto Contador Velasco & RFEC), paragraphs 393-395.

184 ibid at paragraph 394.

185 In cricket, for example, each Participant is deemed to have waived and forfeited any rights, defences and privileges provided by any law in any jurisdiction to withhold, or reject the provision of, information formally requested by the ACU General Manager. See the ICC Anti Corruption Code, 9 February 2018, Article 1.5.8, available at https://www.icc-cricket.com/about/integrity/anti-corruption/the-code-pmoa [accessed 9 April 2018].

186 CAS 2014/A/3467 (Guillermo Olaso de la Rica v. TIU).

187 ibid., paragraphs 80-82.

Protected witnesses

194. Sports governing bodies may have difficulty in convincing a potential witness to testify, since they cannot guarantee protection in the same way that the state may be able to do. As such, even if a person has direct knowledge of a disciplinary offence, and reports it, such information might only be capable of being used as intelligence rather than as evidence. Although refusing to testify means the participant is failing to cooperate, and therefore in breach of the integrity rules, such breaches are not always prosecuted. In any event, it is more likely that someone with information who is not prepared to testify will either report it anonymously, or will not report it at all.

195. In order to avoid this problem, some sports have considered whether to allow witnesses to testify anonymously. In that way the evidence is heard, but the fear of reprisals is reduced. Such an option, however, raises significant questions with respect to the right to be heard and the right to a fair trial because "*the personal data and records of a witness are important elements of information to have in hand when testing his/her credibility*"[188].

196. CAS has considered this issue in the context of decisions addressing Article 6 of the ECHR, as interpreted by the European Court of Human Rights, and Article 29(2) of the Swiss Constitution, as interpreted by the Swiss Federal Supreme Court[189]. While acknowledging that CAS arbitral tribunals are not directly bound by the provisions of the ECHR[190], CAS has shown deference to the decisions of the European Court of Human Rights. The Swiss Federal Supreme Court has also relied upon the ECHR in a decision recognising a party's right to rely on anonymous witness statements and to prevent the other party from cross-examining the witness if the personal safety of the witness is at stake[191].

197. The encroachment on the right to be heard and the right to a fair trial is, however, subject to strict conditions. In order for a witness to testify anonymously, *"the witness shall motivate his/her request to remain anonymous in a convincing manner, and the court must have the possibility to see the witness. In such cases, the right to a fair trial must be ensured through other means, namely a cross-examination through 'audiovisual protection' and an in-depth verification of the identity and the reputation of the anonymous witness by the Court. Finally, the Swiss Federal Tribunal stressed that the ECHR and its own jurisprudence impose that the decision is not 'solely or to a decisive extent' based on an anonymous witness statement."*[192]

198. The arbitral tribunal's decision to admit the evidence is both a balancing act and a creative endeavour. The risk to the witness must be a concrete one, or there must at least be a likely danger in relation to the protected interests of the person concerned[193]. In addition, the "*measure ordered by the tribunal must be adequate and proportionate in relation to all interests concerned*"; *"the more detrimental the measure is to the procedural rights of a party the more concrete the threat to the protected interests of the witness must be"*[194].

188 CAS 2011/A/2384 and CAS 2011/A/2386 (UCI v. Alberto Contador & RFEC), paragraph 24.

189 Decision by the Swiss Federal Supreme Court of 2 November 2006 published in BGE 133 I 33.

190 CAS 2011/A/2384 and CAS 2011/A/2386 (UCI v. Alberto Contador & RFEC), paragraph 22.

191 In a decision dated 2 November 2006 (ATF 133 I 33), the Swiss Federal Supreme Court decided (in the context of criminal proceedings) that the admission of anonymous witness statements does not necessarily violate the right to a fair trial as provided under Article 6 ECHR. According to the Court, if the applicable procedural code provides for the possibility to prove facts by witness statements, it would infringe the principle of the court's power to assess the witness statements if a party was prevented from the outset from relying on anonymous witness statements. The Court stressed that the ECHR case law recognises the right of a party to use anonymous witness statements and to prevent the other party from cross-examining such witness if "la sauvergarde d'intérêts dignes de protection", notably the personal safety of the witness, requires it. See CAS 2009/A/1920 (FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA), paragraph 72; CAS 2011/A/2384 and CAS 2011/A/2386 (UCI v. Alberto Contador & RFEC), paragraphs 26 and 27.

192 CAS 2011/A/2384 and CAS 2011/A/2386 (UCI v. Alberto Contador & RFEC, paragraph 30.

193 Note that, although the CAS jurisprudence on protected witnesses is relatively recent, certain scholars and practitioners have stressed that "the suggestion by a witness that his or her career might be adversely affected by testifying against another party … does not, in general bear this same risk"; "to prefer anonymity of a voluntary witness on the basis of his or her career prospects over the interests of an athlete to have a fair hearing in circumstances where he or she has no right but to participate in such hearing would quite simply be an inappropriate balance of the competing interests of these parties" (A. Rigozzi, B. Quinn, Evidentiary issues before CAS, in M. Bernasconi (ed), International Sports Law and Jurisprudence of the CAS, Bern 2014, page 51).

194 CAS 2011/A/2384 and CAS 2011/A/2386 (UCI v. Alberto Contador & RFEC), paragraph 29.

Burden and standard of proof

199. In the sports context, the burden of proof usually falls on the party seeking to establish a disciplinary violation. If the burden is not discharged, the case must be dismissed. As a consequence, bearing in mind that an allegation of match-fixing or other breach of integrity is usually brought by sports governing bodies, the latter will generally bear the burden of proving the constituent elements of the offence. In certain disciplinary proceedings, such as doping cases, the burden might shift and there may even be some form of strict liability[195]. However, as one CAS arbitral tribunal has held[196] and a sports governing body has acknowledged in another CAS case[197], this principle does not generally apply in match-fixing cases.

200. The standard of proof refers to the level of certainty and the degree of evidence necessary to establish and prove a case. Disciplinary and criminal proceedings are subject to different standards of proof. According to the jurisprudence of the Swiss Federal Supreme Court: "*the duty of proof and assessment of evidence … cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as presumption of innocence and the principle of 'in dubio pro reo' and the corresponding safeguards contained in the European Convention on Human Rights*."[198] Accordingly, "*in CAS jurisprudence the application of the standard of proof of beyond any reasonable doubt has so far been dismissed on the basis of the different nature of disciplinary proceedings as opposed to criminal proceedings and the fact that disciplinary proceedings in general do not qualify as a "criminal charge" under the criteria set by the European Convention on Human Rights*"[199].

201. Sports governing bodies are therefore free to set the standard of proof that should be applied to their disciplinary proceedings[200], subject to public policy considerations (such as the right to due process). As a result, CAS awards can be divided into: (a) cases in which the applicable sports regulation sets forth a standard of proof[201]; and (b) cases in which the applicable sports regulation is silent.

202. CAS case law confirms that tribunals are unlikely to deviate from a standard of proof provided in the regulations of sports-governing bodies unless: (a) there is mandatory law suggesting otherwise, or (b) if the application of the standard is incompatible with public policy[202].

195 World Anti-Doping Code (2015), Article 3.1, available at https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2018_english_final.pdf [accessed 9 April 2018]

196 CAS 2010/A/2226 (N. & V. v. UEFA), paragraph 17: "in other words, it is the Panel duty to verify if UEFA has discharged this burden proving that the Appellants committed infringements of the applicable regulations".

197 CAS 2009/A/1920 (FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA), paragraph 84, where UEFA expressly agreed that it must demonstrate that match-fixing took place.

198 Decision by the Swiss Federal Supreme Court No. 5PAGE83/1999 of 31 March 1999, paragraph 3.d-3.d.d.

199 E. Barak, D. Koolaard, Match-fixing. The aftermath of Pobeda – what have the past four years brought us?, in CAS Bulletin 2014, pages 5-24, page 17 quoting CAS 2010/A/2266 (Mészáros & Poleksic v. UEFA), paragraph 68; CAS 2010/A/2267-2281 (Football Club "Metalist" et al v. FFU), paragraph 730, with further references to CAS 2008/A/1583 (Sport Lisboa c Beniica Fatebol SAD v. UEFA and FC Porto Putebol SAD) and CAS 2008/A/1584 (Vitoria Sport Clube v. UEFA and FC Porto Putebol SAD), paragraph 41 and a decision by the Swiss Federal Supreme Court No. 5PAGE83/1999 of 31 March 1999, paragraph 3.d.

200 According to the CAS tribunal in Köllerer v. ATP, WTF, ITF & GSC, "while the Panel acknowledges that consistency across different associations may be desirable, in the absence of any overarching regulation (such as the WADA Code for doping cases), each association can decide for itself which standard of proof to apply, subject to national and/or international rules of public policy. The CAS has neither the function nor the authority to harmonize regulations by imposing a uniform standard of proof, where, as in the present case, an association decides to apply a different, specific standard in its regulations" (CAS Bulletin 2014 quoting CAS 2011/A/2490 (Daniel Köllerer v. Association of Tennis Professionals, Women's Tennis Association, International Tennis Federation & Grand Slam Committee), paragraph 86.

201 For instance, certain sports governing bodies have set forth the standard of proof for match-fixing cases:

International Cricket Council's Anti-Corruption Code for Participants (2016): Article 3.1 provides that "the standard of proof in all cases brought under the Anti-Corruption Code shall be whether the Anti-Corruption Tribunal is comfortably satisfied, bearing in mind the seriousness of the allegation that is being made, that the alleged offence has been committed. This standard of proof in all cases shall be determined on a sliding scale from, at a minimum, a mere balance of probability (for the least serious offences) up to proof beyond a reasonable doubt (for the most serious offences)";

FIFA Code of Ethics (2012): Article 51 provides that "The members of the Ethics Committee shall judge and decide on the basis of their personal convictions";

UEFA Disciplinary Regulations (2016): Article 18(2) provides that "the standard of proof to be applied in UEFA disciplinary proceedings is the comfortable satisfaction of the competent disciplinary body"; and

Olympic Movement Code on the Prevention of the Manipulation of Competitions (2016): Article 3.3 provides that "the standard of proof on all matters under this Code shall be the balance of probabilities".

202 CAS 2011/A/2490 (Daniel Köllerer v. ATP, WTF, ITF & Grand Slam Committee); CAS 2011/A/2621 (David Savic v. Professional Tennis Integrity Officers); CAS 2014/A/3467 (Guillermo Olaso

203. The TACP provides "*the standard of proof shall be whether the Professional Tennis Anti-Corruption Officer has established the commission of the alleged Corruption Offense by a preponderance of evidence*"[203]. In a case interpreting an older version of this provision, the CAS arbitral tribunal equated the "*preponderance of evidence*" standard to a "*balance of probabilities*" test. The tribunal observed that the standard of "preponderance of evidence" is met "*if the proposition that the Player engaged in attempted match fixing is more likely to be true than not true*"[204]. This analysis is reiterated in the IOC's *"Olympic Movement Code on the Prevention of the Manipulation of Competitions"*[205].

204. The applicable standard of proof in cases where the relevant sports regulation is silent is less clear. For such cases, tribunals have established certain general principles on the standard of proof to be applied in match-fixing cases, although the CAS jurisprudence is not entirely consistent. In the words of Barak and Koolaard, "*whereas there appears to be a general consensus towards accepting the application of the standard of comfortable satisfaction, this is not always the case and even though some CAS panels came to the conclusion to apply the standard of comfortable satisfaction, the reasons relied on by these panels in applying this standard vary and may lead to different conclusions in the future*"[206].

205. Other examples of the standard of proof in a sporting context are: (a) cricket, where the governing body's Anti-Corruption Tribunal must be "*comfortably satisfied*" that the alleged offence has been committed[207]; and (b) rugby, where the standard of proof in all matters under its anti-corruption regulations is the balance of probabilities[208].

The adequacy of the standard of proof and its compatibility with public policy

206. It has been suggested that the seriousness of the potential sanctions arising from match-fixing (such as the lifetime ban of a player) calls into question whether the standard of proof should – as a matter of public policy – involve a higher threshold than the balance of probabilities.

207. This issue was raised in *Köllerer v. ATP, WTF, ITF & GSC*. Daniel Köllerer, who had been given a lifetime ban by the AHO, argued that, as a matter of public policy and according to CAS jurisprudence, a higher threshold than "*preponderance of evidence*" should be applied when a player is charged with serious offences (the proposed standard being one of "*comfortable satisfaction*"). The arbitral tribunal rejected the player's argument, observing, amongst other points, that *"by signing a consent form, the Player agreed to both the standard of proof and the contractual sanctions in case of breach*"[209]. Nonetheless, the arbitral tribunal stressed that *"in assessing the evidence the Panel has borne in mind that the Player has been charged with serious offences. While this does not require that a higher standard of proof should be applied than the one applicable according to the UTACP, the Panel nevertheless considers that it needs to have a high degree of confidence in the quality of the evidence*"[210].

208. Bearing in mind the above, although sports governing bodies are entitled to set the standard of proof for disciplinary proceedings, such standard must not violate the minimum evidentiary requirements established by public policy (which CAS determined was not the case for an older version of the TACP in *Köllerer*).

209. Moreover, the recognition and enforcement of an award can be denied if it is contrary to public policy.

de la Rica v. TIU); CAS 2011/A/2362 (Mohammad Asif v. ICC); CAS 2011/A/2426 (Amos Adamu v. FIFA); CAS 2013/A/3256 (Fenerbahçe Spor Kulübü v. UEFA); CAS 2013/A/3258 (Besiktas Jimnastik Kulübü v. UEFA).

203 TACP Section G(3)(a).

204 Daniel Köllerer v. ATP, WTF, ITF & Grand Slam Committee, paragraph 25.

205 'Olympic Movement Code on the Prevention of the Manipulatrion of Competitions, Article 3.

206 E. Barak, D. Koolaard, 'Match-fixing. The aftermath of Pobeda – what have the past four years brought us?', in CAS Bulletin 2014, pages 5-24, page 12.

207 Cricket Anti-Corruption Code for Participants, Article 3.1.

208 Rugby Anti-Corruption Regulation 6.6.1.

209 CAS 2011/A/2490 (Daniel Köllerer v. ATP, WTF, ITF & Grand Slam Committee), paragraph 28.

210 ibid., paragraph 40.

Materiality of evidence

210. As discussed in paragraph 184 above in relation to admissibility of evidence, sports governing bodies generally have discretion to establish integrity offences using sources of evidence that might not be admissible in criminal proceedings – as long as the relevant evidence is sufficiently reliable. In this respect, there is currently a debate as to whether, and as to the extent to which, suspicious betting patterns may constitute a reliable means of establishing match-fixing.

211. CAS jurisprudence has recently established important precedents as to whether and the extent to which suspicious betting patterns may suffice to prove match-fixing. In *Oleg Oriekhov v. UEFA*, the arbitral tribunal observed that "*when assessing the evidence, the Panel has well in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing*"[211]. This, coupled with the limited investigative powers granted to sports governing bodies, creates a situation in which it is difficult for a sports governing body to amass sufficient evidence to prosecute successfully a match-fixing case. This is notwithstanding that there is often clear betting data evidence that something out of the ordinary occurred.

212. Against this background, CAS arbitral tribunals have recently relied, at least in part, on suspicious betting patterns to conclude that parties were involved in match-fixing:

212.1 In *Vsl Pakruojo FK et al. v. LFF*, the arbitral tribunal decided that a football team was liable for "*presumed*" match-fixing[212] since "*the anomalies in the betting patterns were abundant and inexplicable – if not by the reason that the punters knew in advance the result of the Matches*" and *"the behavior of the Players during the Matches … allows the presumption that the Players could be responsible of match fixing*"[213]. In other words, the tribunal concluded that "*abundant and inexplicable*" (namely, at the very least suspicious) betting patterns coupled with the players' performance during the match was sufficient evidence to prove a presumption of (as opposed to actual) match-fixing.

212.2 On 1 June 2016, in *Skenderbeu v. UEFA*, a CAS arbitral tribunal reached the conclusion that a football club was "*at the very least indirectly involved in match fixing activities*"[214] based on: (a) suspicious betting patterns[215], (b) the fact that "*an important Asian betting operator removed live market bets on a game involving the accused team*"[216]; and (c) the debatable performance of some players on the team[217]. In particular, as to the materiality of the betting patterns, the arbitral tribunal observed that "*they are an important element to take into account in concluding the Club was at least indirectly involved in match fixing activities*"[218], although it observed that those patterns are "*quantitative information*" that "*is not definitive in the assessment of whether a specific match has been fixed*"[219], since a "*qualitative assessment*" of the betting patterns "*is … also needed*"[220].

212.3 More recently, in *Joseph Odartei Lamptey v. FIFA*[221] CAS found that the referee was involved in match-fixing on the basis that he had made several incorrect on field decisions and that the undisputed "*deviation from the expected, ordinary movements in the odds on 'overs' in the Match*" demonstrated that bettors had foreknowledge of the result.

213. In each of these cases, the CAS arbitral tribunal found that a team was involved in match-fixing on the basis of suspicious betting patterns combined with other evidence. In addition, neither tribunal found that the team was directly involved in actual match-fixing – which presumably would require a greater degree of certainty than a finding that a team is culpable of presumed, or indirect, match-fixing.

211 CAS 2010/A/2172 (Oleg Oriekhov v. UEFA), paragraph 54.
212 The Lithuanian Football Federation Disciplinary Code (year) provision on "presumed" match-fixing applies where it is impossible to prove "actual" match-fixing.
213 CAS 2015/A/4351 (Vsl Pakruojo FK et al. V. LFF), paragraph 92.
214 CAS 2016/A/4650 (Klubi Sportiv Skenderbeu v. UEFA), paragaph 104.
215 ibid., paragaph 98.
216 ibid., paragaph 99.
217 ibid., paragaph 100.
218 ibid., paragaph 98.
219 ibid., paragaph 92.
220 ibid., paragaph 93.
221 CAS 2017/A/5173.

214. In sports disciplinary cases, therefore, suspicious betting patterns may be evidence of match-fixing, but will rarely be sufficient to support a disciplinary violation unless combined with some other evidence. It is however possible that there may be some contexts, such as spot fixes, where the betting evidence is so strong as to indicate bettor certainty in the outcome based on circumstances that must have involved the player's agreement in advance to ensure that outcome.

(2) STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE IN CRIMINAL PROCEEDINGS BROUGHT BY LAW ENFORCEMENT AGENCIES AND REGULATORS

215. While criminal procedure laws vary from one country to another, there are certain fundamental principles that apply across states, such as in particular the principles enshrined in human rights treaties. The ECHR serves as a good example of an international instrument that contains principles of criminal law and criminal procedure. Foremost among these principles are: (a) the requirement of reasonable suspicion before arresting or detaining an individual[222]; (b) prompt information of the reasons for an arrest and any charges[223]; and (c) the presumption of innocence, which has fundamental implications for evidentiary rules in criminal cases[224].

216. Drawing on such international standards of criminal law, several observations can be made in relation to the prosecution of match-fixing by law enforcement agencies and regulators, as set out below.

Preparedness to prosecute criminal cases

217. State criminal prosecutors should not bring charges unless there is sufficient evidence of guilt. When prosecutors exercise their discretion as to whether to prosecute a case and what charges to bring against a suspect, they should consider the seriousness of the offence and the extent of the offender's culpability. In any event, they should make sure that at the very least "*reasonable suspicion*" can be established as to the occurrence of the offence, which can be defined as the "*existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence*"[225].

Burden and standard of proof in criminal proceedings

218. Under most national legal frameworks, the burden of proof in criminal law rests with the prosecution, and the suspect is presumed innocent until proved guilty[226]. The European Court of Human Rights has indeed held that "*the burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution … to adduce sufficient evidence to convict him*"[227]. The proof must normally be made for both the *actus reus* (the conduct or actions that are a constituent element of the crime) and the *mens rea* (the person's guilty state of mind).

219. However, in some common law jurisdictions, certain "*strict liability*" offences do not require proof of *mens rea* with regard to at least one element of the *actus reus*. This may even extend to absolute liability, meaning crimes for which there is no *mens rea* that needs to be proved at all. Moreover, in some common law jurisdictions, once the *actus reus* has been proved, an onus sometimes falls on the defendant either to introduce evidence or to prove that he or she had reasonable grounds for the failure to be aware of, or to foresee, relevant facts.

222 Article 5(1) ECHR.

223 Article 5(2) ECHR.

224 Article 6(2) ECHR. See also E. Cape, Z. Namoradze, R. Smith, T. Spronken, Effective Criminal Defence in Europe, Antwerp/Oxford/Portland 2010, pages 23 and 27.

225 Fox, Campbell and Hartley v. the United Kingdom, ECHR, 30 August 1990, Section 32, Series A no.182.

226 Indicatively, Article 6, Section 2 ECHR.

227 Barberà, Messegué and Jabardo v. Spain, ECHR, 6 December 1988, Section 77, Series A no. 146.

220. In common law countries, crimes of strict liability are almost invariably found in statutes. They do not only arise in the context of minor "regulatory" offences, but may also arise in the context of more serious ones . The argument that is most frequently advanced for the imposition of strict liability is that it is necessary to do so in the "interest of the public". Where an offence is to be interpreted as entailing strict liability, the fact that the defendant could not have avoided the prescribed harm, even if he had tried to do so, does not absolve him of liability. As a result, it is unnecessary for the prosecution to tender evidence of mens rea – such evidence is irrelevant.

221. It has been suggested that strict liability conflicts with the presumption of innocence (Article 6(2) of the ECHR). The European Court of Human Rights has however held, at least in some cases, that strict liability offences are compatible with the ECHR: "*in principle the contracting States may, under certain conditions, penalize a simple or objective fact as such irrespective of whether it results from criminal intent or from negligence*." However the trend within European institutions such as the European Union or the Council of Europe is arguably now to limit the application of strict liability in the light of the principle *nulla poena sine culpa*, or no punishment without guilt.

222. As to the standard of proof, or the degree of certainty required before any criminal conviction is imposed, judgments must be based on evidence adduced as opposed to mere allegations or assumptions[228]. Apart from this general principle, however, there are significant differences between common and civil law jurisdictions:

222.1 Common law: the criminal law standard is "*beyond reasonable doubt*", meaning that a criminal conviction is not possible if there remains an "*honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence*"[229].

222.2 Civil law: the standard of proof is virtually the same for criminal and civil cases – being the full conviction of the judge. In this respect, the Swiss Federal Supreme Court described the latter standard as follows: "*conviction of the truth of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient if the court has no serious doubt or any remaining doubt appears insubstantial*"[230].

Adducing the evidence

223. As noted above, in order to prove a case, the criminal prosecution must adduce sufficient evidence to dispel all reasonable doubt, or to leave no more than an unsubstantial doubt in the tribunal's mind. Though it might not be done in this order, and the evidence will necessarily vary in each case based on the particular circumstances, the prosecution will generally have to adduce evidence in a match-fixing case, of:

223.1 The planning between the player and the fixer. This will likely take the form of witness evidence of their acquaintance and of their meeting and electronic evidence or records of the contacts between them. This therefore involves the presentation of witness testimony, and cooperation with the relevant communications or internet companies. It may also involve the collection and presentation of evidence based on intercepts, video and audio recordings, and other surveillance techniques.

228 Telfner v. Austria, no. 33501/96, ECHR, 20 March 2001, Section 19.

229 For example, Decision by the Court of Appeals of New York, People v. Antommarchi, 80 N.Y.2d 247 (N.Y. 1992), page 252.

230 Decision by the Swiss Federal Supreme Court of 29 January 2004 published in BGE 130 III 321, paragraph 3.2.

223.2 The placing of the bets. The prosecution will generally seek to identify not only what contingency was bet upon, and by whom, but also likely that it gave rise to a suspicious betting pattern, through the use of betting data. The proof of this stage of the offence will therefore involve the cooperation, and possibly testimony, of betting operators, regulators, or experts to explain the relevant betting evidence.

223.3 The execution of the fix. While the suspicious betting pattern and the record of events on the court or on the pitch will help to establish this stage of the offence, the prosecution will also generally seek to adduce video or audio footage of the relevant incident, together with other witness evidence, which will involve the cooperation of officials and other players and coaches.

223.4 The provision of reward. The prosecution will generally seek to establish how the player was rewarded, again through witness evidence, electronic evidence of communications or financial records.

224. While human rights concerns might conceivably be voiced particularly in relation to obtaining intercepts and video and audio recordings, the ECHR has held that insofar as this is aimed at the prevention of crime, it is in conformity with the right to privacy. However, when such calls or images have been intercepted illegally, in other words by third parties and not with an order by the competent judge, they maybe be considered illegal and hence inadmissible.

E DISCIPLINARY SANCTIONS AND INTERIM MEASURES

Sanctions

225. Possible disciplinary sanctions for violating sports integrity rules include, amongst others, (a) a warning or reprimand; (b) a fine or other financial sanction which might include the restitution of improper gains; (c) a limited or unlimited period of ineligibility, which might range from a limited number of weeks, months or even years to a lifetime ban; and (d) the annulment of the result of a match or the withdrawal of a title or award.

226. Certain sports governing bodies, such as UEFA, consider that monetary sanctions are an insufficient basis for fighting match-fixing, and that only a period of, or permanent, suspension from participation by both contemplated clubs and players is a proper response[231].

Administrative measures

227. In addition to disciplinary sanctions, some sports governing bodies have the option of imposing an administrative suspension - akin to an ineligibility rule - for offences that fall short of actual, direct match-fixing. For instance, UEFA established a two-stage process. In the first, it can impose an administrative suspension of one year from UEFA competitions if it is comfortably satisfied that a club was "*directly and/or indirectly involved… in any activity aimed at arranging or influencing the outcome of a match*"[232]; while "*the second stage involves disciplinary measures, which may be imposed subsequent to the administrative measure and do not have a maximum duration*"[233].

228. Thus this administrative measure is independent from, and can be combined with, sanctions in disciplinary proceedings for "*a concrete and specific breach of the regulations*"[234]. In other words, UEFA can impose an administrative suspension if a team had any involvement whatsoever with match-fixing, while it can only impose a disciplinary sanction if the team's involvement was direct and with a view to gaining an undue advantage.

Interim measures

229. In addition to sanctions and administrative measures, most sports governing bodies also have the option of issuing interim or provisional measures, usually suspensions[235]. The main goal of interim measures is not to punish for past actions or omissions, but rather to provide immediate protection to the sport's integrity while full disciplinary investigations and proceedings are resolved. They are therefore imposed before a final adjudication as to liability.

230. Unless revoked earlier, interim measures therefore stand only until a final decision is rendered on the merits of the alleged disciplinary violation. Interim measures may be revoked either because the harm to be avoided can no longer occur or because the measure has become disproportionate to the goal to be achieved. Since interim measures are part of, and dependent on, the disciplinary proceedings, they should be taken into account when the final sanction is determined (for example, a reduction in the length of a ban).

231 Statement of Emilio García and Graham Peaker (UEFA).

232 UEFA Champions League Regulations, Article 4.02.

233 Emilio Garcia in Marc Cavaliero and Michele Colucci (eds.), 'Disciplinary Procedures in Football. An International and Comparative Analysis', International Sports Law and Policy Bulletin 1/2017 (October 2017), page 178, making reference to CAS 2013/A/3256 (Fenerbahçe SK v. UEFA), paragraph 160 onwards.

234 CAS 2016/A/4650 (Klubi Sportiv Skenderbeu v. UEFA), paragaph 50.

235 Provisional suspensions are, for example, available in both golf and cricket.

(2) PROPORTIONALITY OF SANCTIONS AND INTERIM MEASURES

231. In order to avoid arbitrariness, any sports disciplinary system must specify defined criteria that are to be considered when imposing sanctions. Defining these criteria can be complex. A criterion that is defined too narrowly could be viewed as arbitrary if it consequently does not cover all similar situations. Conversely, if a criterion is defined too broadly, it may not reflect the diversity of situations that it covers and may also result in arbitrary sanctioning decisions.

232. As sanctions and interim measures do not have the same purpose, different criteria should be applied to each. The main consideration for interim measures should be the preservation of the sport's integrity from an immediate irreparable harm, balanced against the consequences for the player or other participant. By contrast, the main considerations for disciplinary sanctions should be: the vindication of the interests of the sport by punishing the offender; the protection of the sport by preventing the offender from committing additional offences in the future; and the need to deter others from integrity offences – subject to the overriding requirement that the sanction must be proportionate, and so go no further than reasonably necessary to pursue those legitimate aims of sanctioning.

233. It is also established that *"the adoption and implementation of disciplinary sanctions applied by sports organisations, such as suspension from other sports activities, must be done in accordance with the national law. This includes, in particular, respecting human rights and the principle of proportionality"*[236]. This principle should also apply to interim measures.

234. Outside these basic requirements, sports governing bodies have relatively wide discretion to decide on the sanctions or interim measures that are appropriate. Indeed, CAS tribunals will not overturn sanctions imposed by a disciplinary body in the exercise of the discretion allowed under the relevant rules unless the sanction is "*evidently and grossly disproportionate to the offense*"[237]. As one case put it, a CAS arbitral tribunal "*would not easily 'tinker' with a well-reasoned sanction of 17 or 19 months' suspension for one of 18*"[238].

235. Even with respect to permanent or lifetime suspensions from participation, CAS has concluded that these sanctions are proportionate on the basis that "*the sport of tennis is extremely vulnerable to corruption as a match-fixer only needs to corrupt one player (rather than a full team)*" and therefore it is "*imperative that, once a Player is caught, the Governing Bodies send out a clear signal to the entire tennis community that such actions are not tolerated*".[239]

236. However, cumulative sanctions have on occasion been considered disproportionate. For instance:

    236.1 In *Köllerer v. ATP, WTF, ITF & Grand Slam Committee*, the CAS arbitral tribunal concluded that: "*it would be inappropriate to impose a financial penalty in addition to the lifetime ban, as the sanction of permanent ineligibility provides for the deterrence that corruption offences call for*". The tribunal reasoned that imposing both penalties was disproportionate because *"the lifetime ban also has a considerable financial effect on the Player because it significantly impacts the Player's future earnings by eliminating tennis as a source of revenue…"*;[240]

236 Explanatory Report to the Macolin Convention, paragraph 86.

237 CAS 2004/A/547, paragraphs 66 and 124; CAS 2004/A/690 (D. Hipperdinger v. ATP), paragraph 86; CAS 2005/A/830 (S. v. FINA), paragraph10.26; CAS 2005/C/976 and 986 (FIFA and WADA), paragraph 143; CAS 2006/A/1175 (D. v. International DanceSport Federation), paragraph 90; CAS 2007/A/1217 (Feyernoord Rotterdam v. UEFA), paragraph 12.4; CAS 2010/A/2209, paragraph 68.

238 CAS 2010/A/2283 (Piergorgio Bucci v. Federation Equestre Internationale (FEI)), paragraph 14.36.

239 CAS 2011/A/2490 (Daniel Köllerer v. ATP, WTF, ITF & Grand Slam Committee), paragraph 66.

240 ibid., at paragraphs 70-73.

236.2 The same reasoning was followed by the CAS arbitral tribunal in *Savic v. PTIOs*, which considered that "*the life ban in itself is sufficiently severe to reflect the gravity of the corruption offences*",[241] and it therefore set aside the financial sanction imposed by the AHO.

237. The need for financial sanctions to be proportionate was also apparent in the 2012 *Matuzalem* decision of the Swiss Federal Supreme Court which, for the first time in over 20 years, annulled an international arbitral award for a breach of substantive public policy because the monetary sanction decided by the arbitral tribunal was disproportionate and violated the athlete's right to "*economic freedom*". As the court explained, the player could not be simultaneously found liable for a very large amount in damages, and restrained from playing until he paid that amount, as if he could not play, he could not earn enough money to pay the damages[242].

(3) PARALLEL PROCEEDINGS AND MULTIPLE SANCTIONS

238. The principle of *ne bis in idem* or double jeopardy is often relied upon in an attempt to prevent different sanctions being imposed in different parallel proceedings in respect of the same underlying action. This situation may arise when a player is criminally prosecuted and disciplined by the sport in respect of the same facts.

Interaction between criminal and disciplinary proceedings

239. In principle, sanctions imposed by a national court in criminal proceedings and sanctions adopted in sports disciplinary proceedings are very different in their nature and in their goals. The former is directed against statutory criminal offences, while the latter is directed against contractual sporting breaches of integrity, as explained in paragraph 4 above. Indeed, most of the sanctions imposed by a sports governing body are sporting in nature and aimed at protecting the sport (for example, ineligibility, annulment of the result of a match, or withdrawal of a title or award), and are therefore not available in criminal law systems. This situation should, in particular, be distinguished from the circumstances contemplated by Article 4 Protocol 7 of the ECHR[243], which prohibits an individual from being punished under both the criminal law and administrative law on the basis of the same facts. The ECHR therefore prohibits a scenario where both types of sanction are state imposed.

240. The Explanatory Report to the Macolin Convention also expressly recognises the difference between sanctions determined by a state court in criminal proceedings and sanctions imposed in sports disciplinary proceedings[244].

241. The question is more difficult, however, when the sanctions imposed by both systems are financial. In these circumstances, it is harder to argue that the sanctions are not of the same nature. The existence of concurrent disciplinary and criminal sanctions would not, of itself, imply that a player has been prosecuted and sanctioned more than once for the same offence. Nonetheless, where financial sanctions are concerned, disciplinary tribunals may take into consideration the possibility that criminal courts might also fine players at the end of the criminal proceedings.

241 CAS 2011/A/2621 (David Savic v. Professional Tennis Integrity Officers), paragraph 8.38.

242 Decision by the Swiss Federal Supreme Court No. 4A_558/2011 of 27 March 2012, paragraphs 4.3.1-4.3.5.

243 Also Article 4 Protocol 7 of ECHR: "Right not to be tried or punished twice 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article15 of the Convention."

244 Also the Explanatory Report to the Macolin Convention at paragraph 88: "...disciplinary liability shall in no way exclude any criminal, civil or administrative liability within the framework of state court sanctions. The sports disciplinary sanctions are within a different jurisdiction of criminal law and are driven into separate standards applied according to the procedures and other types of evidence. Also, disciplinary sanctions should not be classified as criminal sanctions. Therefore, the "non bis in idem" principle does not exclude that an act is punishable in both disciplinary and criminal courts. The same act may be punished by disciplinary procedure without coming under criminal law, or criminally without incurring disciplinary sanctions". See also E. Barak, D. Koolaard, 'Match-fixing. The aftermath of Pobeda – what have the past four years brought us?', in CAS Bulletin 2014, pages 5-24, page 19.

242. Criminal proceedings and sports disciplinary proceedings may also intersect in several other ways. For example:

242.1 In certain criminal law systems, prosecutors and judges can take into consideration the fact that the person charged was directly and personally prejudiced by her or his own acts when deciding whether she or he should be prosecuted, judged or sentenced at all.[245] This may be the case, for example, where players are banned for life from tennis competitions by sports governing bodies.

242.2 Under CAS jurisprudence, *"while it is clear that not all disciplinary violations in sports are criminally punishable, findings of fact by the law enforcement authorities confirmed by a court of law should be treated as having maximum persuasive, if not binding, authority."*[246]

243. In these circumstances, parallel disciplinary and criminal proceedings and sanctions are in principle compatible from a legal standpoint.

244. It is then also necessary to assess whether simultaneous parallel proceedings are beneficial or detrimental in the fight against the manipulation of sports competitions.

245. As criminal proceedings will not be stopped or suspended if sports disciplinary proceedings are also being pursued, the question is effectively whether those sports disciplinary proceedings should be suspended or should be allowed to continue once criminal proceedings are open. There are two ways to look at this.

246. On the one hand, it can be argued that sports disciplinary investigations and proceedings should not be suspended during the course of criminal proceedings, because it is important that those investigations, and subsequent disciplinary proceedings are initiated as quickly as possible. If they are not, then either:

246.1 a player who has potentially corrupted the sport is allowed to continue playing, and potentially to continue corrupting the sport while a criminal investigation or proceedings are pending – which could take considerable time to resolve or could result in no action being taken. That delay could result in irreparable harm to the sport not only because of possible further offences, but also at a reputational level; or

246.2 if the player were instead subjected to an interim suspension pending the criminal investigation or proceedings, irreparable harm could be caused to the player's career. Again, the criminal investigation or proceedings might take a long time. During that time, the player would be unable to earn money, notwithstanding the possibility that the criminal investigation or proceedings might not result in a conviction.

247. In this vein, in a leading CAS decision on match-fixing the arbitral tribunal observed that: "*...an effective fight to protect the integrity of sport depends on prompt action. In this context, CAS, or UEFA, cannot wait until states proceedings are over, i.e. after all internal remedies have been exhausted, to take its decision*"[247]. A conviction in disciplinary proceedings, on the lower standard, does not therefore prejudge guilt on the higher criminal standard.

248. On the other hand, it can be argued that disciplinary investigations and proceedings should be suspended during the course of criminal proceedings, because:

248.1 Sports governing bodies' investigators do not have the same wide-ranging powers as law enforcement agencies, and by staying disciplinary investigations and proceedings during the course of criminal investigations and proceedings, it is possible that a more robust case against the player could be built.

245 At the national level, see Article 54 Swiss Criminal Code.

246 CAS 2010/A/2267-2281 (Football Club "Metalist" et al. v. FFU), paragraph 735.

247 CAS 2013/A/3258 (Besiktas Jimnastik Kulübü v. UEFA), paragraph 148.

248.2 If a criminal case is successful on the higher standard of proof, then it would follow that the sports disciplinary case on the lower standard could be quickly dealt with, in a more cost-effective manner. The criminal conviction may be sufficient to establish guilt.

248.3 Criminal prosecutors might be reluctant to cooperate with investigators from sports governing bodies if they knew that evidence gathered in the criminal investigation could be disclosed in prior disciplinary proceedings.

248.4 In certain cases, interim measures or disciplinary sanctions that are imposed before the outcome of criminal proceedings might be undermined by an acquittal, especially if the criminal proceedings were decided on the basis of evidence that was not available to, or taken into consideration by, sports governing bodies.

249. It is impossible to express a preference for either option in the abstract. Rather, each situation will be different, and fact specific. Any decision as to the appropriate course will therefore have to be decided on a case-by-case basis.

250. That said, a sports governing body should not shy away where appropriate from continuing with its own disciplinary proceedings notwithstanding the prospect of a separate criminal investigation or proceedings, bearing in mind that its main priority should always be to preserve the integrity of the sport.

Interaction between sports disciplinary proceedings

251. The interaction between two sets of sports disciplinary proceedings is more difficult, as in those circumstances, the two sets of proceedings have a similar nature and similar goals. The Swiss Federal Supreme Court has however held that the principle *of ne bis in idem* or double jeopardy pertains, in principle, to public policy.[248] As such, when two sports governing bodies prosecute, and then sanction, a player in distinct disciplinary proceedings for the same conduct, the principle of *ne bis in idem* or double jeopardy may dictate that only one of the punishments can stand (most likely the earliest in time).

252. It might however be argued that parallel disciplinary sanctions issued by two different bodies within the same sport do not lead to a violation of the principle of *ne bis in idem* or double jeopardy if domestic sanctions are only effective at the domestic level, while international sanctions are effective in the rest of the world.

253. But that may not always be true. For example, in a recent sports case decided by the Swiss Federal Supreme Court, the appellant invoked this principle and argued that his international sanctions should be nullified because the domestic disciplinary proceedings had been commenced and concluded before the international disciplinary proceedings. The argument was dismissed because the domestic proceedings led only to an interim measure. However, the Swiss Federal Supreme Court held that the principle *ne bis in idem* or double jeopardy could have applied if:

253.1 in the first proceedings, the court had the opportunity to assess the facts in all respects (and not only for purposes of issuing an interim measure); and

253.2 the legal values protected in both proceedings were identical[249].

254. In light of the above, if two sports governing bodies prosecute a player on the basis of the same facts under provisions aimed at protecting identical legal values, there would be a significant risk, at least in certain jurisdictions, that the later proceedings might be considered to be in violation of the principle of *ne bis in idem*, even if the sanctions were of different territorial scope (i.e. international versus national). In the end, whether or not two or more parallel domestic and/or international disciplinary proceedings could violate the principle of *ne bis in idem* or double jeopardy should be considered with caution, on a case-by-case basis.

248 Swiss Federal Court Judgment of October 16, 2014, 4A_324/2014, Fenerbahçe Spor Kulübü v. Union des Associations Européennes de Football (UEFA), paragraph 6.2.1.

249 ibid., paragraph 6.2.3.

255. Besides the risk that sanctions are eventually overturned by CAS or the Swiss Federal Supreme Court, parallel proceedings are damaging for both players and the sport itself. Indeed, it is undesirable that players should have to undergo parallel procedures for the same underlying facts, and bear more costs for their legal defence. Parallel procedures may also follow different rules of procedure or even different burdens or standards of proof, raising the spectre of inconsistent decisions, which could harm the sport's reputation.

256. In view of the above, it is important that the sanctions decided by sports governing bodies be mutually recognised or at least taken into consideration across the sport. As the Explanatory Report to the Macolin Convention puts it, *"any disciplinary sanctions imposed by sports governing bodies should form the subject of mutual recognition procedures by foreign sports federations and by international federations*."[250] In tennis, this principle is followed by Section 5.2.2 of the ITF Bylaws, which provides that each national association must ensure "*that anyone who has been ruled ineligible under the TACP to participate in events organised or sanctioned by the governing bodies of professional tennis is also automatically ineligible, for the same period, to participate in any capacity in events organised, sanctioned or recognised by the national association*".

257. However, in practice, it is possible that different sports governing bodies, within the same sport, may apply different rules, or that national legal or political requirements may force national sports governing bodies to act in a way that is not acceptable at an international level, or vice versa. For instance, in jurisdictions such as France, national legislation obliges French sports federations to exercise their full powers and prevents them from simply endorsing international sanctions issued by the international disciplinary body without "*checking the materiality and the seriousness of the* [underlying] *facts in order to determine the sanction to be imposed according to* [their] *own regulations*".[251]

258. This situation is problematic, as the existence of contradictory or incompatible sanctions within the same sport allows players sanctioned for match-fixing in one or more jurisdictions to compete in and pollute the sport in other jurisdictions. In addition, the imposition of competing sanctions may give rise to the perception that the need to fight the manipulation of sports competitions is not a common goal, or at least is not perceived in the same way, by the national and international governing bodies of the same sport.

250 Explanatory Report to the Macolin Convention, paragraph 88,

251 J. M. Marmayou, 'Sports Justice at National Level: France', in M. Colucci and K. L. Jones (eds), International and Comparative Sports Justice, European Sports Law and Policy Bulletin 1/2013, page 405.