40 COMMENTARIES OF THE MACOLIN CONVENTION
on the Manipulation of Sports Competitions

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Authors

Madalina Diaconu
Surbhi Kuwelker

Editors

Antonio Rigozzi
André Kuhn

Faculty of Law, University of Neuchâtel
Helbing Lichtenhahn

Université de Neuchâtel
Faculté de droit

www.unine.ch/droit

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The Authors,

Madalina Diaconu
Surbhi Kuwelker

The Editors,

Antonio Rigozzi
André Kuhn

April 2024
Neuchâtel, Switzerland

Table of contents

Preamble

by

Surbhi KUWELKER

Preamble

The member States of the Council of Europe and the other signatories to this Convention,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering the Action Plan of the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), which recommends the continuation of Council of Europe activities which serve as references in the field of sport;

Considering that it is necessary to further develop a common European and global framework for the development of sport, based on the notions of pluralist democracy, rule of law, human rights and sports ethics;

Aware that every country and every type of sport in the world may potentially be affected by the manipulation of sports competitions and emphasising that this phenomenon, as a global threat to the integrity of sport, needs a global response which must also be supported by States which are not members of the Council of Europe;

Expressing concern about the involvement of criminal activities, and in particular organised crime in the manipulation of sports competitions and about its transnational nature;

Recalling the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5) and its protocols, the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (1985, ETS No. 120), the Anti-Doping Convention (1989, ETS No. 135), the Criminal Law Convention on Corruption (1999, ETS No. 173) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS No. 198);

Recalling the United Nations Convention against Transnational Organized Crime (2000) and the protocols thereto;

Also recalling the United Nations Convention against Corruption (2003);

Recalling the importance of effectively investigating without undue delay the offences within their jurisdiction;

Recalling the key role that the International Criminal Police Organization (Interpol) plays in facilitating effective co-operation between the law-enforcement authorities in addition to judicial co-operation;

Emphasising that sports organisations bear the responsibility to detect and sanction the manipulation of sports competitions committed by persons under their authority;

Acknowledging the results already achieved in the fight against the manipulation of sports competitions;

Convinced that an effective fight against the manipulation of sports competitions requires increased, rapid, sustainable and properly functioning national and international co-operation;

Having regard to Committee of Ministers Recommendations to member States No. R(92)13 rev. on the revised European Sports Charter; CM/Rec(2010)9 on the revised Code of Sports Ethics; Rec(2005)8 on the principles of good governance in sport and CM/Rec(2011)10 on promotion of the integrity of sport to fight the manipulation of results, notably match-fixing;

In the light of the work and conclusions of the following conferences: – the 11th Council of Europe Conference of Ministers responsible for Sport, held in Athens on 11 and 12 December 2008; – the 18th Council of Europe Informal Conference of Ministers responsible for Sport (Baku, 22 September 2010) on promotion of the integrity of sport against the manipulation of results (match-fixing); – the 12th Council of Europe Conference of Ministers responsible for Sport (Belgrade, 15 March 2012) particularly in respect of the drafting of a new international legal instrument against the manipulation of sports results; – the UNESCO 5th International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS V).

Convinced that dialogue and co-operation among public authorities, sports organisations, competition organisers and sports betting operators at national and international levels on the basis of mutual respect and trust are essential in the search for effective common responses to the challenges posed by the problem of the manipulation of sports competitions;

Recognising that sport, based on fair and equal competition, is unpredictable in nature and requires unethical practices and behaviour in sport to be forcefully and effectively countered;

Emphasising their belief that consistent application of the principles of good governance and ethics in sport is a significant factor in helping to eradicate corruption, the manipulation of sports competitions and other kinds of malpractice in sport;

Acknowledging that, in accordance with the principle of the autonomy of sport, sports organisations are responsible for sport and have self-regulatory and disciplinary responsibilities in the fight against manipulation of sports competitions, but that public authorities, protect the integrity of sport, where appropriate;

Acknowledging that the development of sports betting activities, particularly of illegal sports betting, increases the risks of such manipulation;

Considering that the manipulation of sports competitions may be related or unrelated to sports betting, and related or unrelated to criminal offences, and that it should be dealt with in all cases;

Taking note of the margin of discretion which States enjoy, within the framework of applicable law, in deciding on sports betting policies, …

I. Introduction and Purpose

1. Ordinarily, an international instrument or a treaty would contain a preliminary section titled "Preamble", with elements including the names of the parties, objectives, preparatory work, purposes/considerations surrounding the instrument's existence and a conclusion[1].

2. A preamble's provisions may or may not be binding, the latter line of thought being justified by highlighting the mere supplemental nature of the preamble. Generally, a preamble's provisions would not take

[1] See Practice Guide to International Treaties, Federal Department of Foreign Affairs, Directorate of International Law, 2015, https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_en.pdf (June 14, 2022), 'Preamble', *Max Planck Encyclopaedia of Public International Law*, Oxford Public International Law available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199 231690/law-9780199231690-e1456#law-9780199231690-e1456-div1-2 (June 20, 2022).

precedence over the operative provisions and particularly in cases where the two were in conflict[2].

3. Yet, the interpretative value of the preamble of an international convention is beyond question, with the meaning of any particular provision derived from the examination of the instrument as a whole, including the preamble[3].

II. Contents of the Macolin Convention Preamble

4. The sections below each deal with themes prevalent across the groups of clauses in the Preamble read together. They cover, in the order below, *first*, instruments that came before the Macolin Convention in Europe and the world that dealt with sport ethics and how the provision was drafted (section II.A); *second*, the status of offences connected to competition manipulation and the role of betting (section II.B); *third*, the need for international cooperation, and work of international bodies in sport and at the country level (section II.C); and *fourth*, the objectives of sport, including maintenance of fair competition, ethics and unpredictability, respectively (section II.D).

A. Aim of the Council of Europe and Prior Legislative History

1. Aim and Prior work of Council of Europe

5. The Preamble to the Macolin Convention commences by stating that it recognizes that the **aim of the Council of Europe is to achieve a greater unity between its members**. To this extent, to pave the way for possible ratification by the European Union, the term "Parties" was deemed preferable to "State Party" throughout the text of the Macolin Convention[4]. At the same time, the Explanatory Report to the Preamble states that the manipulation of sports competitions has the **potential to**

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2 YASSEEN M. K., *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, Académie de droit international (Excerpt from the Recueil des cours, Volume III-1976), A. W. Sijthoff, Leyden, 1976, p. 35.

3 *Id*; see also, "Definitions" within "Definitions of Key Terms Used Within the UN Treaty Collection", United Nations available at https://treaties.un.org/Pages/overview.aspx?path =overview/definition/page1_en.xml (June 14, 2022).

4 Explanatory Report, para 23.

affect all countries and all sports and that it constitutes a worldwide threat to the integrity of sport. In this respect, the Preamble outlines the need for a legal instrument open to states other than members of the Council of Europe[5].

6. The Preamble proceeds to refer to **the prior work of the Council of Europe and other international bodies** in order to take such initiatives into consideration throughout the Macolin Convention. These initiatives include: the Action Plan of the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), which recommended the continuation of Council of Europe activities which serve as references in the field of sport, as well as the work and conclusions of the 11th Council of Europe Conference of Ministers responsible for Sport (Athens, December 11 and 12, 2008), the 18th Council of Europe Informal Conference of Ministers responsible for Sport (Baku, September 22, 2010) on promotion of the integrity of sport against the manipulation of results (match-fixing), the 12th Council of Europe Conference of Ministers responsible for Sport (Belgrade, March 15, 2012) particularly in respect of carrying out a feasibility study for drafting of a new international legal instrument against the manipulation of sports results, and the United Nations Economic and Social Council (UNESCO) 5th International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS V)[6].

7. This feasibility study, which concluded that **an international convention was the most logical option** to take forth the groundwork on

5 Explanatory Report, para 26.

6 See Explanatory Report, para 36. The Explanatory Report in its introductory section (para 9), describes prior instruments connected to ethics in sport in light of the mission to defend ethical sport, such as the Council's a key role in coordinating policies in the fight against doping. In the 1980s, this culminated in the opening for signature the Anti-Doping Convention (1989, ETS No. 135), which regulated the fight against that specific emerging problem within the integrity of sport. Thereafter, it was in 2007 that Resolution CM/Res(2007)8 established the Enlarged Partial Agreement on Sport (hereafter "EPAS") and assigned to the EPAS the development and follow-up on standards to deal with topical issues in sport at a pan-European level. EPAS paved the way for targeted action in certain areas and in the course of the preparations for and follow-up to the 11th Council of Europe Conference of Ministers responsible for Sport in Athens, in December 2008, the issues of ethics and autonomy in sport were explored by EPAS in greater depth. The Explanatory Report (para 10), further looks at how at this meeting States made a clear commitment to addressing issues of integrity in sport, particularly manipulation, illegal betting and match-fixing, culminating in turn in the 18th Council of Europe Informal Conference of Ministers (Baku, 2010).

tackling manipulation, was conducted on the basis of Recommendation CM/Rec(2011)10 on the Promotion of the integrity of sport against manipulation of results, adopted by the Council of Europe ("Recommendation CM/Rec(2011)10")[7]. Pending the finalisation of the convention to combat the manipulation of sports competitions, it constituted the most detailed international standard, offering a full range of measures to combat the problem[8]. Resolution No. 1 on international co-operation on promotion of the integrity of sport against the manipulation of results (match-fixing)[9] later paved the way for the negotiation of an international convention on the subject, a culmination of the work done by the Drafting Group responsible for drafting an international convention to combat the manipulation of sports competitions.

8. The Preamble later also considers the fact that it is necessary to further develop a "**common European and global framework** for the development of sport, based on the notions of pluralist democracy, rule of law, human rights and sports ethics." The Macolin Convention borrows this language 'notions of pluralist democracy, rule of law, human rights and sports ethics' from the Recommendation CM/Rec(2011)10[10].

9. Pluralism in democracy recognizes that all those subject to a system of governance must have equal stake in authorizing laws that govern them[11].

10. The term 'sports ethics' is defined in Recommendation CM/Rec(2010)9 of the Council of Europe, which provides for the revised code of sport ethics[12]. This **concept of sport ethics** is discussed further

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7 Recommendation CM/Rec(2011)10 of the Committee of Ministers of the Council of Europe on September 28, 2011.

8 Explanatory Report, para 11.

9 Adopted at the 12th Council of Europe Conference of European Ministers responsible for Sport.

10 Recommendation CM/Rec(2011)10 – see Explanatory Report, para 24. See also, MCNAMEE M., RUBICSEK N., "The Macolin Convention and the Complexity of Sports Competition Manipulation", in: Constandt B., Manoli A. E. ed.s, *Understanding Match-fixing in Sport: Theory and Practice*, Routledge Research in Sport and Corruption, Routledge: London, 2023, 11.

11 See, for example, THEUNS T., "Pluralist Democracy and Non-Ideal Legitimacy", *Democratic Theory* available at https://doi.org/10.3167/dt.2021.080103 (June 29, 2022).

12 Recommendation CM/Rec(2010)9 of the Committee of Ministers to member States on the revised Code of Sports Ethics, adopted by the Committee of Ministers of the Council of Europe on June 16, 2010.

under section II.B.3 below. The Macolin Convention's requirements for international cooperation, including in investigation, are further considered in section II.C.1 below.

11. The Preamble also specifically mentions the Committee of Ministers Recommendation No. R(92)13rev on the revised European Sports Charter, CM/Rec(2010)9 on the revised Code of Sports Ethics, Rec(2005)8 on the Principles of Good Governance in sport and CM/Rec(2011)10 on promotion of the integrity of sport to fight the manipulation of results, notably match-fixing[13].

12. Finally, it is important to note that the work done in setting-up a convention **Follow-up Committee** to monitor implementation of the convention has the merit of providing an institutional base and ensuring sustainability[14].

2. Prior International Instruments

13. The Preamble **includes a reference to the main international instruments**, whose implementation may contribute to effective action against the manipulation of competitions[15].

14. It lists specifically certain **European conventions**, including the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5) and its protocols, the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (1985, ETS No. 120), the Anti-Doping Convention (1989, ETS No. 135), the Criminal Law Convention on Corruption (1999, ETS No. 173) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS No. 198). Among relevant international conventions, it lists the United Nations Convention against

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13 See also Explanatory Report, para 8 where it is stated that Recommendation No. R(92)13rev as adopted in 1992 was used as a reference document, with the two other Recommendations building on that document, to improve integrity and ensure sport was better governed.

14 Explanatory Report, para 22 – here, the Explanatory Report mentions that this type of monitoring is similar to that used by the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (1985, ETS No. 120, hereafter "Convention 120") and by Convention 135. This is discussed further in the commentary to Chapter VIII of the Macolin Convention below.

15 Explanatory Report, para 28.

Transnational Organized Crime, 2000 and the protocols thereto (the 'UNTOC') and the United Nations Convention against Corruption, 2003 (the 'UNCAC'[16]).

15. While making note of these instruments, the Explanatory Report mentions that **CETS. No. 173 and 198** could be used as standard-setting reference points in the definition of the mechanisms and legal means needed to combat the criminal organisations which bribe persons involved in sport in order to manipulate sports results and/or use sports betting as a means of laundering money and as a source of financing for their activities[17].

16. Independently, the **UNCAC** is the only legally binding international anti-corruption instrument, requiring countries to establish criminal and other offences to cover a wide range of corruption offences[18]. It involves cooperation between police, prosecutors and judges, while calling on civil society and the private sector. Various offences defined under the UNCAC could bring within their purview competition manipulation[19]. Consequently, two resolutions adopted by the Conference of State Parties under the UNCAC[20] cover different issues to tackle corruption in sport, the latter addressing manipulation specifically[21].

17. In the same vein, the **UNTOC** is the leading international instrument addressing transnational organized crime[22], and is supplemented by three Protocols, targeting specific areas and

16 Available here https://www.unodc.org/unodc/en/treaties/CAC/ (March 12, 2021).

17 Explanatory Report, para 13.

18 See PASSOS N., ORDWAY C., *Sports Corruption: Justice and Accountability through the use of UNCAC and the UNTOC*, Compendium of the Anti-Corruption Academic Initiative Symposium (UNODC ed., Vienna, 2015) at pp. 132-133.

19 This includes active and passive bribery in the public sector (Art. 15), as well as of foreign officials and officials of international organizations (Art. 16), active and passive bribery while trading in influence (Art. 18), active and passive bribery in the private sector (Art. 21), embezzlement, misappropriation and other diversion of public property (Art. 17) and private (Art. 22), money laundering (Art. 23), concealment (Art. 24) and obstruction of justice (Art. 25). Participation and attempt is also an offence (Art. 27) if in accordance with domestic law. The UNCAC also has procedural provisions of relevance including those of protection of witnesses (Art. 32), reporting persons (Art. 33), cooperation between authorities (Art. 37) among others.

20 Resolution 7/8 (2017, Vienna) and 8.4 (2019, Abu Dhabi).

21 See para 4, 5 and 15 of Resolution 8/4.

22 Available here https://www.unodc.org/unodc/en/treaties/CTOC/index.html (March 12, 2021).

manifestations of such crime[23]. Certain types of sports manipulation may be brought under the UNTOC, raising the threshold for what might be prosecuted as manipulation thereunder[24]. The involvement of organized crime and that of transnational nature, also specifically referenced in the Preamble, is discussed in section II.B.1[25].

18. Yet, the Explanatory Report, emphasizes, [and correctly so,] that **none of the existing international legal instruments specifically dealt with cases involving competition manipulation**, which may occur outside of transnational crime networks and without any acts falling within the definition of corruption having been committed, *inter alia*[26].

B. Evolution of Manipulation Offences and Betting

1. Rising Incidence of Manipulation Offences

19. The Preamble notes specifically that there was an awareness that "*every country and every type of sport in the world may potentially be affected by the manipulation of sports competitions*". It emphasizes that this phenomenon, as a **global threat to the integrity of sport**, requires, in turn, a **global response** which must also be supported by States which are not members of the Council of Europe. Match-manipulation has a long history in sport, that can be traced back to the beginning of modern sport

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23 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

24 Under Article 2.a 'an organized crime group' is a structured group of three or more persons existing for a period of time and acting in concert to commit one or more serious crimes within the UNTOC to obtain direct or indirect financial or other benefit – raising the threshold to bring manipulation within its ambit. Under Art. 3, the UNTOC, except as otherwise stated therein, applies to the prevention, investigation, and prosecution of offences including criminalization of participation in an organized criminal group, as well as organizing, aiding, directing, abetting, facilitating or counselling them (Art. 5), the laundering of proceeds of crime (Art. 6), criminalization of corruption (Art. 8) and of obstruction of justice (Art. 23).

25 See also, SERBY T., "The Council of Europe Convention on Manipulation of Sport Competitions: the best bet for the global fight against match-fixing?", 15(2) *International Sports Law Journa*l 2015, 83.

26 Explanatory Report, para 14.

in eighteenth century in England[27] and has more recently become a major issue through football scandals (around 2005). It currently affects almost every sport[28], whether Olympic or non-Olympic such as cricket, whether due to large amounts involved around betting in football matches[29], to a dearth of them, in smaller leagues and also due to the 2020 Covid-19 pandemic[30]. The amounts involved and reach of manipulation remains immense, attracting criminality due to the high profit, anonymity, vulnerable targets (due to finances or personality types), inconsistent and ineffective legislation across jurisdictions and advent of the internet, among others[31].

20. In the same vein, the Preamble refers to the signatories' concern about the **widespread involvement of criminal activities**, and in

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27 There are instances traced back to 1774 in London – see ALLEN J., *Swimming with Dr. Johnson and Mrs. Thrale Sport, Health and exercise in eighteenth-century England* (Lutterworth Press: Cambridge, 2012), as quoted in DIACONU M., KUWELKAR S., KUHN A., "The Court of Arbitration for Sport Jurisprudence on Matc-fixing", 21 *International Sports Law Journal* 2021, 27.

28 CHAPPELET J., VERSCHUUREN P., *Chapter 28: International Sports and Match Fixing,* The Business and Culture of Sports (Gale: 2019) available at https://serval.unil.ch/resource/serval:BIB_A33DEABE8CB9.P001/REF (June 14, 2022), pp. 429-431.

29 Europol's operation 'Veto' (2011-2013) uncovered more than fifteen countries, hundreds of officials, players and other actors across hundreds of matches across three five continents worth millions of dollars – "Operation VETO- the largest match-fixing investigation in Europe", available at https://www.europol.europa.eu/media-press/newsroom/news/update-results-largest-football-match-fixing-investigation-in-europe (June 12, 2021) and INTERPOL's SOGA ("Soccer-Gambling") operation in Asia in 2016 targeted Euro 2016 related illegal betting dens worth millions of dollars for organized crime syndicates through sport are evidence of this – "More than 4,100 arrests in INTERPOL-led operation targeting Asian illegal gambling networks", INTERPOL, 2016 available at https://www.interpol.int/fr/Actualites-et-evenements/Actualites/2016/More-than-4-100-arrests-in-INTERPOL-led-operation-targeting-Asi an-illegal-gambling-networks (June 12, 2022).

30 See UNODC, IOC and INTERPOL, *Preventing Corruption in Sport and Manipulation of Competitions* (2020) https://stillmedab.olympic.org/media/Document%20Library/Olympic Org/News/2020/07/COVID-19_and_Sport%20Integrity_FINAL_VERSION_2.pdf#_ga=2.154371258.302707046.1615589917-266020737.1614949591 (June 12, 2022).

31 INTERPOL-IOC, *Handbook on Protecting Sport from Competition Manipulation*, 2016 available at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Betting/Education-Awareness-raising/Interpol-IOC-Handbook-on-Protecting-Sport-from-Competition-Manipulation.pdf, p. 19 and p. 23.

particular organised crime in manipulation and its transnational nature. The Preamble further highlights that the potential connection between the manipulation of sports competitions and transnational organised crime thus poses a direct threat to public order and the rule of law[32]. The UNTOC defines both crimes which are organized[33] as well as what 'transnational' connotes[34]. These definitions could be turned to in absence of a specific definition of either term in the Macolin Convention.

21. An **example** of involvement of uncovering of such **organized transnational crime** is EUROPOL's operation "Veto", where a large number of officials, players and criminals from more than 15 countries were suspected of involvement in the manipulation of hundreds of football matches in Europe, Africa, Asia, and South and Central America. Significantly however, these activities were observed to be activities of a sophisticated organized crime network, generating over EUR 8 million in betting profits and EUR 2 million in payments to those involved in the matches[35]. Finally, as also evident in the example above, the transnational, cross-jurisdictional nature of manipulation and corruption related crimes and offences, in particular, has been widely observed as creating unique problems for legislating on the issue[36]. This is also particularly the case as

32 Explanatory Report, para 27.

33 See *supra* note 24, above on Article 2.a of the UNCAC.

34 The UNTOC defines offences of a transnational nature as those which (a) are committed in more than one country; (b) are committed in one country but a substantial part of their preparation, planning, direction or control takes place in another; (c) are committed in one country but involve an organized criminal group that engages in criminal activities in more than one country; and/or (d) are committed in one country but have substantial effects in another. Other bodies have attempted to define organized crime in a sporting context as well – see "The involvement of organized crime groups in sport: Situation Report", EUROPOL, https://www.europol.europa.eu/sites/default/files/documents/the_involvement_of_organised_crime_groups_in_sports_corruption.pdf (June 14, 2022).

35 EUROPOL, "Update – Results from the Largest Football Match-Fixing Investigation in Europe", https://www.europol.europa.eu/media-press/newsroom/news/update-results-largest-football-match-fixing-investigation-in-europe (June 15, 2022).

36 Explanatory Report, para 159; see also, for example, UNODC – IOC, Legal Approaches to tackling the Manipulation of Sports Competitions: A Resource Guide, 2021 available at https://www.unodc.org/documents/corruption/Publications/2021/Legal_Approaches_to_Tackling_the_Manipulation_of_Sports_Competitions_EN.pdf (June 15, 2022), p. 2.

offences are increasingly 'artificial' i.e. in non-territorially demarcated spaces or cyberspace and through the use of computer systems[37].

22. Finally, the Explanatory Report states that the Preamble's recognition of manipulation risk being compounded by the transnational nature of activities involved in it, as well as the potential involvement of organised crime, makes it clear that the Macolin Convention seeks to cover cases of national or transnational manipulation of sports competitions, whether or not they are linked with sports betting (looked at further in section II.B.2 below) or involve a nationally defined criminal offence[38].

2. Role of Betting

23. The Preamble to the Macolin Convention acknowledges that the **development of sports betting activities, particularly of illegal sports betting**, **increases the risks** of competition manipulation. Thus, the Preamble sees this development of the sports betting activities as a potential threat to the integrity of sport, something which the Macolin Convention seeks to address in a practical manner[39].

24. The Preamble also takes note of the **margin of discretion which States enjoy, within the framework of applicable law, in deciding on sports betting policies** and the Explanatory Report also emphasizes this wide margin of discretion given to Parties in policy making[40]. With the progression of the extent of manipulation in sport, the regulation thereof has also expanded based on need at every level of regulation of sport, having initially, in many cases, corresponded to the laws regulating gambling and/or betting. The connection of betting to sponsorship, after a return of amateurism of sport in the twentieth century spurred this growth, which in turn resulted in more legislation regulating traditional forms of

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37 By way of example, numerous virus attacks, fraud and other violations committed through the internet target matches and function through persons and platforms in other countries – Explanatory Report to the Cybercrime Convention, para 239.

38 Explanatory Report, para 35. See also DIACONU M., KUHN A., KUWELKER S., "The Concept of Manipulation under the Macolin Convention", 19:2 *Causa Sport* 2022, 145.

39 Explanatory Report, para 33.

40 Explanatory Report, para 33.

betting, only to evolve further with the advent of more complex systems with the advent on the internet[41].

25. A consequence of this discretionary approach is that the **Macolin Convention aims to be compatible with all types of sports betting** markets/structures/regulations, whether prohibition, monopoly, market open to licensed operators or free market. However, the reference to compliance with the "applicable law" draws attention to the fact that states must nevertheless abide by the rules in force, in particular the relevant applicable international and European Union law[42].

26. While usually dissociated from the broader offence of manipulation, it has also been observed that **some countries still adopt a betting based or focused approach** to regulating manipulation, where in the absence of specific offences of manipulation, umbrella offences, including for illegal betting, are used to convict manipulation[43]. As well, **a vast majority of sporting governing bodies, use parallel existing definitions** to define an independent betting offence in their regulations alongside manipulation[44] or, alternatively, even in having manipulation related offences, conflate the two either intentionally or unintentionally[45].

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41 See CHAPPELET and VERSCHUUREN, *supra* note 28 discussing initial laws in Great Britain (Gaming Act of 1845 and Betting Act of 1853) followed by Switzerland and Italy – at pp. 431 and 432.

42 Explanatory Report, para 33.

43 See section 3.7 in UNODC-IOC, *supra* note 36, where references in the concerned provisions used to convict manipulation include economic gain sought or obtained through betting on a sports event that was manipulated. Sports betting manipulation was found independently also to be an offence in itself in China, Republic of Moldova, Slovakia, South Africa, Sri Lanka and United States among the nations studied, with six further nations studied [Bulgaria, Greece, Italy, Poland, Spain and Turkey] having manipulation of a betting outcome be an aggravating factor [for sentencing] a competition manipulation offence.

44 See section titled "Relationship to, and definition of 'betting'", in KUWELKER S., DIACONU M., KUHN A., "Competition Manipulation in International Sport Federation Regulations: A Legal Synopsis", 22 *International Sports Law Journal* 2022, 1.

45 Examples include the International Weightlifting Federation (where the respective Guidelines on Competition Fixing under the applicable regulation title imply that the regulations are for the "Specific Context of Betting"). Also to note is the International Federation of Sport Climbing whose Disciplinary Appeals Rules, 2019 talk of "betting and gambling offences" (p. 34), as well as Article 10 of the statutes defines "illegal and irregular betting". World Taekwondo Federation and UIPM (governing the modern Pentathlon) also contain "Betting" within the title of their respective regulations applicable to manipulation – see footnote 73, 74 and 76 in KUWELKER S., DIACONU M., KUHN A. (2022), *idem*.

27. As discussed below and noted across literature[46], **the Macolin Convention itself defines manipulation as an independent offence to that of sports betting**[47]. The Convention further creates three sub-categories of sports betting: illegal (whether or not allowed in a jurisdiction), irregular (inconsistent with usual/anticipated patterns) and suspicious (appears linked to manipulation offences based on available evidence)[48]. Notably, Articles 9 and 11, for example, within the Macolin Convention are provisions dedicated to tackling betting, making evident the instrument's focus and recognition of the link between and need to address both betting and manipulation.

C. International Cooperation and Role of Various Bodies

1. International Cooperation in Prosecution and Investigations

28. The Preamble acknowledges the results already achieved in the fight against the manipulation of sports competitions internationally. It further emphasises that an effective fight against the manipulation of sports competitions needs "***increased, rapid, sustainable and properly functioning national and international co-operation***" based on mutual respect and trust. The Explanatory Report states that the Macolin Convention seeks to contribute to the improvement of co-operation between the main stakeholders who are public authorities, the sports movement and sports betting operators[49], as such co-operation is instrumental in fighting transnational manipulation.

29. The Macolin Convention seeks, *inter alia*, to identify acts which should be prosecuted **without, however, imposing the creation in each Party's domestic law of a harmonised special criminal offence**. The purpose of clarifying which acts should be considered offences is to facilitate legislative, judicial and police co-operation between countries, particularly as offences, depending on their definitions, could be criminal,

46 DIACONU M., KUHN A., KUWELKER S. (2022), *supra* note 38.

47 Defined as "any wagering of a stake of monetary value in the expectation of a prize of monetary value, subject to a future and uncertain occurrence related to a sports competition".

48 See Article 3.5 of the Macolin Convention.

49 Explanatory Report, para 21 and 23.

civil or administrative in nature in a specific country. With a view to ensuring an efficient and yet harmonious enforcement system, the Macolin Convention thus proposes a wide range of effective criminal, administrative and disciplinary sanctions[50].

30. Against these affirmations, the Preamble recalls the importance of Parties **investigating effectively and without undue delay** the offences within their jurisdiction. The Explanatory Report clarifies that each Party should recognise the need to lead such investigations and mobilise resources, in accordance with their legislation, given the importance of the issue. Based on the degree of seriousness of the acts committed, the respective competent authorities may consider that effective investigation may involve monitoring communications, seizing material, covert surveillance, monitoring bank accounts and other financial investigations[51].

31. Further, based on the seriousness of the conduct, **investigative methods may also involve** co-operation between different public authorities, and those responsible for investigations or criminal prosecutions. The Macolin Convention is equally concerned with enforcement, prevention, including detection, exchange of information and education. To this end, sporting organizations (discussed in section II.C.2 below), and other bodies such as betting operators are also considered key in facilitating co-operation, particularly concerning the exchange of information[52].

32. Co-operation between entities thus importantly includes the **exchange of information** between relevant authorities, on their own initiative or upon request. For certain bodies, these competent authorities could also be prosecutorial authorities operating under the responsibility of autonomous magistrates[53]. Chapter III of the Macolin Convention is dedicated to provisions concerning the exchange of information and,

50 Explanatory Report, para 21; see generally, ZAKSAITE S., "Match-fixing: The shifting interplay between tactics, disciplinary offence and crime.", 13(3-4) *International Sports Law Journal* 2013, 287.

51 Explanatory Report, para 29.

52 Explanatory Report, para 21.

53 Explanatory Report, para 29.

specifically, requires the creation of national platforms for this purpose under Article 13[54].

33. In the same vein, the Preamble also emphasizes the **key role that the International Criminal Police Organization ("INTERPOL") fulfils** in facilitating effective co-operation between the law-enforcement authorities, as well as the judicial authorities. As noted above in connection with the work of bodies such as EUROPOL, INTERPOL's own investigation SOGA ("SOccer-GAmbling"), against illegal betting which was undertaken between 2007 and 2014 resulted in more than 8400 arrests, the seizure of close to USD 40 million in cash and the closure of around 3400 illegal gambling dens which altogether handled bets worth almost USD 5.7 billion. Such operations have led to the successful removal of a major source of proceeds for organized crime syndicates[55]. The Explanatory Report states that the Preamble emphasises that the intention of the convention is not to introduce a framework that would act as a substitute for the work done by other organisations such as INTERPOL and EUROPOL, but rather to enhance the role that these organisations play, by complementing it[56].

34. Finally, it is important to note that while advocating international co-operation in investigating and prosecuting offences, the Explanatory Report specifies that the Macolin Convention **does not seek to prejudice instruments or sanctions which already exist.** This includes instruments in the field of mutual assistance in criminal matters and extradition (which can facilitate investigations and prosecutions) such as the European Convention on Extradition (ETS No. 24, 1975), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959) and its Additional Protocol (ETS No. 99, 1978)[57].

35. In the same vein, the Macolin Convention aims to encourage the **mutual recognition of disciplinary sanctions** adopted by national sports organisations, in order to avoid an athlete sanctioned by a national

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54 See commentary to Article 13 where the establishment of the Network of National Platforms is spoken about in further detail. See generally also VANDERCRUYSS L., VERMEERSCH A., BEKEN T. V., 22(3) *International Sports Law JournalI* 2022, 241.

55 INTERPOL, "Illegal gambling networks across Asia targeted in INTERPOL-led operation", 2014 available at https://www.interpol.int/News-and-Events/News/2014/Illegal-gambling-networks-across-Asia-targeted-in-INTERPOL-led-operation (June 15, 2022).

56 Explanatory Report, para 30.

57 Explanatory Report, para 21.

organisation managing to evade punishment by participating in competitions in other countries or the risk of disciplinary sanctions being imposed twice for the same offence[58].

2. Role of International Sports Governing Bodies

36. As noted above in section II.C.1, the Macolin Convention recognizes that sports organisations do sanction manipulation. The Preamble emphasizes that that they do bear the responsibility to **detect and sanction the manipulation of sports competitions committed by persons under their authority**. While not specified in the Preamble, it could be implied that the detection and sanctioning of manipulation is sacrosanct for both domestic and international sports governing bodies[59].

37. Yet, while the Preamble explicitly acknowledges the well-established principle of the autonomy of sport[60], stating also that sports organisations are responsible for sport and have self-regulatory and disciplinary responsibilities in the fight against manipulation, it adds that, where appropriate, **public authorities are to protect the integrity of sport and aid in tackling manipulation**[61]. It should be underlined that the principle of autonomy as mentioned here does not intend to exclude the sports movement from compliance with the rule of law and the applicable law in each jurisdiction[62].

38. The Explanatory Report clarifies that the **principle of autonomy of sport**, as referred to in the Preamble, has the same meaning as in Recommendation CM/Rec(2011)3 of the Committee of Ministers to member States on the principle of the autonomy of sport in Europe

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58 Explanatory Report, para 21. We see that provisions within the Macolin Convention, notably Article 19, seek to enhance such cooperation between countries to avoid violation of the principles of *ne bis in idem*.

59 See also, HAAS U. and HESSERT B., "The Sanctioning Regime in Match-fixing Cases", Jusletter 2021 available at https://jusletter.weblaw.ch/fr/juslissues/2021/1071/sanctioning-regime-i_1005540459.html__ONCE&login=false (September 24, 2023).

60 See for example, as noted in BADDELEY M., "The Extraordinary Autonomy of Sports Bodies in Swiss Law: Lessons to be Drawn", 20 *International Sports Law Journal* 2020, 3.

61 Explanatory Report, para 31.

62 Explanatory Report, para 32.

("Recommendation CM/Rec(2011)3")[63]. Similarly, noted also in the context of Article 1.1 of the Macolin Convention which recognizes this principle of autonomy, Recommendation Rec(92)13rev of the Committee of Ministers to member States on the revised European Sports Charter specifies that sports organizations are to set up autonomous decision-making mechanisms within the limits laid down by the law of the country within whose territory they have their seat[64]. Article 7 of the Macolin Convention also enshrines to some extent this concept of sporting autonomy by providing measures to be taken by sporting organizations, without specifying how they should be implemented[65].

39. The aforementioned context assumes importance when one considers that for **most manipulation offences in sport**, first instance investigations, whether or not in parallel with state authorities, are **ordinarily initiated by the respective governing body in the sport** ("sport justice")[66]. Sport justice, as noted above, does however remain subject to national law[67].

40. **Initially**, in such sport organization regulations, at least at the international level (which then national bodies tend to emulate) **manipulation was an offence grouped with general corruption** within codes of conduct or ethics, if at all, i.e. no consistent approach across federations was present. With the increase in prevalence and of its profile as a threat to integrity, Article 3 and other provisions in the Macolin Convention have served as a model set of regulations including for the

63 Explanatory Report, para 32 - this recommendation specifies the main features of the autonomy of sport, namely the possibility for non-governmental sports organisations to establish, amend and interpret rules of the game, appropriate to their sport, freely, without undue political or economic influence; to choose their leaders democratically, without interference by States or third parties; to obtain adequate funds from public or other sources, without disproportionate obligations; and to use these funds to achieve objectives and carry out activities chosen without severe external constraints.

64 See also Explanatory Report, para 37.

65 See Explanatory Report, para 73.

66 While written on by various authorities, for an initial discussion on the distinction of recourse in dispute resolution within sport versus national judicial fora and applicable legislation accordingly, one may look, for example, at NAFZIGER J., "International Sport Law as a Process for Resolving Disputes", 45(1) *International Comparative Law Quarterly* 1996, 130.

67 The Court of Arbitration for sport has held that "disciplinary sanctions imposed by associations are subject to civil law and must clearly be distinguished from criminal penalties" imposed by a state – *Johannes Eder* v. *Ski Austria*, CAS 2006/A/1102, award dated November 13, 2006 at para 52.

International Olympic Committee's Olympic Movement Code on the Prevention of Manipulation of Competitions, 2015 ("IOC 2016 Code", adopted by numerous federations as a basis for their own definitions of manipulation)[68]. Now, a number of international federations have adopted provisions dedicated to the prohibition of manipulation or adopted the IOC 2016 Code as a whole[69].

D. Objectives of Sport – Fairness, Ethics, Unpredictability

41. Last, but not in the least, this section discusses certain provisions of **the Preamble that enshrine certain concepts and values sacred to sport** which the Macolin Convention seeks to recognize and that give it its purpose.

42. As seen in section II.A.1 above, the phrase '**sport ethics**' is used in the Preamble and is also closely connected to the concept of **fairness and equal competition** referred to later in the Preamble. To this end, the Preamble recognizes that sport, based on fair and equal competition, is unpredictable in nature and requires that unethical practices and behaviour be forcefully and effectively countered.

43. The Explanatory Report specifies that the concept of sport ethics has, in turn, two underlying principles: fairness and sport as a **space for individual self-fulfilment**[70]. It further goes on to say that integrity of sport is understood as an ethical fundamental value in the sport movement **characterised by credibility, transparency and fairness as well as by the unpredictability of sports competition results**[71]**.**

44. **Fairness** accordingly refers to practising a sport while faithfully respecting the rules of competition, and to providing everyone with an equal chance of taking part in sport, though fairness in sport can have multiple meanings and purposes contingent on who makes the requisite regulations and whom they are made for, and has been much discussed[72].

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68 See Preamble, Clause (c) of the IOC 2016 Code; see also KUWELKER S., DIACONU M., KUHN A. (2022), *supra* note 44.

69 See generally KUWELKER S., DIACONU M., KUHN A. (2022), *supra* note 44 where research findings showed that a vast majority of federations had specifically defined manipulation offences.

70 Explanatory Report, para 25.

71 Explanatory Report, para 26.

72 Explanatory Report, para 25. It may be noted that the concept of fairness in sport has been discussed in much detail across academic literature and, as well, in different

The Explanatory Report further states that sport must be **practiced** according to the principle of **fair play**, must be **free of discrimination** and ensure **inclusivity for all**. In addition, sport provides **opportunity for self-development and self-control** according to potential and interest, to become an **important ethical and cultural factor** in society[73].

45. Finally, a key aspect to maintaining interest in sport remains the concept of **unpredictability**. Undermining the unpredictable nature of a sport through activities, including manipulation, doping and other forms of 'unethical' behaviour, which make a specific outcome certain or more likely is considered to take away from the purpose of playing and organizing sporting competitions[74].

46. **Manipulation is thus considered a threat to the future of sport as a social, cultural, economic and political practice**, these traits being brought into question every time doubts are raised about sporting integrity and values. Therefore, manipulation, which risks the unpredictability underlying sports, call into question the nature of sport, the public's interest in it and the willingness of public and private sponsors to finance it[75]. Accordingly, the **Macolin Convention recognizes that sport requires that unethical practices such as manipulation be forcefully and effectively countered to uphold the above values**.

47. In Articles 22, 23 and 24 the Macolin Convention mentions the phrase 'legislative or other measures'. The section below addresses the implication of usage of this phrase.

contexts – see, for example, BROWN A., "Principles of Stakes Fairness in Sport", 14(2) *Politics, Philosophy & Economics* 2015, 152; while discussed here so to have a fair playing field and no undue influence, it may also be discussed in the concept of fairness for a specific context such as discrimination, see for example, HOLZER L., "What does it mean to be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport", 20 *Human Rights Law Review* 2020, 387 and KRECH M., "The Misplaced Burdens of 'Gender Equality' in Caster Semenya v IAAF: The Court of Arbitration for Sport Attempts Human Rights Adjudication", 19(3) *International Sports Law Review* 2019, 66.

73 Explanatory Report, para 25.

74 See for example, ANDRADE G., "The Problem of Evil in Sports" 15(3) *Sport Ethics and Philosophy* 2021, 400.

75 Explanatory Report, para 6.

Article 1

by

Madalina DIACONU

Article 1 – Purpose and main objectives

1 The purpose of this Convention is to combat the manipulation of sports competitions in order to protect the integrity of sport and sports ethics in accordance with the principle of the autonomy of sport.

2 For this purpose, the main objectives of this Convention are:

a to prevent, detect and sanction national or transnational manipulation of national and international sports competitions;

b to promote national and international co-operation against manipulation of sports competitions between the public authorities concerned, as well as with organisations involved in sports and in sports betting.

I. Purpose of Article 1

1. The purpose of Article 1 is to define the very objective of the Convention, which is to combat the manipulation of sports competitions. To this end, Article 1, firstly, identifies **which values are protected or promoted** by this Convention (ethics, integrity and autonomy), and secondly, **sets the two main objectives** pursued by the Convention. This general framework is completed by the guiding principles enumerated in Article 2 (human rights, legality, proportionality, and protection of private life and personal data).

II. The Contents of Article 1

A. First Paragraph – The Protected Values

1. Ethics and Integrity of Sport

2. By including a reference to sports ethics and the integrity of sport, this article emphasises that *all* forms of manipulation pose a threat to the values of sport[1].

3. **Ethics** refers to a system that guides and motivates adherence to a set of moral values and behaviors. Among those values, **fair play and sportsmanship** appear to be the most widely quoted[2], as they stem from the Greek idea of moral and physical excellence (*arête*). Certain scholars situate the origin of the fair-play and sportsmanship concepts in the Muscular Christianity movement[3] which flourished in 19th century British Public Schools – this movement claiming to have its roots in classical Greek sports[4].

4. Simply put, these concepts are **the opposite of the "winning-at-all-costs" strategy**, including by cheating – a corrupt mentality which was encouraged and sustained by the increasing commercialization of sport.

5. **Integrity** in sports is a rather slippery concept[5]. Like other notions, such as "happiness" or "health", it is easier to define what it is not, than what it is. When addressing this issue, most people refer to it as the *absence of practices such as corruption, match-fixing, illegal betting, doping, abuse and harassment, racism*, *discrimination*, etc. In a deeper sense, the virtue of integrity is the cornerstone of character, for it is the embodiment of our

1 Explanatory Report, at 37.

2 See BOXILL J. (Ed.), *Sports Ethics. An Anthology*, Blackwell Publishing, Oxford, 2003.

3 This philosophical movement originated in England during the Victorian era as a method of building character in pupils, and was characterized by a belief in patriotic duty, discipline, self-sacrifice, masculinity, and the moral and physical beauty of athleticism. See TROTHEN T. (Ed.), *Sport, Spirituality, and Religion. New Intersections*, MDPI 2019.

4 BOXILL J. (2003), p. 153.

5 For a synopsis of literature, see TREAGUS, COVER, BEASLEY, Integrity in sport literature review, 2011, https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.713.5863&rep= rep1&type=pdf.

ideals[6]. Integrity in sport is largely addressed in research through the ethical concepts of *fair play*, *respect* for the game, *sportsmanship*, positive personal values of *responsibility*, *compassion* for the other, and *honesty* in adhering to rules[7].

6. Confronted with recent scandals, numerous sports organizations have adopted or updated codes of ethics, integrity guidelines, and similar texts aiming at obtaining more ethical behavior and management[8].

2. Autonomy of Sport

7. The principle of autonomy of sport, as derived from the fundamental principle of **freedom of association**[9], is one of the cornerstones of the activity of organized sport. Indeed, sports organizations tend to act **in self-organizing, interorganizational networks characterized by interdependence, resource-exchange, rules of the game, and significant autonomy from the state**[10]. For almost a century, the sporting network exercised its self-governance without any significant interference from states or other actors[11].

8. However, following the tremendous increase in revenues experienced by sport organizations in the last decades, alongside the increased media attention, many negative factors were also exposed, such as corruption, inefficient management, political manipulation, and other governance failures. In this context, the justification of the principle of sports autonomy was recently **reshaped to present it more as a "deserved prize" for implementing good governance.** In the words of Mr. Patrick

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6 See LAWAL YAZID I., *Integrity Issues in Competitive Sports*, IOSR Journal of Sports and Physical Education (IOSR-JSPE), Volume 3, Issue 5 (Sep. – Oct. 2016), pp. 67-72, and references.

7 Idem, p. 67.

8 For an analysis, see DE WAEGENEER E., DEVISCH I., WILLEM A., *Ethical Codes in Sports Organizations: An Empirical Study on Determinants of Effectiveness*, Ethics & Behavior, 2017, 27:4, 261-282

9 See Article 23 of the Swiss Constitution; Article 11 ECHR.

10 RHODES, R.A.W., Understanding governance: policy networks, governance, reflexivity and accountability, Open University Press, 1997.

11 GEERAERT A., MRKONJIC M., CHAPPELET J.-L., *A rationalist perspective on the autonomy of international sport governing bodies: towards a pragmatic autonomy in the steering of sports*, International Journal of Sport Policy and Politics, 2015, 7:4, 473-488.

Hickey, EOC President, "good governance is a very important way for sports organisations to achieve autonomy"[12].

9. At its basis, this **"tandem movement" between autonomy and good governance** mirrors the fundamental conundrum which international sports organizations face nowadays: organized most often in the form of an association, but having budgets worthy of successful international business groups, sports organizations must reconcile association and commercial logic to ensure their sustainability[13].

10. Sports autonomy can be analyzed at several levels[14], which are, mainly: **political** (the absence of (significant) governmental and political interferences in the affairs of sports organizations); **legal** (the private autonomy to adopt rules and norms that have a legal impact within the legislative framework imposed by the State[15]); and **financial** (sports organizations should have their own financial resources, which does not preclude them from receiving subsidies)[16]. Of course, this concept may also be analyzed at other levels (psycho-sociological[17], functional, etc.). As the European Commission noted in its White Paper on Sport, "European sport is characterized by a multitude of complex and diverse structures which enjoy different types of legal status and levels of autonomy in Member States"[18].

11. Many international sports organizations have adopted **sport-specific rules** proclaiming the autonomy of the sports movement. Such examples include the Olympic Charter, which in 1949 included the term of "autonomy" (Rules 2.5, 25 and 27.6), the FIFA Statutes (principle of "non-

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12 https://olympics.ie/eoc-president-autonomy-and-good-governance-vital-to-our-very-existence/.

13 DIACONU M., *La bonne gouvernance des organisations sportives: état des lieux et perspectives,* in: Citius, altius, fortius: Mélanges en l'honneur de Denis Oswald, Bâle 2012 – p. 83-102; CHAPPELET J.-L, *La gouvernance du Comité international olympique*, in: Gouvernance des organisations sportives, coordonné par Bayle E. et Chantelat P., 2006.

14 MRKONJIC M., GEERAERT A; Sports organisations, autonomy and good governance, in *Action for Good Governance in International Sports Organisations*. Final report, Play the Game/Danish Institute for Sports Studies, Copenhagen, Denmark, 2013.

15 OSWALD D., VEUTHEY A., HAFNER Y., Associations, fondations et autres formes de personnes morales au service du sport, Peter Lang (Bern), 2010, p. 155.

16 See also CHAPPELET, J.-L., *L'autonomie du sport en Europe*. Publications du Conseil de l'Europe, Strasbourg, 2010.

17 CHAPPELET (2010), p. 32.

18 EUROPEAN COMMISSION, White Paper on Sport, 2007, p. 18.

interference", Art. 15.c), World Rowing Federation Statutes (Art. 2.2 of Statutes), UCI Constitution (Art. 3.b), FIS (International Skiing Federation) Statutes (Art. 4.2), etc.

12. This principle was also expressly mentioned by the United Nations General Assembly, which adopted a Resolution on sport titled "Sport as a means to promote education, health, development and peace"[19]. This was the first time in its history that the UN recognized the autonomy of sports organizations.

13. In Article 1 of the Convention, the reference to the autonomy of sport needs to be understood in the sense of Recommendation CM/Rec(2011)3 of the Committee of Ministers to member States on the principle of autonomy in sport in Europe[20], which, like Recommendation Rec(92)13rev of the Committee of Ministers to member States on the Revised European Sports Charter[21], specifies that **sports organisations are to set up autonomous decision-making mechanisms within the limits laid down by the law of the State within whose territory they have their seat**[22]. Recommendation CM/Rec(2011)3 further specifies the main features of the autonomy of sport, namely the possibility for non-governmental sports organisations to *establish, amend and interpret the "rules of the game*" appropriate to their sport freely, without undue political or economic influence; to *choose their leaders democratically*, without interference by States or third parties; to *obtain adequate funds* from public or other sources, without disproportionate obligations; *to use these funds to achieve objectives and carry out activities they chose,* without severe external constraints[23]. Naturally, the principle of autonomy does not intend to exclude the sports movement from compliance with the rule of law and the applicable law in each jurisdiction[24].

14. The concept of sports autonomy has also been discussed in the **CAS jurisprudence**, especially in relation to disputed elections, admission

19 UN General Assembly Resolution 58/5.
20 https://rm.coe.int/16805b4d00.
21 https://rm.coe.int/16804c9dbb.
22 Explanatory Report, ad Preamble and Article 1, 32, 37.
23 Idem.
24 Idem.

or exclusion of members, and the selection of athletes for the Olympic Games[25].

15. In certain cases, **the legal autonomy of sport has been seriously challenged by the decisions of the European Court of Justice (ECJ).** Indeed, athletes have a dual catalogue of rights and obligations: one category derives from ordinary law, while the other originates in the rules of the sports federations they are registered with[26]. Many of the latter rules are captured by the EU's treaties, regulations and directives establishing its internal market, notably by EU competition law, which *de facto* limits the autonomy of the affected sports organizations.

16. **In practice**, **the concept of sports autonomy varies largely**, in accordance with the legal and political environment present at a certain moment in time. For example, the level of autonomy of an NOC may fundamentally vary from one country to another, with situations where certain NOCs are controlled by their national government or even represent an "annex to the Ministry of sport"[27], the NOC president being the Minister of Sport, or even President of the country.

17. Autonomy is therefore a concept with **variable geometry**, the content of which depends on the context in which it is used. Moreover, its potentially broad contours exceed, at first sight, those of legal science[28].

B. Second paragraph – Objectives of the Convention

18. The second paragraph of Article 1 specifies that in order to achieve its purpose, the Convention aims to prevent, detect and sanction manipulation of competitions and to promote national and international co-operation between those concerned, principally public authorities, sports organizations and sports betting operators.

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25 For a review, see MAVROMATI D., *Autonomy and Good Governance in Sports Associations in Light of the CAS Case Law*, International Sports Law Journal, 2014, pp. 71-79.

26 PARRISH R., *Sports law and policy, in the European Union*, Manchester University Press, 2003, pp. 109 et seq..

27 CHAPPELET J.L., KÜBLER-MABBOTT B., The International Olympic Committee and the Olympic System: The Governance of World Sport, Sport in Society, 19:6, 739-7, 2008, p. 55.

28 DIACONU M., *La bonne gouvernance des organisations sportives: état des lieux et perspectives,* in: Citius, altius, fortius: Mélanges en l'honneur de Denis Oswald, Bâle 2012.

1. Objective 1: Prevention, detection and sanctioning of manipulation

19. The first objective of the Convention is to prevent, detect and sanction competition manipulation.

20. **Prevention strategies and measures** are provided in Chapter II, and include domestic coordination (Article 4), risk assessment and management (Article 5), education and awareness raising (Article 6), adoption and implementation of rules on competition manipulation and good governance by the sports organizations (Article 7), measures regarding financial transparency and financial good governance as to the funding of sports organizations (Article 8), measures to be implemented by betting regulators (Article 9), measures to be implemented by sport betting operators (Article 10), and measures to combat illegal sports betting (Article 11).

21. **Detection is primarily the task of international sports organizations and sports betting operators,** which are recognized as key partners of public authorities in combating the manipulation of sports competitions. In practice, many sports organizations and sports betting companies have put in place their own detection systems (either individually or collectively)[29], which combine traditional features (on-field reports, whistle blower information, etc.) with different scientific techniques (notably betting surveillance systems, AI video surveillance, etc.) to detect **abnormal patterns** in a given competition. Concerning betting, unusual characteristics of a competition may be detected by organisations or authorities involved in betting market surveillance, by sports betting operators who follow the competitions on which bets are placed, but also by the sports organisations[30].

22. **Sanctioning is a key feature of the Convention**, which is mainly expressed in Chapter IV, Articles 15 to 18, and in Chapter VI, Articles 22 to 25. The purpose of these articles is to ensure that the manipulation of sports competitions is covered by the domestic legislation of the Parties in such a way that this manipulation may be effectively punished in accordance with its gravity, including through criminal sanctions when appropriate[31]. It should be noted that, to date, approximately **fifty states have already adopted and enforce criminal sanctions against**

29 See detailed analysis in commentary on Chapter III.
30 Idem.
31 See detailed analysis in Chapters IV and VI.

perpetrators of manipulation involving elements of corruption, bribery, coercion, or organized crime[32]. A recent study identified a significant increase in the criminalization of competition manipulation[33], criminal sanctions being applied in parallel to other types of sanctions, such as administrative, disciplinary or civil sanctions.

23. These three objectives of the Convention are set and incumbent upon all parties, i.e. public authorities, organizations involved in sport and organizations involved in sports betting.

24. According to the Explanatory Report, the term "**public authorities**" encompasses, inter alia, the legislature, the judiciary, the police, the authorities responsible for regulating sports betting, the governmental authorities in charge of sport, the authorities responsible for personal data protection and local authorities[34]. This broad definition does not imply that each public authority concerned in one way or another by a provision of this convention is systematically covered by all the references to public authorities. The definition of relevant or competent public authorities, referred to in subsequent articles, should be applied with regard to the specific nature of the task and the statutory mandate of the authorities[35].

25. "**Organizations involved in sport**" refers primarily to sports organizations and competition organizers, but can also cover supporters' clubs and players' organizations, organizations which seek to promote sports ethics or good governance in sport and their fraud detection systems[36].

26. Finally, the term "**organizations involved in sports betting**" refers to any operator, publicly or privately owned, authorized to provide betting services but may also cover umbrella organizations of operators (for example of the lotteries or commercial gambling operators) and their fraud detection systems[37].

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32 See UNODC – IOC, Legal Approaches to Tackling the Manipulation of Sports Competitions, 2021.
33 UNODC – IOC, Legal Approaches to Tackling the Manipulation of Sports Competitions, 2021, p. 6.
34 Explanatory Report, at 39.
35 Idem.
36 Idem.
37 Idem.

2. Objective 2: Promoting national and international co-operation

27. The second objective of the Convention is to effectively promote national and international cooperation in the fight against match-fixing. This is primarily dealt with in Chapter VII (International cooperation in judicial and other matters), Articles 26 to 28, but also throughout the Convention, for example in Chapter III, notably in Articles 12 and 13, which regulate the exchange of information and national platforms specifically addressing the issue of competition manipulation.

28. This means that Parties should, in compliance with the law, offer the maximum assistance to the other Parties and the 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[38].

29. **National platforms** serve as information hubs, collecting and disseminating information relevant to the fight against manipulation of sports competitions to the relevant organisation and authorities[39].

30. As regards **judicial co-operation in criminal matters**, this relies on the existing normative framework, which is quite vast, both at international and European level[40].

31. On a more general note, Parties should integrate, where appropriate, measures related to the prevention of and the fight against manipulation of sports competitions in **development of assistance programs for the benefit of third States**[41].

32. Finally, under Article 28, the Parties shall cooperate with *international sports organizations* in the fight against the manipulation of sports competitions, in accordance with their domestic law[42].

III. Conclusion

33. Overall, from the perspective of its two main objectives, the Convention presents itself as a very promising legal framework to tackle

38 Explanatory Report, at 112.
39 Explanatory Report, at 119.
40 See detailed analysis in Chapter VII.
41 Explanatory Report, at 209.
42 Explanatory Report, at 210.

competition manipulation at a global level, at least for the following reasons:

- it brings together, for the first time, **all the actors involved** (governmental authorities, sports organizations, sports betting operators and betting regulators),
- it takes a **complete approach for tackling the issue of competition manipulation**, from prevention, to detection, to prosecution and sanctioning,
- it provides for the possibility of an **unprecedented level of cooperation**, notably through the national platforms, and
- it aims to achieve a truly **universal reach**, being open for signature to all states, including non-European States.

Article 2

by

Madalina DIACONU

Article 2 – Guiding principles

The fight against the manipulation of sports competitions shall ensure respect, inter alia, for the following principles:

a. human rights;

b. legality;

c. proportionality;

d. protection of private life and personal data.

I. Purpose and Scope of Article 2

1. The purpose of Article 2 is to **clearly set the guiding principles** (human rights, legality, proportionality, and protection of private life and personal data) that must be observed by all authorities or entities involved in the fight against competition manipulation.

2. It seems reasonable to note that the express mention of these guiding principles, at the very beginning of the Convention, underlines the Convention's focus and legal nature, which mostly relates to **sanctioning (criminal) law.** Indeed, such principles have been traditionally used to temper the action of criminal law authorities, in the broad sense (including the police, prosecutors, judges, enforcement and executing authorities, etc.), and to generally **balance the various interests of the offenders, the victims, and the community**.

3. Human rights must be respected inasmuch as they are rules dictated by public policy which are essentially **enshrined in national Constitutions and in international law instruments, such as the ECHR**;

the same applies to the principles of legality and proportionality inasmuch as they constitute **general principles of law**[1].

4. As clarified in the Explanatory Report[2], the Convention clearly states that respect for human rights, legality and proportionality must apply **both to state authorities and to private stakeholders** in the fight against manipulation of sports competitions.

5. However, despite this generously affirmed scope (and as we will discuss further, see II.A hereinafter), the **horizontal application of the ECHR – notably in arbitration proceedings and in procedures aimed at setting aside arbitral awards – is still a very debated topic**, especially in the context of Swiss law (which is paramount, as the vast majority of sports-related dispute resolution takes the form of arbitration by Swiss-based tribunals such as the CAS).

II. The Contents of Article 2

A. Human Rights in International Sports

6. In general, the relationship between human rights and sports is one of the vastest and most intricate issues in the sports law doctrine. On the one hand, there are many policies that protect and promote citizens' right to play sports and engage in physical activity. For example, one of the first international instruments linking physical activity and education was the **Declaration on the Rights of the Child**, published in 1959. The **International Charter of Physical Education and Sport**[3] later declared access to physical education as a fundamental right in 1978. On the other hand, sports organizations (especially the largest ones, such as the IOC, FIFA, UEFA, etc.) have adopted human rights as one of the pillars of their activities (see Ch. 1 hereinafter). However, when it comes to the practical application of such rights and principles, especially in disciplinary and arbitration proceedings (and notably in contexts such as doping or competition manipulation), things do not appear as clear (see Ch. 2 hereinafter).

1 Explanatory Report, at 40.
2 Explanatory Report, at 40.
3 https://en.unesco.org/about-us/legal-affairs/international-charter-physical-education-physical-activity-and-sport (23.03.2023).

1. Incorporation of Human Rights in the fundamental texts of International Sports Bodies

7. Many international sports bodies have incorporated human rights provisions into their statutes and future event regulations.

8. For example, the **Olympic Charter** provides, among the "Fundamental principles of Olympism", Principle 4, according to which "the practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play". Also, Principle 6 provides that "the enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status". Moreover, Rule 2.18 of the Olympic Charter states that "the IOC's role is to promote safe sport and the protection of athletes from all forms of harassment and abuse".

9. **Participation in sport is recognised as a human right** under the terms of the United Nations Universal Declaration of Human Rights (UDHR), specifically as a component of "participation in the cultural life of the community". It has also been declared a human right in the Council of Europe's Sport for All Charter[4], and the UNESCO International Charter of Physical Education, Physical Activity and Sport[5], among others.

10. **Sport governing bodies must also observe basic human rights in their activities**, especially since a number of them expressly undertook such an obligation in their statutes or regulations[6]. Furthermore, the **host city contracts** (HCCs) for the Summer Olympic Games in 2024 and 2028 and the Winter Olympic Games in 2026 now include human rights clauses as core requirements. By signing the contract, the host city, National Olympic Committee (NOC) and Local Organising Committee (LOC) guarantee to the IOC to *"protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and regulations applicable in the Host Country and in a manner consistent with all internationally-recognised*

4 https://www.coe.int/en/web/sport/the-european-sports-charter (05/09/2023).

5 https://www.unesco.org/en/sport-and-anti-doping/international-charter-sport (05/09/2023).

6 See HAAS U., HESSERT B. (2021). *Sports Regulations on Human Rights Applicability and Self-Commitment*. In: Le sport au carrefour des droits: Mélanges en l'honneur de Gérald Simon. Paris: Payot, 287-307.

human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights".

11. Also, according to Article 3 of **FIFA's Statutes**, "FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights". FIFA also has enacted a Human Right Policy (May 2017), whose Article 1 provides for FIFA's commitment to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights. Article 2 of the same document provides for FIFA's commitment to embrace "all internationally recognised human rights, including those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work".

12. Based on the revised **bidding regulations for the 2026 World Cup**, FIFA expects all bidders to respect internationally recognized human rights, including workers' rights, when carrying out activities related to the bidding or hosting of events.

13. Without exhausting all the possible examples, let us finally note that compliance with the principles of human rights is also enshrined in the **World Anti-doping Code** (WADC) 2021 (p. 9), which states, under "Rule of law", that it seeks to ensure that all relevant stakeholders have agreed to submit to the Code and the International Standards, and that all measures taken in application of their anti-doping programs respect the Code, the International Standards, and the principles of proportionality and human rights.

2. A limited applicability of Human Rights in disciplinary and arbitration proceedings

14. However, despite the above, one should not forget that when it comes to **disciplinary proceedings** (for example, in the context of competition manipulation) initiated by sports governing bodies, the vast majority are judged through arbitration, most of which is centralized at the CAS in Lausanne. This aspect is paramount because, **as per the traditional arbitration doctrine, human rights in general are not**

directly applicable in arbitration proceedings involving private parties[7].

15. This peremptory affirmation was seriously challenged by an ECtHR decision rendered in 2018 in the *Mutu & Pechstein* case[8]. Note that until that decision, the European Court of Human Rights had been only marginally involved in sports matters in general, and even less in matters related to sports arbitration. Since the creation of the CAS in the '80s, only a couple of sports arbitration matters were brought to Strasbourg but nothing meaningful until the landmark *Mutu & Pechstein* case[9].

16. In this decision, the ECtHR notably considered the question of the applicability of Article 6§1 ECHR to (sports) arbitration. Analyzing the case, it rejected the traditional case law of the Swiss Federal Tribunal according to which this article was only "indirectly applicable" in arbitration (i.e., to the extent that some of the protections of this article are implemented at the stage of the action to set aside the award). **According to the ECtHR, Article 6§1 ECHR is directly applicable to all adjudicatory proceedings, including arbitration, where they concern the determination of "civil rights and obligations or of any criminal charge**"[10].The ECtHR considered that civil rights and obligations were clearly at issue in the *Pechstein* case, which arose from a "disciplinary procedure before the professional bodies and in the context of which the right to carry on an occupation is at stake"[11]. The ECtHR also held that the possibility for the parties to the arbitration to **waive the guarantees enshrined in Article 6§1 ECHR is conceivable only in case of "voluntary arbitration"** (freely agreed upon by the parties) but is **excluded if such arbitration is "compulsory"**, as is often the case in the sports world.

17. Thus, confirming the views of certain authors[12], the ECtHR concluded that even though it had not been imposed by law but instead by

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7 For a detailed discussion, see A. RIGOZZI, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in Müller Ch./ Besson S./ Rigozzi A. (Eds), New Developments in International Commercial Arbitration 2020, Stämpfli 2020.

8 ECtHR, *Mutu & Pechstein v. Switzerland* (Applications nos. 40575/10 and 67474/10), judgment of 2 October 2018.

9 RIGOZZI, quoted above, p. 78.

10 ECtHR, *Mutu & Pechstein v. Switzerland*, § 56.

11 Idem, § 58.

12 MAISONNEUVE M., *Le Tribunal arbitral du sport et le droit au procès équitable: l'arbitrage bienveillant de la Cour européenne des droits de l'homme*, Revue

sports (private) regulations, the (forced) acceptance of CAS jurisdiction by the athlete must be regarded as "compulsory arbitration", which means that **in such cases, CAS arbitration proceedings must afford the safeguards secured by Article 6 § 1 ECHR**.

18. This prompted the CAS to change its rules in several respects, notably to allow **public hearings** in disciplinary and/or ethics matters[13].

19. However, even after the ECtHR *Mutu & Pechstein* decision, a fundamental discordance seemed to perdure between the human rights framework as affirmed by the EctHR (and referred to in the statutes, constitutions, and rules of international sports bodies), and the (still) restrictive approach adopted by the Swiss Federal Tribunal in motions to set aside arbitral awards on this matter (on the basis of Art. 190 para. 2 of the Private International Law Act - PILA).

20. In the famous ***Semenya case***[14], which was posterior to *Mutu & Pechstein*, the Swiss Federal Tribunal argued, on the basis of traditional doctrine and jurisprudence, that the application of the non-discrimination principle enshrined in the Swiss Constitution was restricted to the treatment of individuals by *public* entities, not private bodies such as sports organizations[15] (nevertheless, the Tribunal did observe that sports governing bodies possess a status "similar" to states).

21. The case was then brought forward to the ECtHR[16], whose decision favored the athlete. With a 4-3 majority, the Court ruled that Article 14 ECHR, read together with Article 8, as well as Article 13 ECHR, were violated. In particular, the Court found that Ms. Semenya had not

trimestrielle des droits de l'homme (RTDH), Vol. 30, No. 119, 2019, pp. 687-705; HAAS U., *The Role and Application of Article 6 of the European Convention on Human Rights* in CAS Procedures, International Sports Law Review 2012/3, pp. 43-60.

13 https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_ECHR_GC.pdf (24.03.2023).

14 SFT, cases 4A_248/2019 & 4A_398/2019, judgment of 25 August 2020. The case concerned a hyperandrogenous (46 XY DSD) South African athlete, specialising in middle-distance races. She complained about certain regulations of the International Association of Athletics Federations (IAAF – now called World Athletics) requiring her to take hormone treatment to decrease her natural testosterone level in order to be able to take part in international competitions in the female category. Having refused to undergo the treatment, she was no longer able to take part in international competitions. Her legal actions challenging the regulations in question before the Court of Arbitration for Sport (CAS) and the Federal Court were rejected.

15 Idem, recital 9.4.

16 ECtHR, *Semenya v. Switzerland*, judgment of 11 July 2023 (application no. 10934/21). This judgment was referred to the Grand Chamber in October 2023.

been afforded sufficient institutional and procedural safeguards before the Swiss Federal Tribunal that would have allowed an effective examination of her substantiated and credible claim of discrimination on grounds of her sex characteristics.

22. Importantly, the ECtHR found that, **in the context of compulsory arbitration, which had deprived the applicant of the possibility of applying to the ordinary courts, the only remedy available to her had been an application to the CAS which, despite providing very detailed reasoning, had not applied the provisions of the Convention** and had left open serious questions as to the validity of the World Athletics DSD Regulations, in particular as regards: the side-effects of the hormone treatment; the potential inability of athletes to remain in compliance with the DSD Regulations; and the lack of evidence of 46 XY DSD athletes having an actual significant athletic advantage in the 1,500 and 1 mile races.

23. Furthermore, **the review carried out by the Federal Court on an appeal against a CAS decision was very limited**, being restricted to the question whether the arbitration award was compatible with substantive public policy, and had failed, in the present case, to respond to the serious concerns expressed by the CAS in a manner compatible with the requirements of Article 14 ECHR.

24. Importantly, the Court considered that, **while the very limited control exercised by the Swiss Federal Court may be justified in the field of commercial arbitration**, where companies that are generally on an equal footing agree on a voluntary basis to settle their disputes in this way, **it may prove more problematic in the field of sports arbitration, where individuals find themselves up against often very powerful sports organizations** (para.177). Indeed, as recognized by the Swiss Federal Court itself, competitive sport is characterized by a highly hierarchical structure, at both international and national level. Established on a vertical axis, the relationships between athletes and the organizations that deal with the various sporting disciplines are distinguished in this respect from the horizontal relationships entered into by the parties to a contractual relationship (para. 177).

25. Accordingly, the ECtHR concluded that **judicial protection should not be lesser for professional sportsmen and women than for people in more conventional occupations** (para. 178).

26. It is important to note that the judgment remains subject to **potential referral to the Grand Chamber of the EctHR**, meaning that new developments are to be expected in the future.

B. Principle of Legality

27. In its criminal law meaning, the principle of legality – as developed in the eighteenth century by the Italian thinker Cesare Beccaria – translates into the Latin adage ***nullum crimen, nulla poena sine lege*** (no crime and no punishment without law), which basically means that no one can be convicted of a crime in the absence of a previously published legal text which clearly describes such crime. This principle, which is one of the most widely held values in criminal law, is accepted and codified in modern democratic states as a basic requirement of the rule of law (ex multis, see Article 15 of the International Covenant on Civil and Political Rights, Article 7§1 ECHR, Article 49 EU Charter on Fundamental Rights, Article 7§2 of the African Charter on Human Rights and Peoples′ Rights, Article 1 of the Swiss Criminal Code, Article 9 of the Canadian Criminal Code, etc.)[17].

28. Thus, Article 2 must be **read in close connection to Chapter IV of the Convention, notably to Article 15**, which requires the Parties to ensure that its domestic laws enable to criminally sanction the manipulation of sports competitions (when it involves either coercive, corrupt or fraudulent practices, as defined by its domestic law). As such, Article 2 requires the Parties to **establish the legal basis (if not existent already) for the prosecution and sanctioning of competition manipulation in their domestic law**.

29. One remarkable example of the (correct) application of the principle of legality was provided in 2012 by the Swiss Federal Criminal Court, in a case concerning the manipulation of several football matches. In that case, after an investigation which had begun in 2009 in the context of the wider "**Bochum file**"[18] (where more than two hundred football

[17] For further readings, see Gallant K. (2008). *The Principle of Legality in International and Comparative Criminal Law* (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511551826

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

matches in nine European countries were suspected to be rigged, out of which twenty-two Swiss league matches and six friendly matches), the Federal Criminal Court's final verdict was to acquit the accused persons, although match-fixing had been largely proven (and even admitted by one of the players). In its decision of November 13th, 2012, the Court stated that the Swiss criminal laws, as in force at that time, were insufficient to allow for the accused persons' conviction[19]. Indeed, although the Swiss Criminal Code provides for crimes such as bribery (Art. 322ter to 322decies)[20] and fraud (Art. 146 and 147), it did **not contain any specific criminal provision capturing match-fixing,** and the general offences mentioned above were considered unsuitable by the court in that case. Recognizing both the threat that match-fixing poses on society as well as the insufficient coverage provided at that time by Swiss criminal provisions, and bearing in mind that Switzerland is home to the vast majority of international sport organizations, Swiss lawmakers adopted a **new criminal law provision** specifically tackling match-fixing, which was introduced in the Sport Promotion Act (SpoPA)[21], at its Article 25*a*, and entered into force on January 1st, 2019.

30. As previously mentioned, however, the application of cardinal principles of criminal law between private entities and individuals (so-called **horizontal effect**) is not self-evident in certain systems of law, such as – notably – in Swiss law, where the rather generous approach found in the case law of arbitral tribunals is not entirely confirmed by the stricter approach of the Swiss Federal Tribunal.

31. Indeed, in sports-related disputes, the **CAS jurisprudence offers numerous examples of the application of this principle, in diverse disciplinary matters**. For example, in a case involving the exclusion by the IOC of the former Russian Minister for Sport from participating in the Olympic Games, because of his involvement in a large doping affair, the CAS Panel decided that, "according to well-established CAS jurisprudence, 'the 'principle of legality' ("principe de légalité" in French) requir[es] that the offences and the sanctions be clearly and previously defined by the law and preclud[es] the 'adjustment' of existing rules to apply them to situations or behaviours that the legislator did not clearly

19 Swiss Federal Criminal Court, TPF 2013 46 (SK.2011.33), judgment of Nov 13th, 2012.
20 Swiss Criminal Code of 21 December 1937; CC 311.0.
21 Federal Act on the Promotion of Sport and Exercise of 17 June 2011; CC 415.0.

intend to penalize. […]. In light of the foregoing, the Panel must set aside the Appealed Decision for lack of a legal basis"[22].

32. In other cases, the CAS case law has consistently held that "for a sanction to be imposed, a sports regulation must prescribe the misconduct with which the subject is charged, i.e., *nulla poena sine lege* (principle of legality), and the rule must be clear and precise, i.e., *nulla poena sine lege clara* (principle of predictability)"[23].

33. In the context of competition manipulation, the principle of legality and predictability of sanctions was also affirmed in a CAS case concerning skiing[24].

34. However, despite this rather undisputed application of the principle of legality by the CAS, the Swiss Federal Tribunal has repeatedly held (for ex., in case 4A_462/2019, judgment of July 29, 2020, recital 7 and the precedents cited) that "on a more general level, [...], in the case of **disciplinary sanctions imposed by private law associations, such as sports federations, the automatic application of criminal law concepts such as the presumption of innocence and the principle *in dubio pro reo* is not self-evident**". In other words, in front of the Swiss Federal Tribunal, the appellant(s) must prove that such disciplinary sanctions (for example, those taken against them by a sports federation, according to its regulations, in a case of proven competition manipulation) are so akin to criminal sanctions that they trigger the applicability of the generally recognized principles of criminal law, such as the principle of legality, the presumption of innocence, etc.

C. Principle of Proportionality

35. The principle of proportionality is one of the cardinal principles in all the repressive fields of the law, such as criminal law, but also administrative law, disciplinary law, and even civil law.

36. Like the principle of legality, the principle of proportionality is widely recognized in national and international law (see, *ex multis*, the sentence is unfinished and brackets need to be closed).

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22 CAS 2017/A/5498, *Vitaly Mutko v. International Olympic Committee (IOC),* award of July 3, 2019, no. 50 et seq.

23 *Ex multis*, see CAS 2019/A/6226, par. 143; CAS 2017/A/5086 at para. 149, CAS 2014/A/3832 & 3833 at paras. 84-86, CAS 2008/A/1545 at paras. 93-97.

24 CAS 2014/A/3832 & 3833 *Vanessa Vanakorn v. FIS*, award of 19 June 2015, para. 86.

37. In **Switzerland**, it is the third principle in the list of Art. 5 and Art. 36 of the Swiss Constitution, being both a general requirement for state action (Art. 5) and a prerequisite for the restriction of fundamental rights (Art. 36). Under the Swiss law doctrine, this principle encompasses a threefold test, based on a comparison of the end pursued (in the public interest) and the means employed. The means must be (1) **suitable** to the end pursued, (2) **necessary** in the sense that milder means would prove inefficient; and (3) **bearable**, i.e., the end must outweigh the private interest. All three prerequisites must be satisfied otherwise the authority's action will fail the test of proportionality.

38. From a practical perspective, perhaps the main application of this principle concerns the **proportionality of sanctions,** notably those applied by sports bodies (disciplinary sanctions) and by state authorities (civil, administrative, or criminal sanctions).

39. Insofar as the sporting **disciplinary sanctions** are concerned, the CAS Panels have repeatedly recognized that the severity of a sanction must be proportionate to the offence committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search for the justifiable aim. Elaborating on this topic, CAS Panels have held – including in cases involving competition manipulation – that the fight against match-fixing is considered to be extremely important for the purpose of preserving confidence in and the integrity of sport. Against the background of these circumstances, a possibility must exist "for **imposing appropriate sanctions, sufficient to serve as an effective deterrent** to those who might otherwise be tempted to consider involvement in such activity". However, a sanction must comply with the principle of proportionality in the sense that "there must be a **reasonable balance between the kind of misconduct and the sanction**"[25].

40. In this respect, special attention should be given to **long suspensions or life bans**[26], which are sometimes pronounced by sports bodies (and upheld by the CAS). For example, in the *Savic* case involving competition manipulation in tennis (CAS 2011/A/2621), the player was sanctioned with permanent ineligibility and fined USD 100,000 for

[25] CAS 2013/A/3297 Public Joint-Stock Company "Football Club Metalist" v. Union des Associations Européennes de Football (UEFA) & PAOK FC, award of 29 November 2013, paras. 8.25 – 8.26.

[26] For a discussion and analysis of CAS jurisprudence on competition manipulation, see DIACONU M., KUWELKAR S., KUHN A., The Court of Arbitration for Sport Jurisprudence on Match-fixing: A Legal Update, ISLJ, 2021, 27-46.

offering a fellow competitor USD 30,000 to lose the first set against himself, after which he could win the remaining two. The life ban was upheld as justified by the federation's objectives to protect integrity; yet, given the player's affected livelihood, additional financial penalties were considered disproportionate. Likewise, in the *Köllerer* case (CAS 2011/A/2490), the Panel upheld the life ban citing tennis' susceptibility to fixing (because a limited number of athletes need to be corrupted for a fix) and the deterrent effect of exemplary punishment, but considered any additional financial penalties disproportionate, because of the player's difficult financial situation. Turning to football, in the *Lamptey* case (CAS 2017/A/5173), a Ghanaian referee was sanctioned for match-fixing in connection with the 2018 FIFA World Cup Russia and handed a lifetime ban at all levels, confirmed by FIFA's Appeals Committee. The lifetime ban was upheld by the CAS Panel, citing seriousness, referee responsibility for match/sports credibility, the need for unpredictability and fairness, and no scope for mitigation based on a high degree of the Panel's satisfaction. In another football-related case (*Keramuddin*, CAS 2019/A/6388), the CAS Panel used prior lifetime bans on FIFA officials in match-fixing awards and bans of two to 10 years for bribery, as benchmarks for the proportionality of sanctions.

41. Finally, in certain (rather rare) cases, the CAS Panels **mitigated** the main sanction and **replaced life bans with shorter periods of suspension** or ineligibility. For example, in the *Sammut* case (CAS 2013/A/3062), the life ban initially applied by the UEFA disciplinary bodies against a football player was reduced to 10 years ineligibility, as the Panel was not convinced that one particular on-field error committed by the player was intentional to allow a goal for the opposite team.

42. Insofar as state-applied sanctions are concerned (mainly **criminal sanctions**) – and as discussed in length in the commentary on **Articles 22, 23, and 24 of the Convention** – such sanctions are provided in domestic regulations and are **extremely disparate**. To give just a few examples, fixing the result of a match may be sanctioned, in Australia, Greece, or Poland, by imprisonment of up to 10 years, whereas in Denmark the maximum sanction is of one year. In this context, the application of the principle of proportionality to criminal sanctions must be **understood and observed in the context of the applicable domestic law**, as the Convention does not provide any tool or means to harmonize such sanctions at an international level.

D. Protection of Private Life and Personal Data

43. The last guiding principle inventoried in Article 2 concerns the protection of private life and personal data, which must be read together with **Article 14** of the Convention (protection of personal data).

44. The term "personal data", as used in the **Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981, CETS No. 108)**, means "any information relating to an identified or identifiable individual (data subject)". The protection of private life and personal data is part of human rights; however, it was decided to mention it separately to stress its importance and the relevant standards[27].

45. The term "protection of private life" refers back to **Article 8 ECHR**, which aims to safeguard private and family life. As previously mentioned, the applicability of this principle is not contested when it concerns actions by public authorities (in civil, administrative or criminal proceedings); however, when it comes to private disciplinary sanctions, we note that **certain CAS panels are reluctant to directly apply international human rights treaties, in particular Article 8 ECHR**, **to sports-related disputes between private entities** (such as federations, clubs, etc.) and individuals (see, for ex., TAS 2011/A/2433 *Amadou Diakite c. FIFA*, para. 57; TAS 2012/A/2862 *FC Girondins de Bordeaux c. FIFA*, para. 105)[28].

46. The **European Court on Human Rights** did not hesitate to apply this principle, as enshrined in Article 8 ECHR, to situations concerning sportspeople. While the ECtHR has yet to rule on the application of Article 8 ECHR in the context of competition manipulation, some guidance may be sought from doping cases. In a case from 2018[29], concerning the requirement for a targeted group of sports professionals to notify their whereabouts for the purposes of unannounced anti-doping tests, the applicants alleged in particular that the mechanism requiring them to file complete quarterly information on their whereabouts (and, for each day, to indicate a sixty-minute time-slot during which they would be available for

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27 Explanatory Report, at 41.

28 TAS 2012/A/2862 *FC Girondins de Bordeaux c. FIFA*, para. 105: "Par principe, les droits fondamentaux et les garanties de procédure accordées par les traités internationaux de protection des droits de l'homme ne sont pas censés s'appliquer directement dans les rapports privés entre particuliers".

29 EctHR, *Fédération Nationale des Syndicats Sportifs (FNASS) et al. c. France*, n° 481581/11 et 77769/13, decision of January 18, 2018.

testing) amounted to unjustified interference in their right to respect for their private and family life and their home. The ECtHR held that there had been no violation of Article 8 ECHR (right to respect for private and family life and home), finding that the French State had struck a fair balance between the various interests at stake. In particular, taking account of the impact of the whereabouts requirement on the applicants' private life, the ECtHR nevertheless took the view that the public interest grounds, which made it necessary, were of particular importance and justified the restrictions imposed on their rights under Article 8. The Court also found that the reduction or removal of the relevant obligations would lead to an increase in the dangers of doping for the health of sports professionals and of all those who practise sports and would be at odds with the European and international consensus on the need for unannounced testing as part of doping control.

Article 3

by

Madalina DIACONU

Article 3 – Definitions

For the purposes of this Convention:

1 "Sports competition" means any sport event organised in accordance with the rules set by a sports organisation listed by the Convention Follow-up Committee in accordance with Article 31.2, and recognised by an international sports organisation, or, where appropriate, another competent sports organisation.

2 "Sports organisation" means any organisation which governs sport or one particular sport, and which appears on the list adopted by the Convention Follow-up Committee in accordance with Article 31.2, as well as its continental and national affiliated organisations, if necessary.

3 "Competitions organiser" means any sports organisation or any other person, irrespective of their legal form, which organises sports competitions.

4 "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 "Sports betting" means any wagering of a stake of monetary value in the expectation of a prize of monetary value, subject to a future and uncertain occurrence related to a sports competition. In particular:

a "illegal sports betting" means any sports betting activity whose type or operator is not allowed under the applicable law of the jurisdiction where the consumer is located;

b "irregular sports betting" shall mean any sports betting activity inconsistent with usual or anticipated patterns of the market in question or related to betting on a sports competition whose course has unusual characteristics;

c "suspicious sports betting" shall mean any sports betting activity which, according to reliable and consistent evidence, appears to be linked to a manipulation of the sports competition on which it is offered.

6 "Competition stakeholder" means any natural or legal person belonging to one of the following categories:

a "athlete" means any person or group of persons, participating in sports competitions;

b "athlete support personnel" means any coach, trainer, manager, agent, team staff, team official, medical or paramedical personnel working with or treating athletes participating in or preparing for sports competitions, and all other persons working with the athletes;

c "official" means any person who is the owner of, a shareholder in, an executive or a staff member of the entities which organise and promote sports competitions, as well as referees, jury members and any other accredited persons. The term also covers the executives and staff of the international sports organisation, or where appropriate, other competent sports organisation which recognises the competition.

7 "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.

I. Purpose of Article 3

1. The purpose of Article 3 is to define and clarify the key concepts used in the Convention, including the leading notion of "competition manipulation", which is still subject to certain controversies[1].

2. The authors of the Convention followed the typical legislative drafting techniques, which usually recommend inserting an article for the purpose of defining the terms of the act, at the very beginning of the act, immediately after stating its object and scope[2].

1 See analysis in Section A hereunder.

2 See, for example, Directives de la Confédération suisse sur la technique législative (DTL), 2013, at 31.

3. The terms are customarily defined in their logical order[3], never in alphabetical order (because such order would be affected by translations into other languages).

II. The Contents of Article 3

4. Article 3 defines seven key concepts of the Convention, the most prominent being that of competition manipulation itself, but also the notions of: sports competition; sports organization; competitions organizer; sports betting; competition stakeholder; and inside information.

A. Definition of "sports competition"

5. Sports competitions are defined using three criteria: 1) a **real sports event**; 2) **organized in accordance with the rules of an organization**, listed by the Convention Follow-up Committee in accordance with Article 31.2, as well as its continental and national affiliated organizations, if necessary; and 3) **recognised** by a competent sports organization[4].

6. The term "*competition*" is **multipurpose** and covers each event, i.e., each race and match, but should not necessarily be interpreted as covering either the whole tournament (for example a championship where the winner is determined following a series of competitions) or all of the competitions taking place within the framework of an event involving several competitions or tournaments (for example the Olympic Games)[5].

7. Interestingly, this definition **also covers ancillary processes**, such as the draw of the opponents or the designation of the referee to the competition[6]. According to the Convention's drafters, this is justified by the fact that such auxiliary events may influence the competition itself. However, this stance is, in our opinion, debatable: for example, if it's undoubtably wrong to unduly influence the choice of a referee (an act which might be captured, in itself, by disciplinary or criminal law offences, such as bribery and corruption), it is hardly possible to demonstrate, in the

3 Idem, at 32.
4 Explanatory Report, at 43.
5 Explanatory Report, at 44.
6 Idem.

absence of an actual unethical or illegal conduct by such referee, that the course of action or result of the actual sports event was manipulated.

8. The term "competition" is further clarified by the fact that it is circumscribed to a "*real sports event*", which **excludes virtual sports events**, such as e-sports and those simulated by certain fixed-odds betting terminals[7].

9. The term "competition" excludes other events organized by sports organizations, such as **assemblies, conferences, seminars**, etc. In our opinion, this should also exclude **exhibition or demonstrative tournaments**, whose objectives are solely to present a sport discipline to the public, but not to face opponents in order to win a competition.

10. **Elections***,* including host elections*,* also constitute a separate event (*not* a sports competition), where potentially corrupt conduct may be captured by different disciplinary and/or criminal law provisions.

11. Finally, the term "*competent sports organization*" refers to a sport organization, as defined in Article 3, paragraph 2, which has the right to include in its fixture list a competition involving competitors from a given geographical area[8].

B. Definition of "sports organizations"

12. There is little debate about what constitutes a "sports organization". Indeed, this term refers **to any organization which governs sport**, namely those mentioned in the list drawn up by the Convention Follow-up Committee in accordance with Article 31.2, **as well as any continental or national organizations affiliated thereto**[9]. In the light of this definition, continental organizations are deemed to be "international", while local organizations are deemed to be "national". National organizations also include national umbrella organizations (for example, national Olympic committees, or national confederations of sport) which bring together the national sport federations[10].

7 Explanatory Report, at 45.
8 Explanatory Report, at 46.
9 Explanatory Report, at 47.
10 Explanatory Report, at 48.

C. Definition of "competition organizers"

13. The concept of "competition organizer" is also fairly straightforward. Under the Convention, it means any sports organization or any other person, irrespective of their legal form, which organizes sports competitions[11]. This definition therefore covers **both natural persons and legal persons**.

14. In most cases, there is an overlap with the previous definition because competitions are mostly organized by sports organizations, but sometimes sports organizations recognize competitions organized by other entities (e.g., an organization in charge of a multi-sport event or a private company)[12]. For example, the Jeux de la Francophonie, created in 1987, are organized by a committee named Comité international des Jeux de la Francophonie, which is a body of the Organisation internationale de la Francophonie (an international organization regrouping 54 French-speaking States). Its competitions are recognized by the respective international sports federations, such as FIFA, UCI, World Athletics, etc.

D. Definition of "manipulation of sports competitions"

15. This is arguably the most important definition in Article 3 of the Convention. It has evolved from its original meaning as it was revisited, or even revolutionized, by an Updated Concept[13], in 2018. However, whatever the definition given to it, it is clear that competition manipulation kills the very spirit of sport, as it in involves cheating to remove the unpredictability of a competition.

16. The main elements of this definition may be summarized as follows:

1. "Manipulation" and "arrangement"

17. In the Convention, the term "manipulation" originally referred to the improper *arrangement* (fixing) of the course or result of a sports competition. This definition is an integral part of "criminal offences relating to the manipulation of sports competitions", defined in

11 Explanatory Report, at 49.
12 Explanatory Report, at 49.
13 Council of Europe, Updated Concept of Manipulations of the Sports Competitions, T-MC(2018)87rev, September 8, 2018 ("Updated Concept"), p. 1.

Article 15[14]. In layman's terms, **an 'arrangement' is an agreement between several parties (at least two) who agree on certain elements**[15]. In sports, a multitude of arrangements are conceivable, including the **result of a match, the total number of goals or points, the number of red or yellow cards, etc.**

18. However, this concept was **tremendously enlarged in the Updated Concept (2018)**. Indeed, 'manipulation' as an umbrella term under the Updated Concept is currently envisioned to include not just fixing[16] of any kind, but all possible means of what may colloquially be referred to as '*cheating'* in sport, including *doping, insider information trade, conflicts of interest and poor governance* among other acts[17]. According to the Updated Concept, these acts are "attempted, successfully or unsuccessfully, to change the way a competition is played and/or its result. Rendering competitions predictable (in part or entirely) ruins the basic values of sport and the interest of fair and ethical competition"[18].

19. Also, **the Typology Framework**[19], developed in 2020 as a tool to aid state parties and national platforms created pursuant to the Convention, suggests "three types of sports competition manipulation:

- Direct interference in the natural course of a sporting event or competition i.e., deliberate manipulation by individual(s) involved in the event;
- Modification of an athlete's identity or personal information in order to influence the natural course or outcome of a sports competition;

14 Explanatory Report, at 50.

15 See, for example, 'Arrangement' in the Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/arrangement (January 5, 2022).

16 Limited to on-venue manipulation of an event, tournament or a part of it – Updated Concept, p. 2. The Council of Europe makes a distinction between fixing on the venue and off it, though both are regarded as important for the purpose of tackling 'manipulation' under the Macolin Convention – Updated Concept, p. 2 though it is observed that there is no specific reference present in the Updated Concept for where the Council of Europe says this.

17 Updated Concept, p. 2.

18 Updated Concept, p. 2.

19 Issued by the Council of Europe in June 2020 (T-MC(2020)17) through their Working Group for Typology ("Typology Framework"), p. iv.

- Modification that is non-compliant with criminal laws or sport rules relating to: playing surfaces, equipment, athlete physiology, or a sporting venue[20].

20. The Typology Framework then envisages that these three categories be further divided, based on criteria related to who instigated the manipulation, i.e. whether it was: exploitation of governance; exploitation of power or influence; external influences; or opportunistic"[21].

21. It is to be noted that the Typology Framework, unlike the Explanatory Report, considers the distinction between "betting" and "non-betting manipulation" to be "no longer relevant", the stated reason behind this being that betting was not the purpose of manipulation but a means to gain an undue advantage, with betting potentially being an added layer of improper conduct over and above all kinds of manipulation. As such, the independent definition of betting related offences, as described above, under the Convention[22] supports this distinction.

22. In our view, the above-mentioned changes, contained in the Updated Concept and Typology Framework, are questionable. While the temptation to unify, under one single concept, all possible offences which result in "cheating" in sports is understandable, **maintaining *separate violations* is much more realistic for several reasons**:

- *Firstly*, the perpetrators' motives, capacity, modus operandi, and so forth, are extremely varied and require tailor-made responses instead of a global unspecified fighting strategy. There is a vast difference, for example, between a sportsperson who uses a doping substance in order to enhance his/her performances and win a competition, and another sportsperson who makes sure that his/her team gets two yellow cards in the first half of the game, for the purpose of winning a bet.
- *Secondly*, the response given to the threat of doping, for instance, has been perfected and nuanced to various circumstances over decades, resulting in the establishment of specific prevention and detection tools (such as blood and urine testing; the biological passport, etc.), the creation of specialized authorities, such as the WADA, ITA, NADAs, etc., and the

[20] Typology Framework, p. iv.

[21] Typology Framework, p. iv. A grid providing actor specific examples of what constitutes manipulation is available on p. v of the Typology Framework.

[22] Article 3.5, sub-article a-c; see *supra* note 70.

development of specific procedures and sanctions (see the World Antidoping Code).

- *Thirdly*, unlawful financial schemes, for instance using shell companies and bad financial governance, which can sometimes help to arrange match-fixing, can take the form of other criminal offences, such as embezzlement, misuse of funds, tax fraud, etc., and may be co-prosecuted and sanctioned, according to the rules of concurrent offences[23].
- *Lastly*, the authors of the Updated Concept seem to overlook that the Macolin Convention defines the manipulation of a sports competition as an *arrangement*[24]. Neither doping, nor using clubs as shell companies, influencing players' agents, conflict of interests or bad governance can therefore be a part of such a definition, which includes only 'the fix' as it is, arguably traditionally, understood[25].
- Insofar as the specific issue of *doping* is concerned, we believe that it should be excluded from the definition of "competition manipulation" for two supplementary reasons: *firstly*, the very notion of "arrangement" supposes the existence of at least two perpetrators (in contrast, one can commit a doping offence alone); and *secondly*, doping does not guarantee any result in a given competition and, thus, does not "remove the predictability" of a sports competition; for example, a doped runner can increase his/her chances to (unethically) achieve a better result in the race, but he/she may still lose the race or otherwise underperform. After all, as it was previously pointed out, *cheating to (try to) win* (doping) is fundamentally not the same as *cheating to lose* or to obtain a specific result (competition manipulation)[26].

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23 For an in-depth analysis, see DIACONU M., KUHN A., KUWELKER S., *The Concept of "Manipulation" under the Macolin Convention*, CausaSport, no. 2/22, September 2022.

24 See Article 3.4.

25 See KUWELKER S., DIACONU M., KUHN A., *Competition Manipulation in International Federation Regulations*, ISLJ, 26 Jan 2022, available here: https://link.springer.com/article/10.1007/s40318-022-00210-9.

26 VILLENEUVE J.P., DIACONU M., CHAPPELET, J.L., *Cheating to win / Cheating to lose: Structural responses to match fixing. Lessons learned in the fight against doping*, presentation at the Sport&EU Conference, Nottingham, 30/06/2011.

23. Concretely, prior literature has listed various acts, across a number of sports, which constitute competition manipulation, based on past jurisprudence within the realm of sporting justice[27]. Referring to the instances that have been adjudicated by the CAS, for example, **acts which might be considered manipulation (ratione materiae) include**[28]:

- Spot fixing or fixing a part of the match or game, not only the end result;
- Bribing or attempting to bribe (or receiving bribes);
- Approaching and offering competitors sums to perform in a specific manner (lose matches, give up advantages);
- Actions connected to spot fixes being bet on (particularly deliberate underperformance); and
- Intentional losses of matches or making arrangements on results, in the context of certain detected betting patterns and proven responsibility for these results[29].

24. Finally, these concrete applications are also visible **at national level**. Across the states which are now signatories to the Convention[30],

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27 Referring to the litigation taking place within the realm of the sports world pursuant to the conception of 'autonomy' of sports bodies to govern their own affairs (a function of being structured as private bodies usually under Swiss law, including arbitration law for disputes, and reluctance of Swiss courts of law to intervene in 'internal' sport affairs); as opposed to deliver of justice, dispute resolution or investigation and prosecution by state bodies or justice systems – see, for example BADDELEY M, 'The Extraordinary Autonomy of Sports Bodies Under Swiss Law', The *International Sports Law Journal* 20 (2021), p. 3-6.

28 DIACONU M., KUWELKAR S., KUHN A., *The Court of Arbitration for Sport jurisprudence on matchfixing: a legal update*, ISLJ, 2021, available here: https://link.springer.com/article/10.1007/s40318-021-00181-3, section 6.1.

29 Idem.

30 Greece (Article 132 of the L.2725/99 was replaced by Article 13 of the Law 4049/2012 (Official Gazette 35A), Italy (Law401/1989, amended by Law-Decree No. 119 of 2014), Norway (Norwegian Penal Code Part II Chapter 30), Portugal (Article 1, 4, 8, 10, 11 and 12 of Law No. 50/2007 of 2007 revoking Law No. 390/91), the Republic of Moldova (Article 242 of Moldova Criminal Code, 'Manipulation' and 'Bet-fixing', as well as Article 333 on 'Taking Bribes' and Article 334 on 'Giving Bribes'), Switzerland (Section 3.3, Article 25a, 25b and 25c, Sport Promotion Act, 2019 and Article 64,the Federal Act on Money Games, 2019) and Ukraine (Law No. 2243a of 2015, complementing Article 369.3 of the Criminal Code, 1986); it has also been signed by thirty other European states, as well as Australia and Morocco – https://www.coe.int/en/web/sport/t-mc. Malta, having elaborate provisions in its own laws on manipulation (Chapter 263, Art. 3 of the Prevention of Corruption (players) Act XIX/1976, amended by Acts XIII of 1983, XXIV of 2001, and Legal Notice 423

various applications of the concept of "competition manipulation" have also been observed. For example, the "Calciopoli" scandal, involving clubs including Juventus, Milan, Fiorentina, Lazio and Regina in Italy, saw the conviction of persons involved in fixing football matches under provisions for criminal association and sporting fraud in the Italian Criminal Code, including prison sentences[31]. In Spain, six tennis players were convicted in 2022 for different frauds, including corruption in business (match-fixing), under Article 286 bis of the Spanish Criminal Code, as well as organized crime[32]. Interestingly, in Norway, provisions on fraud and corruption[33] are used, despite this nation being the first country to ratify the Convention, with no specific criminalizing legislation[34].

2. Commission and/or omission

25. A question that arises here is whether Article 3 of the Convention envisages **commission offences, omission offences, and/or commission by omission offences**. The very wording of Article 3.4 mentions both an action (i.e., the commission) and an omission. However, there is no reason to believe that an omission as such (i.e., in the strict sense of the term) is envisaged here, since no offence of omission (failure to referee, failure to play, etc.) is directly addressed by the Convention. Some may consider that the failure to fight by remaining too passive, which is sanctioned by certain federations, mainly in combat sports, is a proper omission offence. But such a violation of the rules of the game should, in our view, be considered as the commission of an act [lacking sportsmanship] and not the omission of an obligation to fight. It is thus more a matter of commission by

2007) notably, has raised issued with the definition of illegal betting in the Convention, which has been associated with the less-than-expected number of ratifications to the convention.

31 Decision No. N 14692/11 by the Court of Naples. The Italian Supreme Court reversed certain sentences on grounds of limitation in 2016 – see BOZKURT E, '*Match-fixing and fraud in sport: Putting the pieces together'* (September 17, 2012), available at https://www.europarl.europa.eu/document/activities/cont/201209/20120925ATT52303/20120925ATT52303EN.pdf (January 17, 2022), pp. 11 and 12.

32 https://www.itia.tennis/news/sanctions/six-spanish-players-banned/.

33 Norwegian Penal Code, Part II, Chapter 30. Norway has national platforms and National Action Plan against Match-Fixing in Sport 2013-2015 as well.

34 Prison sentences were awarded for aggravated corruption and fraud for fixing offences in football by an Oslo Appeals Court in 2017 – see UNODC, *Legal Approaches to Tackling the Manipulation of Sporting Competitions* (2021), p. 61.

omission (committing an unsportsmanlike act by failing to apply the rules of the game) than a proper omission offence[35].

3. "Intentional" arrangement

26. The Convention expressly provides that competition manipulation is an intentional arrangement. In the Explanatory Report, the term "intentional" means that **the arrangement, act or omission, is *deliberately* aimed at improperly influencing the natural and fair course** (notably through a foul, penalty or action on the field altering the intermediate result or phase of the game) **or the result of a sports competition** (through the score, marks, time or ranking, for example)[36].

27. An intentional act is behavior committed **with conscience and will**; in opposition, negligent behavior is committed without conscience and/or without will, while the perpetrator nevertheless remains at fault through culpable improvidence[37].

28. Interestingly, a study of the regulations adopted by 43 international federations shows that the approach is nuanced on the topic of *mens rea*. If intention is provided for by all the international sporting federations that have regulated the fight against manipulation of competitions, some of them also incriminate *negligent* behaviors, either explicitly or through other texts (such as a code of ethics, for example), thus extending the scope of application of competition manipulation to negligence[38].

29. The situation is also nuanced in national legislations, for example in Australia, the law specifically covers both intentional and reckless behavior, while other states, such as Spain, specifically require "deliberate" behavior[39].

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35 See DIACONU M., KUHN A., KUWELKER S., *The Concept of* "*Manipulation*" *under the Macolin Convention*, CausaSport, no. 2/22, September 2022.

36 Explanatory Report, at 54.

37 For a discussion on intention, negligence and strict liability within match-fixing, see DIACONU M., KUHN A, '*Match-fixing, the Macolin Convenion and Swiss Law: An Overview'*, *Jusletter* 16 (September 16, 2019), p. 9.

38 KUWELKER S., DIACONU M., KUHN A., *Competition Manipulation in International Federation Regulations*, ISLJ, 2022, para 2.2.2.

39 DIACONU M., KUHN A., KUWELKER S., *The Concept of* "*Manipulation*" *under the Macolin Convention*, CausaSport, no. 2/22, September 2022. See UNODC *Legal Approaches to Tackling the Manipulation of Sports Competitions: a Resource Guide* (2021), p. 24 – the UNODC recommends the inclusion of unintended (reckless) acts, as

4. "Aimed at" (Attempt)

30. As clarified in the Explanatory Report, the term "aimed at" indicates that the definition includes not only arrangements, acts or omissions which improperly alter the result or course of a competition, but **also the acts committed with the *intention* of improperly altering the result or course of a competition, even if the arrangement, act or omission is unsuccessful** (e.g. if a player on whom pressure has been brought to bear is not actually selected for the competition)[40].

31. Thus, an unsuccessful attempt to improperly alter a sports competition also qualifies as manipulation under the Convention. The Updated Concept (2018) states that acts of manipulation are attempted, *successfully or unsuccessfully*, to change the way a competition is played and / or its result.

32. Sports federations' regulations, in large majority, include attempt within the definition of manipulation[41].

33. Finally, jurisprudence has highlighted cases of such attempts, for example, at bribing referees[42], or fixing tennis matches[43], which have been successfully sanctioned by the respective sports federations and ultimately by Court of Arbitration for Sport[44].

5. "Improper" Alteration and/or Agreement

34. In the Convention, the term "improper" alteration refers to an arrangement, act or omission which infringes the existing legislation, or

well as inchoate and incomplete offences (such as attempts, encouraging, assisting and conspiracies).

40 Explanatory Report, at 51.

41 KUWELKER S., DIACONU M., KUHN A, *Competition Manipulation in International Federation Regulations*, section 3.3, including as part of aggravating or mitigating factors.

42 *Royal Sporting Club Anderlecht/Union des Europeen Football* Associations ("UEFA"), TAS 98/185 sentence du juillet 22, 1998; *Sport Lisboa e Benfica Futebol SAD v. UEFA*, CAS 2008/a/1583 and *FC Porto Futebol SAD*, CAS 2008/A/1584, *Vitória Sport Clube de* Guimarães v. *UEFA* and *FC Porto Futebol SAD*, award of July 15, 2008.

43 *Daniel Kollerer* v. *Association of Tennis Professionals, Women's Tennis Association, International Tennis Federation and Grand Slam Committee*, CAS 2011/A/2490 award of March 23, 2012.

44 See DIACONU M., KUWELKAR S., KUHN A., *The Court of Arbitration for Sport jurisprudence on matchfixing: a legal update*, ISLJ, 2021, note 11.

the regulations of the sports competition or organization concerned, which may be aimed at alterations of the course or result of a competition that would be sanctioned by sports regulations only[45]. Thus, while most arrangements are totally acceptable, some are defined as "improper" in Article 3.4 because they are likely to alter the result or the course of a sports competition and to "remove all or part of the unpredictable nature of the aforementioned sports competition".

35. An improper alteration consists therefore in **the (c)ommission of an act contrary to the rules (notably, the rules of the game) and aimed at alterations of the course or result of a competition**.

36. Concerning the issue of the *contrariety to the rules of the game*, an incident involving the high jump final at the Tokyo 2020(1) Olympic Games gave rise to some interesting discussions as to the notion of "improper" alteration[46], namely whether it is necessary that the arrangement be contrary to the *letter* or to the *spirit* of the applicable sports regulations.

37. In that Olympic final, Mutaz Essa Barshim of Qatar tied with Italy's Gianmarco Tamberi before agreeing, on the spot, to share the first place on the Olympic podium rather than risking a jump-off. The emotion and genuine display of solidarity between the two high jumpers were praised by (almost[47]) the entire world and their shared podium looked like a cinematographic "happy ending"[48]. Interestingly for our discussion, the possibility for such an agreement between athletes was *allowed* by the relevant rules of World Athletics[49] (and has been endorsed by this international federation), meaning that this arrangement could seemingly

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45 Explanatory Report, at 53.

46 Conference and podcast "Petits arrangements entre athlètes", Café scientifique de l'Université de Neuchâtel, 23/03/2022, available on https://soundcloud.com/user-219788198/petits-arrangements-entre-athletes.

47 A few opinions have been expressed to the contrary including, for example, in NIALL J., The absurdity of athletes choosing gold medals, *The Sydney Morning Herald*, August 2, 2021 available at https://www.smh.com.au/sport/athletics/the-absurdity-of-athletes-choosing-gold-medals-20210802-p58f6t.html (January 1, 2022).

48 For a legal analysis, see DIACONU M., KUHN A., KUWELKER S., *The Concept of* "*Manipulation*" *under the Macolin Convention*, CausaSport, no. 2/22, September 2022.

49 Technical Rules 26 and 27, changed in 2009 to allow for a new situation where a choice could be made as to how the event ends (instead of a jump-off). In the new rules, there is a possibility to raise the bar by less than the ordinary 2 cm (Technical Rules 26.4.1), but the rule also provides that the Technical Delegate or Referee may terminate a jump-off subjectively or *if athletes so decide*.

not qualify as "improper". However – and although we believe the jumpers' intentions were not corrupt – their conduct qualifies, in our view, as an *abuse of rights*[50], as developed mainly in civil law jurisdictions. Indeed, theorized in 1905 by the eminent Louis Josserand[51], the principle of prohibition of abuse of rights aims to correct the application of a rule of law on the basis of standards such as good faith, fairness, and justice if, despite formal observance of the conditions of the rule, the objective of that rule has not been achieved[52]. In other words, this concept sanctions the unfair or unjust result of a rule which was formally correctly applied: the rule may be lawfully applied *prima facie*, but in a manner or with a result that is actually contrary to its ultimate purpose[53]. While the reasons behind the adoption of the relevant rule by World Athletics are not easily apparent, we may safely infer that their original purpose was *not* to allow finalists to choose between competing or instead sharing their medals. If this was the case, then all the finalists could simply decide, at any moment, not to continue the competition, sharing victory instead – which is absurd. A valid reason for this rule might have been that athletes jointly decide to stop competing if they feel there are risks for their *health or safety* (which was not the case at the Olympic Games in Tokyo 2020).

38. Thus, in our view, an "improper" alteration occurs not only when the suspected behavior is contrary to the letter, but **also to the spirit of the applicable rules** (which is unquestionably more difficult to prove).

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50 For an overview of national legislations enshrining this principle, see BYERS M., 'Abuse of Rights: An Old Principle, A New Age', *McGill Law Journal* 47 (2002), p. 389 et seq.

51 JOSSERAND L., *De l'abus des droits* (1st edn. 1905); JOSSERAND L, *De l'esprit des droits et de leur relativité: théorie dite de l'abus des droits* (1st edn. 1927). The origins of the principle would, however, seem to lie in Roman law. See KISS A., 'Abuse of Rights' in *Encyclopedia of Public International Law, vol 1* (Bernhardt R., ed, Amsterdam: 1992), p. 5.

52 LENAERTS A., 'The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law', *European Review of Private Law* 18:6 (2010), pp. 1121–1154.

53 For the entire paragraph, see DIACONU M., KUHN A., KUWELKER S., *The Concept of* "*Manipulation*" *under the Macolin Convention*, CausaSport, no. 2/22, September 2022.

6. Alteration of the "Result or Course"

39. As has been noted in prior literature[54], the definition of competition manipulation under the Convention covers not only those acts which alter the end result of any match or competition, but also any "on venue" acts which influence "the natural and fair course" thereof, ostensibly envisioning encapsulating elements of a match, game or event which are not the result but can fall foul to such acts to obtain a benefit or be bet on[55].

40. **Spot fixing and fixing of smaller elements** unrelated to the final result are oftentimes logistically easier to execute and involve fewer actors with a less noticeable consequence, providing a higher likelihood of occurrence[56]. These acts could include elements such as fixing the half-time result of a match, number of yellow or red cards, number of corners, team to kick-off the match, who will score the next goal, number of free kicks in football matches, dropping a set, or certain points in tennis, winning certain hands in sports like bridge, no balls in cricket, micro bets and side bets, and so forth. The nature of such acts makes this additionally a very attractive prospect for being bet upon[57].

41. It is worth noting that the regulations of the vast majority of international federations include not just the alteration of the result of a competition **but also the alteration of the [natural] course of the event/competition within** the definition of manipulation[58]. This is pursuant to the definition originally in the IOC Olympic Movement Code on Prevention of the Manipulation of Competitions[59] and thereby akin to that in the Macolin Convention. Finally, there is jurisprudence from sports arbitration which has, in parallel to that in domestic criminal litigation,

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54 See generally, DIACONU M., KUWELKAR S., KUHN A., *The Court of Arbitration for Sport jurisprudence on matchfixing: a legal update*, ISLJ, 2021, in section 6.

55 DIACONU M., KUHN A., KUWELKER S., *The Concept of "Manipulation" under the Macolin Convention*, CausaSport, no. 2/22, September 2022.

56 DIACONU M., KUHN A., KUWELKER S., *The Concept of "Manipulation" under the Macolin Convention*, CausaSport, no. 2/22, September 2022.; see UNODC *Legal Approaches to Tackling the Manipulation of Sports Competitions: a Resource Guide* (2021), p. 16.

57 DIACONU M., KUHN A., KUWELKER S., *The Concept of "Manipulation" under the Macolin Convention*, CausaSport, no. 2/22, September 2022.

58 DIACONU D., KUWELKAR S., KUHN A., *The Court of Arbitration for Sport jurisprudence on matchfixing: a legal update*, ISLJ, 2021, section 2.2.3.

59 Issues by the IOC in 2016 based on which numerous federations drafted their regulations which contains a definition of manipulation similar to that of the Macolin Convention.

successfully sanctioned, mindful of the parallel proceedings for such action, spot fixing[60].

7. "In order to" obtain an advantage

42. The term "in order to" indicates an *intention* to obtain an *undue advantage* for oneself or others, even if this intentional arrangement, act or omission, aiming at improperly modifying the results or course of a sports competition, fails to obtain the advantage sought (e.g. if the competition in question is the subject of an alert issued by the regulator and the sports betting operators refuse to take bets on the competition, thereby preventing the undue advantage from being obtained)[61].

8. "Undue advantage"

43. According to the Explanatory Report, the *objective* of the arrangement, act or omission, is to obtain an undue advantage **for oneself or for another person**, which may take the form of **financial gain** (for example, a bonus paid to the winner by the competition organizer, a bonus paid to a competitor by their employer, a bribe accepted by a competition stakeholder, winnings from a sports bet placed on the relevant competition or a capital gain realized by the owner of a qualified club who sells their shares), **or some other tangible or intangible advantage**, such as advancing to a higher level in the competition, or simply the "*glory of winning*"[62]. The term "undue advantage" therefore does not imply that every manipulation is related to criminal offences such as fraud or corruption[63].

44. It is thus apparent that the scope of the "undue advantage" is quite wide, as it includes **both sporting and non-sporting related benefits**, and may be **independent of any criminal behavior**, such as bribery, fraud or corruption.

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60 See *Mohammed Asif* v. *International Cricket Council* ("ICC"), CAS 2011/A/2362 and *Salman Butt* v. *ICC*, CAS 2011/A/2364, both awards of April 17, 2013. For a detailed list of CAS cases, see DIACONU M., KUWELKAR S., KUHN A., *The Court of Arbitration for Sport jurisprudence on matchfixing: a legal update*, ISLJ, 2021.

61 Explanatory Report, at 52.

62 Explanatory Report, at 55.

63 Explanatory Report, at 55.

45. This original definition, contained in the Convention and clarified in the Explanatory Report, has been altered in the Updated Concept (2018), which provides that, in the spirit of the Macolin Convention, all types of manipulations are committed to acquire an "undue advantage", and always result in an eventual direct or indirect financial benefit, (intentionally or consequentially). This financial benefit could be attained directly (e.g., accepting bribes) or indirectly (e.g., personal favours)[64].

E. Definition of "sports betting"

46. Competition manipulation is often linked to sports betting[65], making it paramount to define the latter term in the Convention. Indeed, the role of (illegal) betting in sports, notably for money-laundering operations, has become a global issue, and the financial scale of the problem is such that **illegal betting is not only a major driver of corruption in sport, but also a major channel for money-laundering**[66].

47. In the Convention, "sports betting" refers to the predictions made by wagering a stake on an event occurring during a sports competition in order to obtain winnings. Some specific forms of betting are given as examples: fixed and running odds, spread betting, betting exchanges, pools/totalizers and live betting[67].

48. The notion of "sports betting operators" used in the Convention therefore widely covers ***all*** **kinds of operators providing sports betting services, land-based or remote, publicly or privately owned, specialized in sports betting or not** (bookmakers, specialized sports betting operators, gambling operators and lotteries offering sports betting services) and **regardless of the type of sports bet provided**[68].

49. The term "sports" used in this definition refers to sports competitions, as defined in the convention, on which bets are placed. The expression "stake of monetary value" means risking an economic loss[69].

50. The Convention defines three different types of betting activities: 1) *illegal* sports betting, 2) *irregular* sports betting, and 3) *suspicious* sports betting.

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64 Updated Concept, p. 2.
65 UNODC, *Global Report on Corruption in Sport*, 2021, p. 255 et seq.
66 Idem.
67 Explanatory Report, at 55.
68 Explanatory Report, at 56.
69 Explanatory Report, at 57.

1. Illegal Sports Betting

51. "Illegal sports betting" refers to any sports betting activity whose type or operator is not allowed (such as by exclusive rights, a license or automatic recognition of licenses granted by certain third countries) by virtue of applicable law *in the jurisdiction of the Party where the gambler/consumer is located*. While this corresponds to the vision of most sports organizations, notably of INTERPOL[70] and of state-owned providers of sports betting, such as the members of the European Lotteries[71], certain scholars have questioned its compatibility with EU regulations[72]. In any case, this definition was necessary, due to the transnational aspect of sports betting (especially online), in order to avoid a conflict as to the applicable laws which determine the legality or illegality of a sports bet.

52. To clarify that the principle of territoriality applies, the choice of using the term "jurisdiction where the consumer is located" rather than "jurisdiction of the consumer" refers to **the territory where the consumer is located *at the time of placing the bet***[73]. For example, if a bettor places his/her bet from Switzerland (where gambling and betting regulations are fairly strict) with a betting operator licensed in the UK (but not licensed in Switzerland), such a bet is deemed to be illegal in the light of the Convention.

2. Irregular Sports Betting

53. "Irregular sports betting" means **sports betting activity inconsistent with usual or anticipated patterns of the market in question or which concerns a sports competition whose course has unusual features**. Identifying irregular sports betting therefore depends not only on the betting market, but also on the sports competition in question[74]. Unusual features of a competition may be detected by

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70 INTERPOL, Good Practices in Addressing Illegal Betting. A Handbook For Horse Racing And Other Sports To Uphold Integrity, available at https://www.interpol.int/content/download/16262/file/Good-practices-in-addressing-illegal-betting_FINAL.pdf.

71 European Lotteries, *Code of Conduct on Sports Betting*, 2014, at 1.1, 2.1.2, 2.6, etc. Available at: https://www.european-lotteries.org/system/files/2021-02/Code%20of%20Coduct_2014_FINAL_EN_20.pdf.

72 See http://eulawanalysis.blogspot.com/2014/09/is-new-council-of-europe-treaty-on.html.

73 Explanatory Report, at 59.

74 Explanatory Report, at 61.

organisations or authorities involved in betting market surveillance, by sports betting operators who follow the competitions on which bets are placed, but also by the sports organisations. An irregular sports bet is liable to be the subject of exchanges of information or an alert issued by the betting monitoring systems, regulatory authorities, sports betting operators, sports organisations or by the national platform foreseen in Article 13. Such an alert may encourage other stakeholders to take precautionary measures and to examine the case in greater depth, if necessary. The criteria (indicators) used to identify irregular sports betting will be developed if necessary by the Convention Follow-up Committee, but the Convention does not intend to harmonise at international level the way these criteria are combined or the precise thresholds beyond which betting should be considered "*irregular*".

3. Suspicious Sports Betting

54. "Suspicious sports betting" means **any sports betting activity which, according to well-founded and consistent evidence, appears to be linked to a manipulation of the sports competition to which it relates**. Suspicious sports betting will form the subject of exchanges of information and measures on the part of national platforms, public authorities, and where appropriate, sport betting operators and sports organisations. The criteria for determining suspicious sports betting will, where necessary, be set by the Convention Follow-up Committee. However, the Convention does not intend to harmonise at international level the way these criteria are combined or the precise thresholds beyond which betting should be considered "*suspicious*" as such factors depend notably on the characteristics of every national betting market and the sports competition in question.

F. Definition of "competition stakeholders"

55. The scope of this definition is voluntarily wide and **aims to cover *all* those involved, directly or indirectly, in the organization and/or running of sports competitions**. In this, the Convention follows the approach taken by international sports organizations; for example, Art. 2.1 of the IOC Code of Ethics provides that "stakeholders […] encompass all

members who make up the organization as well as all external entities who are involved and have a link, relation with or interest in the organization"[75].

56. This definition lists, among others, three categories of persons[76]:

1) "athletes": active participants in sports events (sportsmen, sportswomen). "Group of persons" refers to teams in the case of team sports[77];

2) their "support personnel": trainers, medical personnel, agents, officials of clubs or other entities taking part in the competition, as well as persons acting in this capacity and any other persons working with the athletes, including players' unions[78], and

3) "officials", meaning the owners, executives and staff members of the entities which organize and promote sports competitions, as well as any other accredited persons, irrespective of their role, including sponsors or journalists, taking part in the activities of sports organizations. Referees, official judges and stewards are considered to be officials[79]. The term also refers to executives and staff members of sports organizations which recognize the competition[80].

57. The first two categories of persons ("athlete" and "support personnel") are derived from the **UNESCO International Convention against Doping in Sport** (2005)[81].

G. Definition of "inside information"

58. This concept is paramount, due to the inherently covert nature of competition manipulation. In the Convention, it refers to **information acquired or possessed by persons who were able to obtain it only because of their position vis-à-vis a particular athlete, sport or competition**, which **may be used especially for the purpose of manipulating a sports competition or to bet on the competition with an advantage**[82].

75 IOC Code of Ethics, 2022 ed., at Art. 2.1.
76 Explanatory Report, at 62.
77 Idem.
78 Idem.
79 Idem.
80 Idem.
81 Explanatory Report, at 63.
82 Explanatory Report, at 64.

59. Examples include information regarding competitors (such as their **health status, their particular training, and any other relevant information** about them which could influence their performance), conditions and tactical considerations, unless this information has already been made public in accordance with the law or according to the rules and regulations of the competition in question[83].

60. We note that this notion is also defined, in very similar terms, in Article 1.3 of the Olympic Movement Code on the Prevention of Competition Manipulation, according to which it covers "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"[84].

61. Finally, we note that this concept is important also from a practical perspective because **competition manipulation may be harder to prove than the supplying of inside information**. In itself, this is often viewed as an ancillary offence, which is connected to the "core" offence of competition manipulation and can be more easily proven (see, for example, Art. 2.4 in the IOC Code of Ethics, Art. 12 of the UEFA Disciplinary Regulations, Rule 6.9 of ITTF's Handbook, Code on the Prevention of Manipulation of Competitions in the Code of Ethics, etc.[85]).

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83 Idem.

84 Olympic Movement Code on the Prevention of Competition Manipulation (OM Code on PCM), Art. 1.3.

85 For a detailed analysis of the IFs regulations, see KUWELKER S., DIACONU M., KUHN A., *Competition Manipulation in International Sport Federations' Regulations: A Legal Synopsis*, ISLJ, 26 Jan 2022, available here: https://link.springer.com/article/10.1007/s40318-022-00210-9.

Articles 4 to 6 - Introduction

by

Surbhi KUWELKER

1. **This first part** of the commentary concerning Chapter II of the Macolin Convention discusses the first three articles in this chapter – Article 4, Article 5 and Article 6 – which largely **address domestic measures** that parties to the Macolin Convention are required **to implement more generally**.

2. The **latter two parts** of the commentary to this Chapter **address measures directed toward sports organizations,** as defined in the Macolin Convention[1] in Article 7, Article 8 and Article 9 and **then those specific to sports betting operators** and for addressing illegal sports betting, as also defined in the Macolin Convention[2], in Articles 9, 10 and 11, respectively.

3. The information contained throughout this chapter is a combination of research from **publicly available resources** as well as information gathered through a **survey circulated among sports federations** by the authors.

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1 Defined under Article 3.ii – see commentary to Article 3 of the Macolin Convention, above.

2 Defined under Article 3.v – see commentary to Article 3 of the Macolin Convention, above.

Article 4

by

Surbhi KUWELKER

Article 4 – Domestic co-ordination

[1] Each Party shall co-ordinate the policies and action of all the public authorities concerned with the fight against the manipulation of sports competitions.

[2] Each Party, within its jurisdiction, shall encourage sports organisations, competition organisers and sports betting operators to co-operate in the fight against the manipulation of sports competitions and, where appropriate, entrust them to implement the relevant provisions of this Convention.

I. Introduction and Purpose of Article 4

1. Article 4 of the Macolin Convention addresses **the need for parties to take certain measures internally**, outside of the legislative and other measures mentioned in the convention's previous provisions.

2. Here, it calls for internal coordination of the efforts, policies and actions of various national bodies engaged in combating manipulations within their jurisdiction.

II. Contents of Article 4

A. Coordinating Actions and Policies

3. Article 4.1 of the Macolin Convention encourages the parties **to coordinate, in a comprehensive manner, the policies and action undertaken by the public authorities** in the fight against the manipulation of sports competitions[1].

[1] Article 4.1, Macolin Convention and Explanatory Report, para 65.

4. The Explanatory Report elaborates that **this article is not concerned with specific co-operation activities with other stakeholders**, such as sports betting operators and sports organisations (referred to in later articles[2]), which include measures such as exchanges of information or issuing alerts, these being dealt with elsewhere in the Macolin Convention[3].

B. Encouragement to sports and betting entities

5. Article 4.2 of the Macolin Convention calls on the parties to the convention to **encourage sports organisations, competition organisers and sports betting operators to co-operate** in the fight against the manipulation of sports competitions and to implement the relevant provisions of the convention[4].

6. The Explanatory Report clarifies that the term "encourage" leaves each party to the Macolin Convention some **flexibility as to the means to be employed**, which may differ widely according to how the sports movement and betting market are organised at national level[5].

7. Finally, it is important to note that the last part of the second paragraph of Article 4 refers to the **delegation of responsibility from the state to sports bodies**, thus encouraging parties to 'entrust' other national bodies to implement the relevant provisions of the Macolin Convention where possible[6].

C. Coordination Activities across Organizations

8. There exists coordination between countries, but also within a country between sports organisations, competition organisers and sports betting operators **to enhance each of their, as well as their cumulative, fight against manipulation**. There are also coordination efforts with other organizations engaged in the field, including bodies such as INTERPOL[7].

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2 Discussed in latter parts of this Chapter II commentary below, being Articles 7 to 11.
3 Explanatory Report, para 65.
4 Article 4.2, Macolin Convention and Explanatory Report, para 66.
5 Explanatory Report, para 66.
6 Article 4.2, Macolin Convention.
7 Countries partake in efforts such as the INTERPOL's Match-fixing Task Force ("IMFTF"), and similar initiatives, which currently consists of 93 member units from jurisdictions in five continents, with more than 145 national points of contact worldwide

9. This cooperation is, at the international level, helmed by the International Olympic Committee ("IOC"), through its **Integrity Betting Intelligence System**[8] ("IBIS") for Olympic Games and for key international competitions that are identified on a yearly basis, such as World Championships and European Championships in the Olympic disciplines[9]. Similarly, there is also a reliance on services provided by non-sport private bodies such as on the betting related information provided by companies such as **SportRadar** which offer to monitor events for sports bodies[10] which they may not themselves have internal resources or expertise undertake themselves.

10. Finally, at the regional level, bodies like Union of European Football Associations ("UEFA") work with national level efforts to promote programs to aid capacity building and assist with investigations through **common resource allocation**[11]. They also undertake exercises with private sector players, like betting operators, as well as bodies such as the Council of Europe, Group of Copenhagen, FIFPRO, INTERPOL, IOC, UNODC and other sports bodies, to promote anti-manipulation efforts[12].

– available at https://www.interpol.int/en/Crimes/Corruption/Corruption-in-sport (March 12, 2023).

8 IBIS is the "intelligence sharing IT platform to collate alerts and information through its established links with Single Points of Contact from all 35 International Sports Federations on the Olympic Programme and major sports betting entities – private and public operators, operators associations and regulating bodies" – INTERPOL-IOC Handbook (2016) at pp. 41; further information available at https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Factsheets/Integrity-Betting-Intelligence-System.pdf (March 12, 2023).

9 This is the case for federations such as Federation Equestre Internationale ("FEI"), World Aquatics (formerly Federation Internationale de Natation Associations or "FINA"), Federation Internationale des Volleyball Association ("FIVB"), among others – based on information provided through survey circulated by authors.

10 World Aquatics (formerly FINA) also relies on SportRadar's services and data, through a deal brokered by the IOC Olympic Movement Unit on the Prevention of Manipulation of Competitions – based on information provided through survey circulated by authors.

11 For instance, through its network of 55 national association Integrity Officers (IO) – UEFA's HatTrick programme provides financial resources and strategic direction to the IOS responsible for national anti-match fixing efforts, and investigations.

12 Based on response received to author survey.

Article 5

by

Surbhi KUWELKER

> ***Article 5 – Risk assessment and management***
>
> *1 Each Party shall – where appropriate in co-operation with sports organisations, sports betting operators, competition organisers and other relevant organisations – identify, analyse and evaluate the risks associated with the manipulation of sports competitions.*
>
> *2 Each Party shall encourage sports organisations, sports betting operators, competition organisers and any other relevant organisation to establish procedures and rules in order to combat manipulation of sports competitions and shall adopt, where appropriate, legislative or other measures necessary for this purpose.*

I. Introduction and Purpose of Article 5

1. Article 5 of the Macolin Convention addresses **risk assessment and management policies** of sports bodies, betting entities and competition organizers, among others, within member states.

II. Content of Article 5

A. Analysis of Risk

2. Article 5.1 **invites the parties to put in place, if necessary, in co-operation with sports betting operators, sports organisations, competition organisers and other relevant organisations, the measures required to identify, analyse and evaluate the risks** associated with the manipulation of sports competitions[1]. The Explanatory Report elucidates

[1] Article 5.1, Macolin Convention and Explanatory Report, para 67.

that, in all circumstances, this risk assessment includes a long-term analysis and development of the capacity to respond to specific risks[2].

3. As such, it may be noted that certain sports are considered, statistically, more susceptible to manipulation than others[3]. In the same vein, the involvement of betting in certain sports, has been proven to increase the risk of manipulation in those sports and disciplines[4]. In fact, it may be concluded that an indication of susceptibility of a sport to potential manipulation is heightened betting activity, as seen in the various monitoring systems prevalent across sport[5].

B. Establishment of Internal Procedures

4. Under Article 5.2, each party is to **encourage sports organisations, sports betting operators, competition organisers and any other relevant organisation to establish procedures and rules in order to combat manipulation of sports competitions**[6]. Each party is therefore to adopt, where appropriate, legislative or other measures necessary for this purpose[7]. The reference to "any other relevant organisation" may cover other organisations related to sport (e.g. players' unions, supporters' or referees' organisations) as well as anti-corruption organisations[8].

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2 Explanatory Report, para 68.

3 See KUWELKER S., DIACONU M., KUHN A., "Competition manipulation in international sport federations' regulations: a legal synopsis", 22 *International Sports Law Journal 2022*, 288 where the sport of tennis has significant high number of instances of manipulation, for example.

4 See for example the emphasis of the International Olympic Committee on prevention of manipulation in sports which involve betting activity – see "Prevention of Manipulation", IOC available at https://olympics.com/ioc/integrity/prevention-competition-manipulation (March 25, 2023); the reasons for this include a conflict of interest in sports participated; for athletes, ability of their entourage members or sports officials to take advantage of their inside knowledge of the competition; temptation of athletes who have bet on their own sport to fully or partly manipulate their competition in order to achieve financial gain; pressurizing of athletes into not doing their best by entourage members, who might have directly or indirectly bet on the competition; athletes or their entourage could become targets for criminals looking for a way to launder money.

5 Betting is addressed in further detail in the commentary to the third part of Chapter II.

6 Article 5.2, Macolin Convention.

7 Explanatory Report, para 68.

8 Explanatory Report, para 69.

5. Details of the measures expected from sports organisations and operators are provided for in Article 7 and Article 10 of the Macolin Convention[9], and are discussed hereafter in the second part of this commentary on Chapter II. It may be noted that most national sports bodies follow in the footsteps of international sports federations in their respective sport, which in turn follow the best practices of bodies such as the IOC in the adoption of measures to combat manipulation, including monitoring of risk as well as investigating, prosecuting and sanctioning manipulation[10]; this shall be discussed in greater detail in the second part of this commentary to Chapter II.

C. Risk related Endeavours by Sports Bodies

6. **At the international level**, there exist a variety of measures that assist in generating and analysing data that aids in complementing efforts to curb manipulation. Different tools, such as ETICA and FINCAS, dedicated to data collection and financial crime analysis, respectively, as well as monitoring, and personnel training facilities are also made available in order to assist international federations[11]. EUROPOL has, for example, started an Analysis Project on Sports Corruption, with 14 European-Union countries, two non-European Union countries and INTERPOL for investigation, primarily into football matches. EUROPOL also actively support the KCOOS+, analyse intelligence, produce reports, deploy officers and experts in the field during law enforcement operations, among other tasks, notably having been involved in operation VETO[12].

7. Alerts are also provided by private companies such as **SportRadar** which operate in the intelligence space[13]. SportRadar has partnered with sport governing bodies[14], with regional bodies such as the Council of

9 Explanatory Report, para 70.

10 See generally KUWELKER S., DIACONU M., KUHN A. (2022), *supra* note 3.

11 See "Corruption in Sport", INTERPOL available at https://www.interpol.int/en/Crimes/Corruption/Corruption-in-sport (March 12, 2023) ("IOC-INTERPOL Handbook (2016)").

12 See "Teaming up for Transparency", EUROPOL available at https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/corruption/sports-corruption (March 12, 2023).

13 See https://www.sportradar.com/ (March 12, 2023).

14 See *supra* note 13; also with Federation Internationale de l'Automobile ("FIA") – "FIA expands partnership with Sportradar Integrity Services", FIA (April 2019) available at

Europe[15], and is cited by CAS and internal disciplinary bodies such as FIFA's[16], providing services including monitoring betting patterns. In March 2021, it launched its Universal Fraud Detection System which is free for all sporting bodies' use[17]. SportRadar also teamed up with ESSA in 2016 to monitor tennis betting, for example[18]. Newer data and artificial intelligence focused companies such as Stats Perform are also popular, putting out valuable insights used by betting operators and governing bodies[19].

https://www.fia.com/news/fia-expands-partnership-sportradar-integrity-services (March 15, 2023).

15 "Sportradar to collaborate with the Council of Europe" (2019) https://www.soloazar.com/index.php/en/category/other/sportradar-to-collaborate-with-the-council-of-europe (March 13, 2023).

16 See *Klubi Sportiv Skenderbeu* v. *Union Européenne de Football Association*, CAS 2016/A/4650 award of November 21, 2016 at para 27 for witnesses heard, for example.

17 INTERPOL Bi-weekly Bulletin (Feb-March 2021).

18 "ESSA and Sportradar kick off tennis monitoring partnership", https://www.lawinsport.com/topics/news/item/essa-and-sportradar-kick-off-tennis-monitoring-partnership (March 12, 2023).

19 See https://www.statsperform.com/ (March 12, 2023).

Article 6

by

Surbhi KUWELKER

> ***Article 6 – Education and awareness raising***
>
> *1 Each Party shall encourage awareness raising, education, training and research to strengthen the fight against manipulation of sports competitions.*

I. Purpose of Article 6

1. Article 6 addresses the need for, and action to be taken by parties in connection with education and awareness-raising nationally, stating that **parties are to encourage awareness-raising, education, training and research** in order to strengthen the fight against the manipulation of sports competitions[1].

2. **At the international level**, preventative measures aimed at raising awareness, spreading education, undertaking training and collecting information through research and data collection on the ground have been deployed by various bodies in order to combat manipulation. By way of example, the IOC's Olympic Movement Unit on the Prevention of Manipulation of Sports Competitions has awareness raising and capacity building as one of its key pillars in combating manipulation[2]. Their work involves meetings, seminars and workshops to ensure that key actors (governments, organizations, betting operations and sports movements actors) have knowledge of the rules and risks[3].

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1 Article 6 and Explanatory Report, para 71.

2 The others being passing of regulations and investigations/intelligence.

3 "Awareness Raising and Capacity Building", *IOC* available at https://olympics.com/ioc/prevention-competition-manipulation/awareness-raising-capacity-building (March 20, 2023). Tools created include Believe in Sport Code of Conduct and educational campaign, comprising an integrity toolbox and e-learning programme for Olympic athletes and officials; educational activities during the Youth Olympic Games; and the IOC-INTERPOL capacity-building programme.

3. There is also **coordination with other international bodies** such as the INTERPOL to ensure capacity building and training[4]. Similarly, there remains coordination between such bodies for the purposes of ensuring research in fields relevant to prevention of manipulation[5].

II. Content of Article 6

A. Scope of Article 6

4. According to Article 6, each party to the Macolin Convention is required to encourage awareness raising, education, training and research as tools to enhance their efforts in combating offences relating to the manipulation of sports competitions **in their respective jurisdictions**[6].

5. The Explanatory Report elaborates that this provision covers sports organisations and sports betting operators, although more specific provisions relating to awareness-raising or training within them are foreseen in Articles 7 and 10 of the Macolin Convention[7], discussed hereafter in the second part of this commentary to Chapter II.

6. The Explanatory Report further states that the intent of this provision is also to cover training of groups such as young athletes, civil servants, judges or encourage awareness-raising of the general public. It may be implemented through means such as anti-manipulation codes, internet platforms, e-learning tools, etc.[8].

B. Education and Awareness Endeavours by Sports Bodies

7. As has been noted above as well, **at the international level**, there are programs for Integrity e-learning, dissemination of material on

4 As available at https://olympics.com/ioc/prevention-competition-manipulation/capacity-building-partnership-with-interpol (March 20, 2023).

5 See, for example the efforts of join publications between the IOC and UNODC (Vienna), having published "Legal Approaches to Tackling the Manipulation of Sports Competitions", 2021, available at https://www.unodc.org/documents/corruption/Publications/2021/LegalApproachesto_Tackling_the_Manipulation_of_Sports_Competitions_EN.pdf (March 20, 2023) as well as between the IOC-INTERPOL Handbook (2016).

6 Explanatory Report, para 71.

7 Explanatory Report, para 72.

8 Explanatory Report, para 72.

reporting mechanisms, capacity building exercises, awareness drives during events, as so forth[9]. A specific emphasis on awareness has also been made in the updated 2022 Olympic Movement Code on the Prevention of Manipulation of Competitions, which revised the Olympic PMC of 2015[10].

8. **At the federation level**, similar endeavours are undertaken, including providing online training materials and raising awareness through programs such as the appointment of athlete ambassadors. One may see, for example, the specific mandatory education program for all stakeholders related to the prevention of competition manipulation created by the FIVB[11]. Another example is the FEI's specific modules for officials, as well its specific campaigns for key FEI competitions[12]. Other bodies, such as World Aquatics (formerly FINA), conduct webinars and appoint athlete ambassadors to increase visibility and access to tools to prevent instances of manipulation[13].

9 See IOC-INTERPOL Handbook (2016), at p. 83

10 See clause f of the Preamble to the 2022 version as well as Article 7.3.

11 Available at https://www.fivb.com/en/development/manipulationcourse (March 23, 2023). Information here, as well as in footnotes 45 and 46 below was supplemented by responses received to authors' survey.

12 FEI's endeavours also include a specific module on competition manipulation in FEI Campus (free FEI online educational platform available to public) – as available at https://inside.fei.org/ fei/cleansport/be-true (March 23, 2023).

13 As available at https://learning.fina.org/preventing-the-manipulation-of-competition/ (March 23, 2023).

Articles 7 and 8 - Introduction

by

Surbhi KUWELKER

1. This second part to the commentary to Chapter II of the Macolin Convention discusses the next two articles – Article 7 and Article 8 which address **domestic measures that parties to the Macolin Convention are required to implement** in connection with sports bodies, more generally, as well as in terms of financing, to combat manipulation.

2. As stated earlier in the first part of this Chapter, information contained across all parts of Chapter II is a combination of research from **publicly available resources** as well as **information gathered through a survey** circulated among sports federations by the authors.

Article 7

by

Surbhi KUWELKER

Article 7 – Sports organisations and competition organisers

1 Each Party shall encourage sports organisations and competition organisers to adopt and implement rules to combat the manipulation of sports competitions as well as principles of good governance, related, inter alia to:

a prevention of conflicts of interest, including:

– prohibiting competition stakeholders from betting on sports competitions in which they are involved;

– prohibiting the misuse or dissemination of inside information;

b compliance by sports organisations and their affiliated members with all their contractual or other obligations;

c the requirement for competition stakeholders to report immediately any suspicious activity, incident, incentive or approach which could be considered an infringement of the rules against the manipulation of sports competitions.

2 Each Party shall encourage sports organisations to adopt and implement the appropriate measures in order to ensure:

a enhanced and effective monitoring of the course of sports competitions exposed to the risks of manipulation;

b arrangements to report without delay instances of suspicious activity linked to the manipulation of sports competitions to the relevant public authorities or national platform;

c effective mechanisms to facilitate the disclosure of any information concerning potential or actual cases of manipulation of sports competitions, including adequate protection for whistle blowers;

d awareness among competition stakeholders including young athletes of the risk of manipulation of sports competitions and the efforts to combat it, through education, training and the dissemination of information;

e the appointment of relevant officials for a sports competition, in particular judges and referees, at the latest possible stage.

3 Each Party shall encourage its sports organisations, and through them the international sports organisations to apply specific, effective, proportionate and dissuasive disciplinary sanctions and measures to infringements of their internal rules against the manipulation of sports competitions, in particular those referred to in paragraph 1 of this article, as well as to ensure mutual recognition and enforcement of sanctions imposed by other sports organisations, notably in other countries.

4 Disciplinary liability established by sports organisations shall not exclude any criminal, civil or administrative liability.

I. Introduction and Purpose of Article 7

1. Article 7 of the Macolin Convention concerns **measures to be taken by sports organisations and competition organisers in the fight against the manipulation** of sports competitions. The Explanatory Report states that it is intended to, in this way, supplement the provisions of Article 5[1], going into greater detail. In order to reflect the variety of ways in which the sports movement is organised at national level and to accommodate the principle of the autonomy of sport, this article calls on parties to the Macolin Convention to encourage sports organisations, without specifying how this is to be done[2].

II. Contents of Article 7

A. Recommended Provisions within Sport Federation Regulations

2. Article 7.1 makes a list of the provisions that the Macolin Convention recommends to be implemented within the framework of regulations adopted by sports organisations. It recommends that such **bodies adopt and implement rules to combat the manipulation of sports competitions as well as principles of good governance, related,**

1 Discussed in the first part of the commentary to Chapter II, above.
2 Explanatory Report, para 73.

***inter alia* to the listed three sub-items**, discussed below in the paragraphs in this section II.A[3].

3. The Explanatory Report states that these rules and principles are general in scope[4]. It further provides guidance on interpretation by noting that when interpreting the notion of "principles of good governance", mentioned in paragraph 1, parties may refer to the Recommendation of the Committee of Ministers to member states on the principles of good governance in sport[5]. In the context of the Macolin Convention, **these principles would include, *inter alia*, ensuring transparent proceedings in financial and administrative issues and democratic structures**[6].

4. Article 7.1.a **calls for the prevention of conflicts of interest among various competition stakeholders** by proposing that they be prohibited from betting on sports competitions in which they themselves are taking part, and that the misuse or dissemination of inside information[7] be forbidden[8]. The encouraged ban on betting on one's own competitions relates to competitions in which such stakeholders are directly involved and represents the minimal scope of application of such a ban. Sports organisations [and the parties to the Macolin Convention] may extend this prohibition to include all competitions in the tournament (for instance, a World Championship) or a specific event (for instance, the Olympic summer or winter games) in which competition stakeholders are taking part[9].

5. It may be noted that this **prohibition on betting on one's own competition is already part of the disciplinary regulations of several national and international sports federations**[10]. Many international

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3 Article 7, para 1.

4 Explanatory Report, para 74.

5 Recommendation Rec(2005)8, adopted on April 20, 2005, since cited in other instruments such as Recommendation CM/Rec(2018)12 on the Promotion of Good Governance in Sport, also adopted by the Council of Ministers of the Council of Europe; see also, for example, literature such Alm J. (ed.), "Action for Good Governance in International Sports Organizations", *Play The Game – Danish Institute of Sports Studies*, April 2013.

6 Explanatory Report, para 75.

7 Defined under Article 3.7 – see commentary to Article 3 above.

8 Article 7.1.a, Macolin Convention.

9 Explanatory Report, para 76.

10 Explanatory Report, para 76; see also KUWELKER S., DIACONU M., KUHN A., "Competition manipulation in international sport federations' regulations: a legal synopsis", 22 *International Sports Law Journal* 2022, 288.

federations follow the structure of regulations that may be observed in the International Olympic Committee's ("IOC") Olympic Movement Code on the Prevention of Manipulation of Competitions, 2016, updated in 2022 ("Olympic PMC"), which in turn is adopted by national bodies in that same sport. The Olympic PMC also provides for a similar provision, albeit not terming it conflict of interest, but recommending disallowing a certain kind of betting[11]. Similarly, a provision for non-dissemination of inside information and its misuse may also be widely observed[12]. Among national legislation governing manipulation there has also been noted inclusion of offences related to inside information[13].

6. Article 7.1.b goes on to provide that sports organisations should consider adopting rules **to ensure that they honour their contractual, statutory and other obligations**[14]. By way of example, the Explanatory Report provides that countries could consider recommending a licensing system which requires clubs to fulfil certain criteria in order to participate in competitions, as a system of this nature may be used to compel clubs to meet their obligations, among others towards athletes[15]. It may be observed that the national and supra national level, a system of a similar kind is present for clubs to qualify for UEFA competitions, where alleged and then proven involvement in manipulation offences may impact eligibility for a

[11] Under Article 2.1, betting on one's own sport, or any sport which is part of a multisport event in which a person is set to participate is considered a violation of the code.

[12] Inside information is defined under Article 1.1 of the Olympic PMC in a manner similar to that in Article 3.7 of the Macolin Convention – the concerned offence is then defined under Article 2.3 of the Olympic PMC. In the Macolin Convention, dealing in inside information does not feature as an independent offence of it's own as in the case of manipulation in the definition in Article 3, but is mentioned here in Article 7 and then in Article 10 in the context of betting to delineate what sports bodies should have regulations on.

[13] See Sri Lankan Prevention of Offences Relating to Sports Act, 2019 where manipulation is an independent criminalized offence.

[14] Article 7.1.b, Macolin Convention.

[15] Explanatory Report, para 77.

specific year of competition[16], with such ineligibility not considered sanctionary in nature[17].

7. **Other mechanisms may also be considered to ensure compliance with contractual, statutory and other obligations**. The aim of this provision, according to the Explanatory Report, is to provide sports organisations and professional athletes with proper conditions in which to pursue their activities[18].

8. Article 7.1.c specifies that in the event of "***suspicious activity, incident, incentive or approach which could be considered an infringement of the rules***", **immediate reporting of such incident should be required**[19]. The Explanatory Report elaborates that the rules to which the Macolin Convention refers may be statutory provisions, but also regulations adopted by sports organisations or competition organisers[20]. It may be noted that this provision is similar to provisions that one may find in federation regulations, including those of the Olympic PMC[21]. As seen in the examples provided across this section, the Explanatory Report also makes note of how certain national and international sports organisations have already integrated such rules within their disciplinary regulations[22].

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16 Under Article 50.3 of the UEFA Statutes; Article 4.02 of the regulations of the UEFA Champions League deal with such ineligibility – available at https://documents.uefa.com/r/Regulations-of-the-UEFA-Champions-League-2022/23/Article-4-Admission-criteria-and-procedure-Online (March 20, 2023). See for example the facts in the CAS award in *Sport Lisboa and Benfica Futebol SAD v. UEFA and FC Porto Futebol SAD*, CAS 2008/A/1583; *Vitória Sport Clube de Guimarães v. UEFA and FC Porto Futebol SAD*, CAS 2008/A/1584 award dated July 15, 2008, where the Portuguese Football Federation sanctioned the football club Porto with ineligibility for being involved in activities aimed at arranging or influencing the outcome of a match for the 2008–2009 Champions League season, which decision UEFA's Appeals Body reversed, and the CAS upheld.

17 *Besiktas Jimnastik Kulübü* v. *UEFA*, CAS 2013/A/3258, award dated January 23, 2014, where the CAS upheld UEFA Appeals Body decision holding Besiktas ineligible for the 2013-4 Europa League, noting that.

18 Explanatory Report, para 77.

19 Article 7.1.c, Macolin Convention.

20 Explanatory Report, para 78.

21 See Article 2.4 of the Olympic PMC, where a failure to report details of approaches or invitations to manipulate, or the details of an incident, fact or matter known could amount to a violation of the Olympic PMC.

22 Explanatory Report, para 78; see also, for instance, Federation Equestre Internationale ("FEI") Reporting Mechanism through the Equine Community Integrity Unit, being available here https://inside.fei.org/fei/cleansport/be-true as well as here https://inside.fei.org/fei/cleansport/ integrity (March 26, 2023). In the FEI's regulations, as well

9. As stated in the Explanatory Report further, Article 7's provisions seek to make recommendations to aid the definitions of internal rules of sports organizations in a party's jurisdiction, which cover a wide range of offences, mainly disciplinary[23]. Being private bodies, **it would remain for the sports organisations to ultimately conclude what the procedure should be and which body or person should be responsible for gathering information and taking further action** (e.g. disciplinary inquiry, disciplinary procedure, referral to the courts and referral to the national platform)[24].

10. It may also be noted that many international federations and sports organisations have also sought to **provide special protection for reporting persons**. By way of example, FIFA has instituted their online platform for protected, anonymous reporting of incidents including match manipulation to ensure the whistle blower's protection[25]. Under the respective applicable regulations there remains a duty to report any offences by various actors[26] and specifically manipulation related offences[27], with a reporting breach drawing an independent sanction of a ban of at least two years from all football related activity and a fine of a minimum of CHF 15,000.

11. For sports organizations provision of such protection gains special significance, as persons who decide to report wrongdoing could be in vulnerable positions, especially when athletes are in a precarious financial position, have short-term contracts or do not have employment contracts, with short careers timelines, low ethical empowerment and where focus remains on individual performance and rather group loyalty[28].

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as those of other federations (e.g. Federation Internationale de Volleyball Associations ("FIVB")) on manipulation offences, independent reporting related offences exist.

23 Article 7.4 below speaks about the sanctions for these offences could be civil, criminal or administrative.

24 Explanatory Report, para 78.

25 Available at https://fifa.gan-compliance.com/p/Case; as well as practical tools such as integrity specific mobile applications to facilitate this process. Under the FIFA Statutes of 2021, independently, FIFA is committed to respecting all internationally recognized human rights under Article 3.

26 Rule 19 under Chapter 3 of the FIFA Disciplinary Code, 2019.

27 Rule 18.3, to be reported "immediately and voluntarily", Chapter 3 of the FIFA Disciplinary Code, 2019.

28 "Reporting Mechanisms in Sport – A Practical Guide for Development and Implementation", UNODC and IOC, Vienna, 2019, available at https://www.unodc.

12. **Certain national legislations specific to corruption, sporting and manipulation offences impose a reporting requirement** (an obligation to report, rather than merely establishment of mechanisms through which reporting may be undertaken) whose violation is **drafted as an offence**[29]. Independently, it may be noted that in certain countries, such as Australia, Bosnia and Herzegovina, Ethiopia, India, Ireland, Jamaica, Malaysia, Malta, Peru, the Republic of Korea, Serbia, Slovakia, Uganda, the United States, Vietnam and Zambia, specific legislation has been passed to protect reporting persons[30].

13. Finally, the Explanatory Report also mentions that **non-compliance with such provisions is recommended to be made sanctionable** within such regulations[31].

B. Further recommended measures

14. Under Article 7.2, measures which sports organisations are encouraged to adopt, and which may be implemented through procedures, policies, practices or even regulations, are recommended. Accordingly, Article 7.2.a calls for the **enhanced and effective monitoring of the course of sports competitions which are exposed to risks of manipulation**[32].

15. The Explanatory Report states that the **intent of the provision is to have sports organization introduce tight and efficient controls** of sports competitions that are particularly exposed to risks of manipulation. Examples provided of such supervisory procedures include provisions for

org/documents/corruption/Publications/2019/19-09580_Reporting_Mechanisms_in_Sport_ebook.pdf (January 17, 2022), 32.

29 See for example, such requirement introduced by the South African parliament in the existing Prevention and Combatting of Corrupt Activities Act, 2004 ("PCCAA") which came into operation on April 27, 2004, to deal with sport-related corruption. Section 15 of the PCCAA in sub-section (ii)(b) requires reporting of this kind.

30 G20 Anti-Corruption Action Plan – Protection of Whistleblowers; Study on Whistleblower Protection Frameworks, "Compendium of Best Practices and Guiding Principles for Legislation", Organization for Economic Cooperation and Development, 2012, available at https://www.oecd.org/corruption/48972967.pdf (January 17, 2022), quoted in footnote 82*,* 2; see also DIACONU M., KUHN A., KUWELKER S., "The Concept of Manipulation under the Macolin Convention", 19(2) *Causa Sport* 2022, 145 under section 4 on 'Specially Protection Persons'.

31 Explanatory Report, para 74.

32 Article 7.2.a, Macolin Convention.

acquiring the necessary expertise to assess and follow up, warnings issued by betting monitoring systems, but also supervision of sporting events with sport experts (for instance, representatives, stewards or referee inspectors). It is also clarified that practical follow-up does not in itself imply any public disclosure[33]. As has been noted in the commentary to Article 4 and 5 above, measures taken by sports bodies for this purpose include subscription to services such as the IOC's IBIS and UEFA's BFDS as well as private services of companies which may offer monitoring and betting data related services[34].

16. Article 7.2.b specifies that sports organizations must provide for **measures to ensure that where suspicious activities linked to the manipulation of sports competitions come to the attention of sports organisations** (notably as a result of reports received under Article 7.1.c, or internal disciplinary inquiries) **they must inform the relevant public authorities and/or National Platforms**[35]. In this context, the Explanatory Report clarifies that the expression "linked to the manipulation of sports competitions" should include, at the very least, activities which could constitute criminal offences. They may also include, however, other suspicious activities or information about conduct which, although not a criminal offence, could form the subject of exchanges of information (via the national platform) with other authorities or organisations, within the country or abroad[36].

17. Article 7.2.c recommends that parties should have **effective mechanisms to enable competition stakeholders to provide information**, concerning potential or actual cases of manipulation of sports competitions, **including adequate protection for whistle blowers**[37]. The definition of whistle blowers, though not provided here, may be borrowed from other instruments to mean any persons who report in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the respective instrument or regulation[38]. Such provisions assume importance given that, across surveys, data seems to suggest that less than 10% of corruption

33 Explanatory Report, para 80.
34 See commentary to Articles 4 and 5 above.
35 Article 7.2.b, Macolin Convention.
36 Explanatory Report, para 81.
37 Article 7.2.c, Macolin Convention.
38 See for example the definition under Article 33 of the United Nations Convention against Corruption.

incidents are reported, due to, among other reasons, a fear of retaliation, as well as the impression of not being taken seriously[39].

18. The Explanatory Report states that these measures and mechanisms to be provided **are in addition to the reporting requirement set out in Article 7.1.c.** Further, for the purpose of being effective, they must enable competition stakeholders to report activities in confidence. The recipient of the information must be of the utmost reliability and integrity. In particular, such persons must not be involved in the competition (e.g. club managers where the whistle blower or informant is a club stakeholder)[40].

19. Such mechanisms 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. They will also include measures which are the responsibility of sports organisations and which are designed to protect whistle-blowers who report suspicious activities to the competent bodies of the sports organisation, or to the authorities (e.g. anonymity, protection against wrongful dismissal or assistance in their subsequent career)[41].

20. At the international level, models such as the International Olympic Committee's Integrity hotline exist to aid in the fight against manipulation which may occur at all levels, and direction to more specific sport or offence focused helplines, where they might exist, is also provided

[39] "United Nations Convention Against Corruption Resource Guide on Good Practices in the Protection of Reporting Persons", United Nations Office of Drugs and Crime, Vienna, August 2015, https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf (January 17, 2022), iii; see also DIACONU M., KUHN A., KUWELKER S. (2022), *supra* note 30.

[40] Explanatory Report, para 82.

[41] Explanatory Report, para 82; on whistleblowers, see also the commentary to Article 21 on Protection Measures, as well as the Explanatory Report, para 125, where whistle blowers are included in the list of 'witnesses' who must be given protection as persons who possess important information relevant to criminal proceedings.

alongside[42]. Over time, numerous federations have also followed suit with this model of an online portal[43].

21. Independently, it may be noted that numerous countries have enacted whistle blower protection legislation that expressly applies to both public and private sector employees, such as Japan, Korea, South Africa and the United Kingdom[44]. While this might not be specific to sport, nor non-employee relationships, depending on the jurisdiction, the law may be extended to the sport sector as well. Specific to sport, country wide mechanisms for reporting and whistleblowing have been instituted (though not only specific to manipulation but all integrity and ethics concerns) in countries such as Australia centrally, through Sport Integrity Australia[45].

22. Article 7.2.d advocates that competition stakeholders including young athletes should be made **sufficiently aware of the issue of manipulation of sports competitions**. The Explanatory Report states that this can be done through education and training provided by sports organisations or players' unions, for example[46]. In this context, the Explanatory Report also specifies that that supporters and fans, although not "competition stakeholders" in the strict sense, should nevertheless be informed and involved in the fight against the manipulation of sports competitions[47]. In the commentary to Article 6, in the first part of this Chapter II, the importance of education and awareness in combating manipulation is emphasized and discussed in further detail, and efforts of various federations in this regard have also been noted[48].

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42 See details as available at https://ioc.integrityline.org/ (March 20, 2023). The website provides that for football related reports, one is to use the existing reporting mechanisms of FIFA and UEFA. For all tennis related reports, one is directed to the reporting mechanism of International Tennis Integrity Agency. For all doping related reports, one is to contact either World Anti-Doping Agency, the International Testing Agency Reveal.sport or the complaint's national/regional responsible authority.

43 See *supra* note 22.

44 "G20 Anti-Corruption Action Plan – Protection of Whistleblowers; Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation", Organization for Economic Cooperation and Development, 2012, https://www.oecd.org/ corruption/48972967.pdf (January 17, 2022), 8 ("OECD Report").

45 See information available at https://www.sportintegrity.gov.au/contact-us/make-an-integrity-complaint-or-report (March 20, 2023).

46 Explanatory Report, para 83.

47 Explanatory Report, para 84.

48 See commentary to Article 6 of the Macolin Convention.

23. Finally, under Article 7.2.e, the Macolin Convention states that sports organisations should also be asked to delay appointing officials until the latest possible stage before the competition. It is emphasized that this can aid in helping to protect the integrity of referees, for example[49].

C. Sanctions

24. As noted, in the context of Article 7.1 and shall be further discussed hereafter in the commentary to Article 22 and 23[50], the Macolin Convention recommends that a **failure to observe regulations established to combat manipulation offences may give rise to disciplinary procedures and sanctions**[51]. Accordingly, as in Articles 22 and 23, sanctions need to be effective and dissuasive, proportionate and specific[52].

25. The objective behind desiring **effective and dissuasive sanctions**, is, as noted in further in detail in this commentary under Article 22 and 23, that the seriousness of the offence, combined with the threat to integrity, public perception and commercial value of sport and the ability/resources of bodies to properly detect, investigate, collect evidence and prosecute such clandestine offences necessitates a strong hand[53]. Further, the disciplinary power of sports institutions can constitute a fast, efficient coercive tool against the manipulation of sports competitions[54]. Thus, deterrence could be the objective of sanctions, provided stated explicitly in applicable law, which brings one to the concept of **specificity**. It is also pertinent 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**[55], **based on the principles of *nullum crimen, nulla poena sine lege scripta et certa***[56].

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49 Explanatory Report, para 85.

50 Sanctions for natural and legal persons respectively, under the Macolin Convention.

51 Explanatory Report, para 74.

52 Article 7.3, Macolin Convention.

53 The need for effective and dissuasive sanctions as stated in the Article is further discussed under section II.B.1 of the commentary to Article 22.

54 ICCS-Sorbonne Report, "Protecting the Integrity of Sport Competition – The Last Bet for Modern Sport", (2014) at p.94.

55 Explanatory Report, para 86.

56 See, section II.A.1.1 under the commentary to Article 22; see also, for example, TIMMERMAN M., "Legality in Europe: on the principle "nullum crimen, nulla poena sine lege" in EU law and under the ECHR", Doctoral Dissertation, European University

When applied to effective sanctions, the concept of legal certainty must not be compromised[57].

26. Finally, there needs to be careful consideration of the **respect of human rights and the principle of proportionality**[58]. The Explanatory Report elaborates further that the disciplinary procedures introduced are required to respect the general principles of law recognised at international level and guarantee the **fundamental rights** of the accused persons[59]. According to these principles, which are also referred to in Convention 135[60], 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, which implies that disciplinary sanctions imposed by sports organisations must be subject to an appeal before a court or an arbitration body[61].

27. It is also important that sanctions issued by sporting bodies be '**proportionate**', i.e. such sanction must be reasonably required in search of a justifiable aim[62]. Considerations of proportionality in maintaining or revising awards rendered by the Court of Arbitration for Sport ("CAS"), for example, and for different parties in the same proceedings have been seen prior[63]. Proportionality may result in the adjustment across types of sanctions – for example, the non-issuance of a fine where there is already a deprivation of personal liberty through a ban – based on gravity of the offence and degree of guilt[64]. Finally, various factors mentioned in

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Institute, Department of Law, 2018. See also, DIACONU M., KUWELKAR S., KUHN A., *supra* note 30, under the section 8 on 'Sanctions'.

57 See section II.B.1 under the commentary to Article 22.

58 See Article 12 for example; Explanatory Report, para 86; proportionality as a principle applicable here is discussed at the end of this section II.C.

59 Explanatory Report, para 87.

60 Being the Anti-Doping Convention, ETS 135 wherein Article 7.2.d addresses that the fundamental rights of sportspersons suspected of doping shall be respected, with principles including i the reporting and disciplinary bodies to be distinct from one another; ii the right of such persons to a fair hearing and to be assisted or represented; iii clear and enforceable provisions for appealing against any judgment made.

61 Explanatory Report, para 87.

62 *Public Joint-Stock Company "Football Club Metalist"* v. *UEFA* and *PAOK FC*, award of November 29, 2013, CAS 2013/A/3297, paras 8.25–8.26.

63 See, for example, *N and V* v. *UEFA*, CAS 2010/A/2266, award of May 5, 2011 ("N and V"), at paras 43 and 81.

64 See, for example, considerations made under the prior tennis Anti-Corruption Programme in – Daniel Köllerer v. Association of Tennis Professionals ("ATP"),

regulations, aggravating or mitigating, among others[65], are usually to be applied in the forum of first instance, even if not expressly mentioned in the regulation[66].

28. In this vein it is important to note that Article 7.4 **specifies that disciplinary liability shall in no way exclude any criminal, civil or administrative liability within the framework of state court sanctions**[67]. As seen under the commentary to Article 22, there could exist a **'duality' of types of sanctions**, i.e. while sanctioning manipulation or sports offences generally, the first level of sanction ordinarily involves disciplinary sporting sanctions, applied by the relevant sports bodies according to their internal punitive system (termed "sport justice")[68]. Thereafter, at the second level there might also be state sanctions, applied by public authorities (termed "state justice"). Depending on the applicable national law, the latter may be of a civil, administrative, disciplinary or criminal nature[69].

29. This may take place within a singular country's jurisdiction as well as between a national court and an international sports body, for instance[70].

Women's Tennis Association, International Tennis Federation and Grand Slam Committee, CAS 2011/A/2490, award of March 23, 2012 at paras 70-73.

65 See detailed discussion in commentary to Article 22 and 23 on proportionality in sanctioning.

66 In the ICC Anti-Corruption Unit decision of in proceedings between the ICC and Zimbabwean cricketer. Heath Streak, dated March 29, 2021 available at https://resources.pulse.icc-cricket.com/ICC/document/2021/04/14/e06b37f8-65cb-4d0b-811b-d7bc0bbe3c2a/Decision-of-the-ICC-28-March-2021.pdf (April 5, 2021) at para. 33 – factors such as admission of breach, remorse, good prior record, lack of substantial damage to commercial value or public interest.

67 Article 7.4, Macolin Convention.

68 See UNODC-IOC, *Criminal Law Provisions for the Prosecution of Competition Manipulation* (2017, "UNODC-IOC (2017)") at p. 1; see also VALLONI L., PACHMANN T., "Sports Justice in Switzerland", 1 *European Sports Law and Policy Bulletin* 2013, p. 600 onwards.

69 For instance, the fixing of a football match within the Swiss national league could potentially be sanctioned both by the Swiss national football federation (under Article 13bis of the Disciplinary Regulations of the Swiss Football Association, as of July 2020), under civil law provisions (under Article 41ss of the Swiss Code of Obligations, as of July 2016) and arguably under new criminal law (Article 25a of the Sports Promotion Act, as of January 2019); this has been confirmed by the CAS in awards such as *Johannes Eder* v. *Ski Austria*, CAS 2006/A/1102, award dated November 13, 2006 at para 52.

70 In awards such as those in Asif and Butt, this may be noted even though the principle is not explicitly cited there.

The legal nature of "sport sanctions"—which may include, *inter alia*, warnings, bans, relegations, fines and other penalties[71], has been clarified by the Swiss Federal Tribunal ("SFT") as statutory, which is **a form of contractual sanctions**[72].

30. Sports disciplinary sanctions are within a different jurisdiction from criminal law and are driven by separate standards, applied according to the procedures, and other types of evidence. The aforementioned distinction in the nature of disciplinary and criminal sanctions also ensures that the ***ne bis in idem*** **principle of criminal law, which prescribes that the same offence must not be sanctioned twice**[73]**, is not violated** and does not exclude that an act is punishable in both disciplinary and criminal courts. Accordingly, there has been reference made by national courts of potential further sanctions possible in the sporting sphere prior to issuing final sanctions, and on the quantum thereof[74]. The Explanatory Report hence states that the same act may be punished by disciplinary procedure without coming under criminal law, or criminally without incurring disciplinary sanctions[75].

31. Finally, the Explanatory Report also specifies that any disciplinary sanctions imposed by sports organisations **should form the subject of mutual recognition procedures by foreign sports federations and by international federations.** Such mutual recognition is dependent on the

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71 See VAN KLEEF, R., "Reviewing disciplinary sanctions in sports", 4(1) *Cambridge Journal of International Comparative Law* 2015, 3.

72 In its notable award of *Gundel* v. *Federation Equestre Internationale*, SFT 119 II 271, decision dated 15 March 1993, at para c. 3c; see also decision of the SFT in S*wiss Ice Hockey Federation* v. *Dube*, SFT 120 II 369 decision dated December 6, 1994 at para c. 2; the SFT's decisions gaining significance in light of the presence of numerous international sporting federations headquartered in Switzerland, with appeals lying to the CAS, also located in Switzerland; see also UNODC-IOC (2017), p. 14.

73 See generally OLIVER P., BONBOIS T., "Ne bis in idem en droit européen: Un principe à plusieurs variantes (Double Jeopardy in European Law: a principle with several variants)", *Journal de Droit Européen* 9, 2012, 266.

74 The CAS panels in *Mohammad Asif* v. *International Cricket Council* ("ICC"), CAS 2011/A/2062 award of April 17, 2013 and *Salman Butt* v. *ICC*, CAS 2011/A/2064 award dated April 17, 2015 noted that the English Courts before whom their respective cases were also proceeding, had already considered as a potential mitigating factor the presence of parallel proceedings in which a guilty finding was likely. This was appealed to the England and Wales Court of Appeal, in *R* v. *Amir & Butt*, Case No. EWCA Crim 2914, November 3, 2011.

75 Explanatory Report, para 87.

rules of international sports organisations on the implementation of disciplinary sanctions and measures[76].

32. This provision was originally inspired by the standards applied in the fight against doping[77], but now such recognition may be observed in a manipulation context itself within the 2022 version of the Olympic PMC, for example. It is stated therein that any decision issued in compliance with the code by a sports organisation, subject to the right of appeal, or by any court of competent jurisdiction must be recognised and respected by all other sports organisations[78].

33. At the national level, legislation prescribes a **variety of sanctions** both in legislation specific and not specific to manipulation offences, and both among signatories[79] and non-signatories[80] to the Macolin Convention. Similarly, sports bodies at the international and national level sanction manipulation with a variety of sanctions, ranging from suspensions and fines, being the most common, to more rehabilitative methods of sanctions such as education and social service[81], despite language in conventions such as this, but also legislation, pushing for more effective and dissuasive sanctions.

34. Finally, it is pertinent to note that domestic and international federation sanctions have usually been upheld by the CAS on appeal from national and international bodies, unless found grossly disproportionate, regardless of their nature. Further CAS panels, for instance, are unlikely to depart significantly from the practice of following decisions rendered by

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76 Explanatory Report, para 88; see also commentary to Article 26, which addresses mutual assistance albeit across criminal jurisdiction.

77 Explanatory Report, para 88.

78 Article 6.1 and 6.2 of the Olympic PMC; In the same vein, a multisport event organizer's sanction is not to prevent an international federation from imposing its own sanction. International federations are also to extend the decisions by a national federation to all other national federations in their realm – Articles 6.3 and 6.4 thereof.

79 See section 26 of the South African PCCAA with fine and imprisonment depending on the authority that is imposing the sentence.

80 See Sri Lankan Prevention of Offences Relating to Sports Act, 2019 where manipulation is an independent criminalized offence and punishable with fine or imprisonment or both.

81 PMC 5.1.3 of the FINA Prevention of Manipulation of Competition Rules, 2016 which provides for "Education and Rehabilitation" as a sanction; PMC 5.1.3 of the FINA Prevention of Manipulation of Competition Rules, 2016 makes "Education and Rehabilitation" a precondition to eligibility to participate after a period of ineligibility issued; in the same vein, Article 7.1.f of the FIFA Code of Ethics, 2019 provides "social work" as a potential disciplinary sanction.

previous panels, even if not bound[82]. Even if not obligated to follow precedent, they tend to do so in the **interest of legal certainty[83], which also then aids in ensuring proportionality.**

35. It has been noted that the independent interpretation of the same regulations by each panel, or indeed a sporting forum and a state forum, or different state judicial bodies across jurisdictions could compromise consistency in many elements of a decision, including sanctioning[84]. Finally, the tendency to borrow from decisions on offences decided on more frequently or on which there exists more jurisprudence or nuanced legislation, such as, within sport disciplinary offences, could lend to further concerns over consistency across issued sanctions before manipulation cases develop domestic law jurisprudence of their own, as seen in a sporting context among CAS awards now[85].

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[82] Seen across awards – for example *Canadian Olympic Committee and Beckie Scott* v. *IOC*, CAS 2002/O/373, award of December 18, 2003 at para 14. KOFFMAN-KOHLER G., "Arbitral precedent: dream, necessity or excuse", 23 *Arbitration International* 2007, 357 at 366.

[83] BLACKSHAW I, "The role of the court of arbitration for sport (CAS) in countering the manipulation of sport", In: BREUER M., FORREST D. (eds) *The Palgrave handbook on the economics of manipulation in sport* (Palgrave Macmillan: Cham, 2018), 223 at 155.

[84] DIACONU M., KUWELKAR S., KUHN A., "The court of arbitration for sport jurisprudence on match-fixing: a legal update", 21 *International Sports Law Journal* 2021, 27 at p. 44.

[85] See discussion in DIACONU M., KUWELKAR S., KUHN A. (2021) at p. 44 where it is also noted that CAS panels have held as well that strict degree of certainty as in criminal procedure is unrequired given the hybrid nature of proceedings as seen in *Skënderbeu* v. *Albanian Football Association*, CAS 2017/A/5272, award of April 13, 2018 – an appeal against this decision was rejected by the SFT in July 2020 (4A_462/2019).

Article 8

by

Surbhi KUWELKER

Article 8 – Measures regarding the financing of sports organisations

[1] Each Party shall adopt such legislative or other measures as may be necessary to ensure appropriate transparency regarding the funding of sports organisations that are financially supported by the Party.

[2] Each Party shall consider the possibility of helping sports organisations to combat the manipulation of sports competitions, including by funding appropriate mechanisms.

[3] Each Party shall where necessary consider withholding financial support or inviting sports organisations to withhold financial support from competition stakeholders sanctioned for manipulating sports competitions, for the duration of the sanction.

[4] Where appropriate, each Party shall take steps to withhold some or all financial or other sport related support from any sports organisations that do not effectively apply regulations for combating manipulation of sports competitions.

I. Introduction and Purpose of Article 8

1. Article 8 of the Macolin Convention concerns measures (legislative or other measures) that parties to the convention may take **to ensure the financial transparency of sports organisations** (i.e. in connection with their funding) and to institute oversight of such organizations which receive financial support from parties[1]. It also looks at how states may aid such organizations in the fight against the manipulation of sports competitions through financial assistance[2].

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1 Article 8, para 1 and Explanatory Report, para 90.

2 Article 8, para 2 and Explanatory Report, para 90.

2. Furthermore, this article touches on the ability of the parties to withdraw financial (or other) support from sports organisations in their jurisdiction (or invite them to do so in turn for other stakeholders in their ecosystem) which have either been sanctioned[3], or do not respect regulations regarding the fight against the manipulation of sports competitions[4].

3. In this vein, it may be noted that the magnitude of financial support received by national sports governing bodies from central governments of countries has been previously documented[5] – thereby justifying the separate emphasis made by the Macolin Convention of leveraging the provision and withdrawal of this support as a tool to aid in combating manipulation. Such support, in addition to governing bodies, could also be provided to private club entities, for example, both professional and grassroot[6].

II. Content of Article 8

A. Financial transparency for bodies receiving party funding

4. Under Article 8.1, the Macolin Convention calls for **appropriate transparency regarding the funding of sports organisations when they are "financially supported" by any party** to the convention. This paragraph is concerned not with the manner of use of public funds but rather with the kind of transparency that is expected in terms of governance

3 Article 8, para 3 and Explanatory Report, para 90.

4 Article 8, para 4 and Explanatory Report, para 90.

5 See, section on Funding for national sport federations and governing bodies of sport, "Strengthening Financial Solidarity Mechanisms in Sport", *Expert Group on Sustainable Financing of Sport*, 2012 available at https://ec.europa.eu/assets/eac/sport/library/documents/xg-fin-201211-deliverable.pdf, p. 11, where, the study in the context of 25 European nations noted that benefits provided as 'financial' support include taxation related benefits, funding for the delivery of projects and events in the jurisdiction, among others. Exceptionally, such funding may include blanket funding for the sports body. In certain other countries, national legislation allows for such contributions to national governing bodies on recognition by the central authority (e.g. Ministry of Youth Affairs and Sport, Government of India under the National Sports Development Code, 2011 of India).

6 Through subsidies and infrastructural support for those undertaking development activities, charitable donations, discounted business rates, specific licensing requirements and also tax benefits – *ibid*., p. 12 and 13.

and funding from bodies that are the recipients of these funds. Examples of this in the Explanatory Report include the maintenance of proper accounts, and the identification of funding sources[7].

5. The Explanatory Report goes on to clarify that parties to the Macolin Convention whose national legal systems allow or require "comparable" transparency with regard to a broader group of organisations, may apply it here[8]. To clarify, it may be hence assumed that the Macolin Convention recommends that financial transparency related regulations, as applicable in national law to bodies not in the sporting ecosystem, may be applied to sport bodies with the objective to combating manipulation offences as well.

6. The Explanatory Report re-emphasizes that such obligation to ensure appropriate transparency of these organisations is a minimum standard to be observed by parties under the Macolin Convention. Nonetheless, it notes that certain parties may not be able to achieve wider transparency due to the limitations imposed by their legal system[9]. An example is the principle of transparency as applicable to organizations is Recital 58 of the General Data Protection Regulation[10]. Similarly, of note are the principles of good governance of the Council of Europe which provide guidance on the responsible conduct of public affairs and managing resources[11], of which openness and transparency, and sound financial management are key tenets[12].

7. To this end, the implementation of good governance regulations and best practices may be observed across international federations, including the requirements to have legally audited and published accounts[13]. To note are the IOC's Basic Universal Principles of Good

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7 Explanatory Report, para 91.

8 Explanatory Report, para 91.

9 Explanatory Report, para 91.

10 See Recital 58, which reads "The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualisation be used."

11 Available at https://rm.coe.int/12-principles-brochure-final/1680741931 (September 24, 2023) as decided in the Council of Europe's 1022nd meeting, 2008, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3dc8 (September 24, 2023).

12 *Ibid*.

13 See, for example, FEI Annual Report of 2021 and Annual Financial Report and Auditor's Report of 2021 available: https://inside.fei.org/fei/about-fei/publications/fei-

Governance within the Olympic Movement[14], which address specifically institutional good governance requiring accountability and transparency, including financial transparency[15].

B. Extending financial support to combat manipulation

8. The limited ability in terms of resources of sporting bodies, even at the international level, to combat manipulation has been noted prior[16]. Despite this, they remain the first line of defence against manipulation through the creation of regulations as well as through education, monitoring, investigations, and prosecution. Bearing this key role of not-for-profit non-governmental sports organisations in mind, the Explanatory Report elaborates that, in Article 8.2, the Macolin Convention **encourages party governments to consider the possibility of supporting sports organisations financially**, where appropriate, for instance, by funding suitable mechanisms for combating the manipulation of sports competitions[17].

9. The form of any support is left to the discretion of the parties. To this end, the Explanatory Report envisions that such support could be

annual-report/2021/ and https://inside.fei.org/fei/general-assembly/2022/meeting-documents-oga (March 23, 2023) respectively. FIVB as well has 2018 Financial Regulations that govern disclosures, for example.

14 These 2022 principles are Implementation Provisions of the IOC Code of Ethics and further to Para 5 of the Fundamental Principles of Olympism in the Olympic Charter. The IOC has attempted to implement good governance through its Charter, Code of Ethics and strategic roadmap, the Olympic Agenda 2020 and most recently the framework of the Olympic Agenda 2020+5 (in Recommendation 14 thereof) of which the updated Basic Universal Principles of Good Governance are part as well – see https://olympics.com/ioc/integrity/universal-principles-for-integrity (September 23, 2023).

15 See Principles 2.2 and 2.4, available at https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Integrity/Bonne-Gouvernance-EN.pdf?_ga=2.202865233.1338260225.1695570176-229038247.1694603889 (September 23, 2023).

16 See, for example, noting of the Court of Arbitration for Sport in it's well known award on competition manipulation *Public Joint-Stock Company "Football Club Metalist"* v. *UEFA and PAOK FC*, CAS 2013/A/3297 award dated November 29, 2013 – also cited in DIACONU M., KUWELKAR S., KUHN A., "The court of arbitration for sport jurisprudence on match-fixing: a legal update", 21 *International Sports Law Journal* 2021, 27 in section 5.11; see also KUWELKER S., DIACONU M., KUHN A., "Competition manipulation in international sport federations' regulations: a legal synopsis", 22 *International Sports Law Journal* 2022, 288.

17 Explanatory Report, para 92.

through direct subsidies or grants, or by taking into account the cost of any such mechanisms and efforts deployed by sports organisations when determining the overall subsidies or grants to be awarded to these organisations[18].

C. Withholding financial support

10. Under the final two paragraphs of Article 8, the Macolin Convention deals with institutionalizing the withholding of financial support as a means to incentivize compliance with applicable regulations by acting as a deterrent, preventative measure. Accordingly, under Article 8.3, each party is encouraged to, where necessary, **consider withholding financial support or inviting sports organisations in their jurisdiction to withhold financial support from competition stakeholders sanctioned for manipulating** sports competitions, for the duration that the sanction persists[19].

11. The Explanatory Report mentions that this paragraph in Article 8 reflects the content of a similar provision in the Convention 135 of the Council of Europe[20]. Thereunder, parties to the Convention 135 are encouraged to take appropriate steps to withhold the grant of subsidies from public funds, for training purposes, to individual sportsmen and sportswomen who have been suspended following a doping offence in sport, during the period of their suspension[21]. Parties should have a framework authorising its possible implementation. This provision shall be implemented in accordance with the principles of legality and proportionality[22].

12. Last, Article 8.4 suggests that parties to the Macolin Convention, where appropriate, **withhold some or all of their support from any sports organisation that fails to effectively apply regulations** for combating the manipulation of sports competitions[23]. The Explanatory Report emphasizes that this provision should be implemented in accordance with the principles of legality and proportionality as well[24].

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18 Explanatory Report, para 92.
19 Article 8.3 and Explanatory Report, para 93.
20 ETS 135, the Council of Europe's Anti-Doping Convention, 1989 ("Convention 135").
21 Article 4.3.b, Convention 135.
22 Explanatory Report, para 93.
23 Article 8.4 and Explanatory Report, para 94.
24 Explanatory Report, para 94.

13. Financial sanctions have in the past commonly been in the form of levied fines[25], though other sanctions can also have the same impact as the withholding of financial support. For instance, though UEFA issues fines for manipulation related offences[26], the ineligibility for admission to a UEFA competition of a member football association or club, directly or indirectly involved in manipulation, with immediate effect, without prejudice to any possible disciplinary measures[27], could in itself have direct financial impact for a member association or a club – this could in turn serve the desired deterrent effect of this provision.

[25] FEI, FIVB and FINA all provide for fines – it remains the among the most common sanction seen across federations – see KUWELKER S., DIACONU M., KUHN A., *supra* note 13 – see Figure 6 in section 3.2.1. Similarly, national legislation also imposes fines for manipulation related offences – see section 26 of the South African PCCAA with fine and imprisonment depending on the authority that is imposing the sentence.

[26] UEFA can sanction member associations, clubs, officials, match officials, players with a fine if it has been established that they have breached Article 12 of the UEFA Disciplinary Regulations.

[27] Article 50.3 of the UEFA Statutes.

Articles 9 to 11 - Introduction

by

Surbhi KUWELKER

1. This **third part** to the commentary to Chapter II of the Macolin Convention discusses the third set of articles – Article 9, Article 10 and Article 11, which address **domestic measures** that parties to the Macolin Convention are required to **implement in connection with betting and betting operators** within their jurisdiction.

2. As previously stated, in the first part of this Chapter, information contained throughout Chapter II is a combination of research from **publicly available resources** as well as information gathered through a **survey circulated among sports federations** by the authors.

Article 9

by

Surbhi KUWELKER

Article 9 – Measures regarding the betting regulatory authority or the other responsible authority or authorities

[1] Each Party shall identify one or more responsible authorities, which in the Party's legal order are entrusted with the implementation of sports betting regulation and with the application of relevant measures to combat the manipulation of sports competitions in relation to sports betting, including, where appropriate:

a the exchange of information, in a timely manner, with other relevant authorities or a national platform for illegal, irregular or suspicious sports betting as well as infringements of the regulations referred to or established in accordance with this Convention;

b the limitation of the supply of sports betting, following consultation with the national sports organisations and sports betting operators, particularly excluding sports competitions:

– which are designed for those under the age of 18; or

– where the organisational conditions and/or stakes in sporting terms are inadequate;

c the advance provision of information about the types and the objects of sports betting products to competition organisers in support to their efforts to identify and manage risks of sports manipulation within their competition;

d the systematic use in sports betting of means of payment allowing financial flows above a certain threshold, defined by each Party, to be traced, particularly the senders, the recipients and the amounts;

e mechanisms, in co-operation with and between sports organisations and, where appropriate, sports betting operators, to prevent competition stakeholders from betting on sports competitions that are in breach of relevant sports rules or applicable law;

f the suspension of betting, according to domestic law, on competitions for which an appropriate alert has been issued.

2 Each Party shall communicate to the Secretary General of the Council of Europe the name and addresses of the authority or authorities identified in pursuance of paragraph 1 of this article.

I. Introduction and Purpose of Article 9

1. The **nexus of and significant contribution of betting related activity to the presence of manipulation in sport** has been noted before, including due to the large economic sums often involved around betting[1]. Most major cases involving manipulation, as defined under the Macolin Convention, have been closely related to betting activities[2].

2. This is also prevalent across all levels of match manipulation, not merely high-eyeball, top level professional sport, with betting on lower leagues, smaller leagues, and now the Covid-19 pandemic spurring on its extensive reach[3].

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1 See commentary to Preamble, above – the Macolin Convention acknowledged the link between betting activity and manipulation therein under 3 clauses. The industry is worth billions of US dollars – see *Global Report on Corruption in Sport*, UNODC: Vienna, 2021, Chapter 9, p. 256 ("UNODC Global Corruption Report, 2021"). See also, for example, in the context of football, around Europol's operation 'Veto' (2011-2013) uncovered more than fifteen countries, hundreds of officials, players and other actors across hundreds of matches across three five continents worth millions of dollars – *Operation VETO- the largest match-fixing investigation in Europe*, available at https://ec.europa.eu/home-affairs/what-is-new/news/news/2013/20130206_01_en (March 20, 2023) and INTERPOL's SOGA ("Soccer-Gambling") operation in Asia in 2016 targeted Euro 2016 related illegal betting dens worth millions of dollars for organized crime syndicates through sport are evidence of this – "More than 4,100 arrests in INTERPOL-led operation targeting Asian illegal gambling networks", 2016 available at https://www.interpol.int/fr/Actualites-et-evenements/Actualites/2016/More-than-4-100-arrests-in-INTERPOL-led-operation-targeting-Asian-illegal-gambling-networks (March 20, 2023).

2 See DIETL H., WEINGARTNER C., "Betting Scandals and attenuated property rights: How betting-related match-fixing can be prevented in the future", 14(1) *International Sports Law Journal* 2014, 128; as also cited in MCNAMEE M., RUBICSEK N., "The Macolin Convention and the Complexity of Sport" in: CONSTANDT B., MANOLI A. E. ed.s, *Understanding Match-fixing in Sport: Theory and Practice* (Routledge: London) 2023, 81 at 89.

3 UNODC, IOC and INTERPOL, *Preventing Corruption in Sport and Manipulation of Competitions* (2020) https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/News/2020/07/COVID-19_and_Sport%20Integrity_FINAL_VERSION_2.pdf#_ga=2.154371258.302707046.1615589917-266020737.1614949591 (March 21, 2023).

3. Further, with the **progression of the extent of manipulation in sport**[4], the regulation of betting therein has also expanded based on the need at every level of sport, having initially, in many cases, corresponded to the laws regulating gambling and/or betting. The connection of betting to sponsorship, alongside endorsements and cultural acceptance, after a return of amateurism of sport in the twentieth century spurred this growth, which in turn resulted in more legislation regulating traditional forms of betting, only to evolve further with the advent of more complex systems with the internet[5].

4. **Betting remains 'legal' and hence regulated, including in sports, in various parts of the world** – for instance, state governments in the United States may authorize commercial sports betting, which had been banned prior[6] after which numerous states have allowed regulated sports betting markets to function, leading to legal betting on sports in the billions of US dollars since[7]. It has also been noted that existing laws in countries such as Australia, which have ratified the Macolin Convention, adopt a limited approach to manipulation, restricting it only to corruption of a betting outcome[8].

5. As seen under Article 3 above, the **Macolin Convention defines 'sports betting'**[9], **within which it contemplates there being illegal,**

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4 CHAPPELET J., VERSCHUUREN P., *Chapter 28: International Sports and Match Fixing,* The Business and Culture of Sports (Gale: 2019) available at https://serval.unil.ch/resource/serval:BIB_A33DEABE8CB9.P001/REF (March 22, 2023) at pp. 429 to 431; UNODC Global Corruption Report, 2021, at p. 256.

5 See CHAPPELET J., VERSCHUUREN P., *ibid* discussing initial laws in Great Britain (Gaming Act of 1845 and Betting Act of 1853) followed by Switzerland and Italy – at pp. 431 and 432.

6 In *Murphy* v. *National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018) where the Supreme Court of the United States of America held that federal law which had banned such betting since 1992 would be overturned – see LIPTAK A., DRAPER K., "Supreme Court ruling favors sports betting", *New York Times*, May 14 2018 available at https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey. html (March 25, 2023); see also RUIHLEY, B. J., BILLINGS, A. C., & BUZZELLI, N., "A Swiftly Changing Tide: Fantasy Sport, Gambling, and Alternative Forms of Participation", 16(6) *Games and Culture* 2021, 681-701.

7 UNODC Global Corruption Report, at p. 256.

8 Section 193N of the New South Wales Crimes Act, 1900, with the term 'corruption of a betting outcome' defined under section 193H – see ORDWAY C., KIHL L., "Chapter 12: Sport Integrity Australia and Match-fixing: Exploring the Work of a National Agency" in: CONSTANDT B., MANOLI A. E. ed.s, *Understanding Match-fixing in Sport: Theory and Practice* (Routledge: London) 2023, 181 at 195.

9 Under Article 3.5, see commentary to Article 3, above.

irregular and suspicious sports betting[10]. While earlier parts of Chapter II[11] deal with coordination and regulating betting behaviour (including that considered illegal, irregular or suspicious), this article focuses on the role of regulatory authorities in combating problematic betting.

6. The Explanatory Report elucidates that, along with sports organisations, the **betting regulatory authorities (or other responsible authorities) have a key role to play** in ensuring exchanges of information between sports organisations and sports betting operators, and in co-ordinating the rules governing sports betting operators as well as a duty to supervise compliance with these rules[12].

7. For this, it is emphasized that **certain functions must be exercised only by public authorities,** i.e., the coordinated enforcement of certain preventative measures by all the sports betting operators should be ensured by a public authority. Further, it is highlighted that the co-ordination of some exchanges of information, in compliance with the relevant national and international personal data protection laws and standards, as set out in Article 14 along with other articles[13] of the Macolin Convention and in preserving the legitimate interest of both the sports betting operators and sports organisations, should be fulfilled by a neutral person or institution[14].

II. Contents of Article 9

A. Measures to be taken by betting regulating authorities

8. Article 9.1 of the Macolin Convention **obliges the concerned competent authorities in a jurisdiction which are responsible for implementing sports betting regulations, to implement certain**

[10] See Article 3.5.1, 3.5.2 and 3.5.3 respectively, as well as the commentary to Article 3 above.

[11] Article 4 on coordination domestically including with betting operators, and Article 7 advising prohibiting of betting on one's own competition.

[12] Explanatory Report, para 95.

[13] See commentary to Article 14 above, as well a requirement for exchange of information under Part II of Chapter II.

[14] Explanatory Report, para 95.

measures where appropriate, being those referred to in an inclusive list as described below[15].

9. As noted above, **such authority being a public institution is deemed desirable**. In general, the term used – "regulatory authority" – would refer to a public authority or more than one such authority being tasked by law with contributing to the provision of a service and to the proper functioning of a market involving in general multiple suppliers for the benefit of consumers[16].

10. For the purposes of this article in the Macolin Convention a **"regulatory authority" is utilized as a generic term to mean the authority responsible for the sports betting market**. The Explanatory Report emphasizes that the indirect reference to a market model involving several suppliers should not be misleading, as the Macolin Convention was intended to be applied whatever the organisational structure of the market, and does not purport to express an opinion for or against opening up the betting market to competition. Such authority could just as well be the supervisory authority for that state's lottery operating in a monopoly market, or the authority responsible for monitoring activities in cases where a ban is in place[17].

11. **Examples of such authorities** present across countries include, in Switzerland, the Swiss Gambling Supervisory Authority[18]. Sport Integrity Australia also administers the Australian Sports Wagering Scheme, which consults with wagering (betting) stakeholders, including wagering service providers[19]. In the United Kingdom the Sports Betting Intelligence Unit, created by the National Gambling Commission, coordinates information received from betting operators, corroborates this with independent

15 Explanatory Report, para 95.

16 Explanatory Report, para 96.

17 Explanatory Report, para 96.

18 See information available at https://www.gespa.ch/en (March 20, 2023) – under the Swiss Federal Constitution (Article 106 of the Federation Constitution), legislation on gambling is the confederation's responsibility and the Federal Gambling Act assigned GESPA to be the national platform as well as the authority controlling betting activity.

19 See "Sport Wagering", available at https://www.sportintegrity.gov.au/what-we-do/sports-wagering (March 23, 2023); also of note is that in Australia, different states have allocated different bodies as those that might control betting such as the Victorian Gambling and Casino Control Commission (available at https://www.vgccc.vic.gov.au/ [March 23, 2023]).

intelligence and follows a matter through prosecution for criminal sanction or other action[20].

12. As stated in the Explanatory Report, such **authorities do not define the policy or sports betting market regulations**, such as opening up the market, but are responsible for co-ordinating its implementation. It should be for each state to decide how supervisory duties of the manipulation of the sport competitions are carried out. Moreover, several authorities may co-exist within the same Party in cases where the sports betting market is organised at the level of federated entities of a federal state or if responsibilities are divided between several authorities[21].

1. Exchange of Information

13. Article 9.1.a states that **measures to be taken shall include the exchange of information, in a timely manner, with and between other competent authorities or a national platform** relating to illegal, irregular or suspicious sports betting and other infringements of the regulations established in accordance with the present convention[22]. The exchange of information is considered one of the main features of the Macolin Convention[23], particularly significant in betting related manipulation[24]. The commentary to Article 12 of the Macolin Convention addresses in detail the exchange of information as envisioned under the Macolin Convention[25]. A general obligation, specific to illegal betting, is placed upon parties to explore ways to develop and enhance cooperation for this purpose[26].

14. The Explanatory Report states that while this provision establishes the principle of the introduction of exchanges of information, the regulatory authority or the other responsible authority or authorities are

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20 'The Gambling Commission's Betting Industry Decision Making Framework', *Gambling Commission*, (London, 2013), available at www.gamblingcommission.gov.uk/pdf/Betting%20integrity%20decision%20making%20framework.pdf (March 24, 2023).

21 Explanatory Report, para 96.

22 Article 9.1.a, Macolin Convention.

23 See Explanatory Report, para 18.

24 Explanatory Report, para 21.

25 See commentary to Article 12 of the Macolin Convention; see also details present under Explanatory Report, paras 112 – 116.

26 Article 12.3, Macolin Convention, and Explanatory Report, para 115.

competent to determine, on a case-by-case basis, whether such exchanges are appropriate and the type of information to be provided[27].

2. Limiting Supply of Sports Betting

15. Article 9.1.b refers to the **limitation, where appropriate, of the supply of sports betting as a relevant measure to combat the manipulation** of sports competitions in relation to sports betting[28].

16. This provision states that, in particular, sports competitions which are designed for those **under the age of 18** or where the organisational conditions and/or **stakes in sporting terms are inadequate** should not be subject to sports betting[29]. The Explanatory Report, by way of brief context in this regard, notes that during the drafting process it was underlined that offering bets on competitions in which mostly under 18s participate exposes them to the risks of being approached for manipulation[30].

17. The expression "where the **organisational conditions and/or stakes in sporting terms are inadequate**" encompasses non-official competitions such as friendly matches with no impact on rankings, or of little interest in sporting terms, therefore nothing at stake, making these competitions easy to manipulate[31]. As seen above, the instances of manipulation in areas more likely to pass under the radar have been documented[32].

18. While the Convention Follow-up Committee may specify criteria for this limitation in a recommendation to the Parties of this convention, it is also clarified in the Explanatory Report that any such limitations are

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27 Explanatory Report, para 97.

28 Article 9.1.b, Macolin Convention.

29 Article 9.1.b, Macolin convention.

30 Explanatory Report, para 98; see, for example, "Youth Football Dogged with Suspicious Betting Activity in 2018", *iGaming Business*, 2019, available at https://www.statsperform.com/news/youth-football-dogged-by-suspicious-betting-activity-in-2018/ (March 23, 2023).

31 Explanatory Report, para 98.

32 See, WARSHAW A., OECD Survey fins football riddles with match-fixing and little being done, http://www.insideworldfootball.com/2016/05/11/oecd-survey-finds-football-riddled-match-fixing-little-done/ (March 23, 2023); see also, for instance, in women's football as described in WIGMORE T., "*Corruption fears in women's football as suspicious betting patterns surge*", The Telegraph (2019) https://www.telegraph.co.uk/football/2019/08/19/corruption-fears-womens-football-suspicious-betting-patterns/ (March 23, 2023).

expected to take effect following consultation with the national sports organisations and sports betting operators[33].

3. Information on Sport Betting Products

19. Article 9.1.c states that competition organisers **should be provided in advance with information about the types and the objects of sports betting products** in order to identify and manage the risks of sports manipulation within that particular sporting competition[34].

20. The Explanatory Report specifies that such information includes, in principle, the operator of the betting, as well as the type and object of the bets offered. It **does not include information about the amounts, the transactions, the total value of the bets or the identity of the consumers**[35]. The way in which information is to be provided to competition organisers may be decided by the regulatory authority or the other responsible authority or authorities[36].

21. The purpose of such information is to **support the efforts of competition organisers to identify and manage the risks of manipulation of sports competitions they organise**, in particular when these risks are identified within the risk assessment referred to in Article 5.1[37]. It allows, for example, competition organisers or sports organisations to put in place effective arrangements for supervising the course of the competition and, where appropriate, to establish a connection between unusual behaviour during a game and any bets that might have been offered on the competition in question[38].

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33 Explanatory Report, para 98.

34 Article 9.1.c, Macolin Convention.

35 The concerns around protection of data in such instances of exchange of information has been discussed in the commentary to Article 14, as well as noted by the Macolin Convention in the context of Article 12 on Exchange of Information – see Explanatory Report, para 116.

36 Explanatory Report, para 99.

37 See commentary to Article 5 dealing with assessment of risk, above.

38 Explanatory Report, para 99.

4. Financial Flow Thresholds

22. Article 9.1.d refers to measures that should be taken to ensure the **systematic use of traceable means of payment for financial flows above a certain threshold**, to be set by each party to the Macolin Convention[39].

23. The **advantages of having this traceability** include allowing for the identification of the senders, recipients and the amounts of these flows, which can, in turn, be important in cases where there is an investigation, whether in combating the manipulation of sports competitions or with regard to the fight against money laundering or other fraudulent activity[40].

24. This **significance of this provision** needs to be understood in the context of both the rapid expansion of the global sports betting market and the involvement of elements that increase the amounts involved including access to betting, larger geographical spread, as well as, and importantly, the nexus of betting in sport with transnational organized crime that have substantially increased the threat of betting-related match-fixing[41]. While impossible to demarcate exactly for want of transparency, the total turnover of illegal sports betting was estimated at as high as $500 billion per year[42].

5. Betting on Certain Competitions

25. Under Article 9.1.e, the Macolin Convention provides that the responsible authority or authorities within a jurisdiction should also provide for appropriate mechanisms, in co-operation with sports organisations, and, where appropriate, between sports organisations and sports betting operators, **to prevent competition stakeholders from betting on competitions in which they themselves are taking part**[43].

26. The **rule prohibiting competition stakeholders from betting on their own competitions should be enshrined at disciplinary level** by

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39 Article 9.1.d, Macolin Convention.

40 Explanatory Report, para 100.

41 See, for example, VAN ROMPUY B., "The role of the betting industry", *Global Corruption Report: Sport, Transparency International* available at https://www.transparency.org/files/content/feature/4.2_RoleBettingIndustry_VanRompuy_GCRSport.pdf (March 25, 2023).

42 *Ibid*., citing the Université Paris I Panthéon-Sorbonne and ICSS, Fighting Against the Manipulation of Sports Competitions (2014).

43 Article 9.1.e, Macolin Convention.

sports organisations, as is advocated within Article 7 of the Macolin Convention[44], as well as discussed in Article 10.1 below in terms of restrictions on betting operators[45], in addition to this section. It is emphasized however, that ensuring compliance with this sub-article is not a task for sports organisations alone, but every party has a certain amount of freedom to make their own arrangements[46].

27. An example, in addition to those seen in the commentary's prior sections above, is the Federation Internationale de Football Associations' ("FIFA") Code of Ethics, where strict regulations on participation in, directly or indirectly, betting, gambling, lotteries or similar events or transactions related to football matches or competitions and/or any related football activities have been introduced; sanctions for violation include heavy fines and bans for a up to a maximum of three years[47]. Similar regulations exist within the IOC's Olympic Movement Code on the Prevention of Manipulation of Competitions[48] and in regulations applicable to its events, for example, where no accredited is to bet on any Olympic events, or share inside information or, of course, manipulate a competition[49].

6. Suspension of Betting

28. Article 9.1.f states that **betting, in respect of which an appropriate alert has been issued, may be suspended**[50], that is to say, no further bets may be accepted on the object in question. The competent authority in a jurisdiction may delegate the management of alerts to a specialised unit[51].

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44 See commentary to Article 7.1.a, where the prevention of manipulation through ensuring regulations provide that conflicts in interest when competitions are bet on are avoided.

45 See commentary to Article 10.1 and its subparts below.

46 Explanatory Report, para 101.

47 Article 26 of the FIFA Code of Ethics, 2019.

48 Article 2.1 which defines betting in relation to a participant's own sport or one that is part of a multisport event they are accredited to, as a violation of the code.

49 See, for example Article 8 of the IOC Code of Ethics with the IOC Code of Conduct and Believe in Sport Toolbox for Tokyo 2020 – available at https://olympics.com/ioc/news/protec ting-sport-s-integrity-at-tokyo-2020 (September 20, 2023).

50 Article 9.1.f, Macolin Convention.

51 Explanatory Report, para 102.

29. The Explanatory Report highlights that there is a **limitation of the wording** of Article 9.1.f is, that it does not specify whether bets placed earlier on the same object should be able to be declared void or should stand. It would hence be for each party to determine what the procedure should be in such cases, depending on the applicable law[52]. The wording, however, does imply that such suspension must be in accordance with domestic law (i.e. keeping with the principle of *nullum crimen, nulla poena sine lege scripta et certa*[53]). When this is, in turn, seen with the objective that manipulation offences warrant effective sanctions[54], care must be taken that the concept of legal certainty is not compromised[55].

30. Finally, in this sub-article, the **reference to an "appropriate" alert** is said to imply that every alert and type of alert generated would not necessarily lead to the automatic suspension of betting. It would be up to the parties to define which alerts may trigger this mechanism[56].

B. Communication with the Secretary General

31. Under Article 9.1, the Macolin Convention requires parties to the convention to **communicate to the Secretary General the names and addresses of the betting regulatory authority** that has been designated or the names of other responsible authority or authorities[57].

32. The Explanatory Report specifies that according to the ordinarily followed practice on such notifications, **parties to the Macolin Convention are expected to notify this information**, by means of a declaration addressed to the Secretary General of the Council of Europe, at the time of signature or when depositing its instrument of ratification,

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52 Explanatory Report, para 102.

53 See, section II.A.1.1 under the commentary to Article 22, below; see also, for example, TIMMERMAN M., "Legality in Europe: on the principle "*nullum crimen, nulla poena sine lege*" in EU law and under the ECHR", Doctoral Dissertation, European University Institute, Department of Law, 2018. See also, DIACONU M., KUWELKAR S., KUHN A., "The Court of Arbitration for Sport Jurisprudence on Match-fixing", 21 *International Sports Law Journal* 2021, 27 under the section 8 on 'Sanctions'.

54 See discussions under Articles 7, 22 and 23 in this commentary which discuss why the nature of manipulation warrants 'effective and dissuasive' or, in other words, 'deterrent' sanctions.

55 See section II.B.1 under the commentary to Article 22.

56 Explanatory Report, para 102.

57 Article 9.2, Macolin Convention

acceptance or approval. They subsequently may, at any time and in the same manner, change the terms of their declaration[58].

[58] Explanatory Report, para 103.

Article 10

by

Surbhi KUWELKER

Article 10 – Sports Betting Operators

1 Each Party shall adopt such legislative or other measures as may be necessary to prevent conflicts of interest and misuse of inside information by natural or legal persons involved in providing sports betting products, in particular through restrictions on:

a natural or legal persons involved in providing sports betting products betting on their own products;

b the abuse of a position as sponsor or part-owner of a sports organisation to facilitate the manipulation of a sports competition or to misuse inside information;

c competition stakeholders being involved in compiling betting odds for the competition in which they are involved;

d any sports betting operator who controls a competition organiser or stakeholder, as well as any sports betting operator who is controlled by such a competition organiser or stakeholder, offering bets on the competition in which this competition organiser or stakeholder is involved.

2 Each Party shall encourage its sports betting operators, and through them, the international organisations of sports betting operators, to raise awareness among their owners and employees of the consequences of and the fight against manipulation of sports competitions, through education, training and the dissemination of information.

3 Each Party shall adopt such legislative or other measures as may be necessary to oblige sports betting operators to report irregular or suspicious betting without delay to the betting regulatory authority, the other responsible authority or authorities, or the national platform.

I. Introduction and Purpose of Article 10

1. Article 10 provides for **requirements that parties to the Macolin Convention should lay down for sports betting operators**. As noted also in the Explanatory Report, the requirements laid down in this article are very similar to those used for sports organizations earlier in the Macolin Convention[1].

2. Section I above in the commentary to Article 9, as well as the commentary to the Preamble, have discussed in detail the nexus between betting and manipulation that necessitates specific focus on betting operators[2].

II. Content of Article 10

A. Conflicts of Interest

3. Akin to Article 9.1.e above[3], Article 10.1 **addresses the need to prevent conflicts of interest and misuse of inside information by any natural or legal persons involved in providing betting products**[4]. Specifically, it calls on parties to the Macolin Convention to place restrictions on four different categories of activities:

1. persons involved in providing sports betting products betting on their own products (Article 10.1.a);
2. abuse of a position as sponsor or part-owner of a sports organisation to facilitate the manipulation of a sports competition or to misuse inside information (Article 10.1.b);
3. a competition stakeholder being involved in compiling betting odds for the competition they are involved in (Article 10.1.c);
4. the offering of bets on a competition in which the sports betting operator controls the competition organiser or one of the competition stakeholders or is itself controlled by a competition organiser or a competition stakeholder (Article 10.1.d).

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1 Explanatory Report, para 104; see requirements recommended for sports organizations under the commentary to Article 7.

2 See commentary to Article 9.1.a as well as to the Preamble, above.

3 In addition to other sections of the Macolin Convention when applied to sports organizations, for instance – see commentary to Article 7.1.a above.

4 Article 10.1, Macolin Convention.

4. The Explanatory Report stated that it should be noted that while Article 10.1.b does not introduce a ban on sports sponsorship by sports betting operators[5], it does, however, highlight a **risk of conflict of interest** which needs to be recognised by the competent authorities and punished in cases where an abuse has occurred. Such risks are identified as including use of privileged position as sponsors to provide an advantage over customers or looking to influence the course of competitions[6].

5. The Explanatory Report relies on the **generally accepted definition of 'conflict of interest'** which refers to a situation in which a person has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of their official duties[7]. A person's private interest includes any advantage to themselves or to their family, close relatives, friends and persons or organisations with whom they have or had business or political relations. It would also include any liability, whether financial or civil, relating thereto[8]. Such a definition is said to be able to be used as a reference when interpreting the concept of conflict of interest[9].

6. **Even within the European Union, it is only a limited number of countries, that have such legislation**[10] - few impose a betting ban for the operators' owners and employees due to management of potential conflicts of interest, and due to data being more scarcely available the betting industry's side. While in some cases this betting ban applies solely to those directly involved in the development of the (sports) betting offering (in the Czech Republic, Italy and Sweden, for instance), in other

5 Recommended as means to counter illegal betting under Article 11.1.c, discussed below in the commentary to Article 11.

6 Explanatory Report, para 105.

7 Explanatory Report, para 106.

8 Explanatory Report, para 106.

9 Explanatory Report, para 107, were the concept is borrowed from is Recommendation No. R(2000)10 of the Committee of Ministers of the Council of Europe to member States on codes of conduct for public officials.

10 See VAN ROMPUY B., "The role of the betting industry", *Global Corruption Report: Sport, Transparency International* available at https://www.transparency.org/files/content/feature/4.2_RoleBettingIndustry_VanRompuy_GCRSport.pdf (March 25, 2023) where at the time of publication, only eight such countries had been identified.

member states the ban extends to participation via third persons such as close relatives (such as France, Hungary and Spain)[11].

B. Raising Awareness and Reporting Requirements

7. Under Article 10.2.2, the Macolin Convention requires the Parties to encourage sports betting operators, and through them international organisations of sports betting operators, to introduce **programmes to raise awareness among owners and employees** of the consequences of and the fight against manipulation of sports competitions, through education, training and the dissemination of information[12].

8. Under Article 10.3, the Macolin Convention recommends that parties adopt such measures as may be necessary to oblige sports betting operators to **report irregular or suspicious sports betting** to the betting regulatory authority, the other responsible authority or authorities and/or the national platform[13]. Certain laws in certain jurisdictions such as Switzerland can be seen to have required reporting to bodies federally responsible for regulating betting activities[14], as well as required such bodies to publish reports on betting activities found over certain time periods[15].

9. Finally, it is also clarified that the provisions of the Macolin Convention **cannot commit national public authorities to cooperate** (e.g. exchange information) with organisations which are considered as illegal[16].

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11 *Ibid*., citing work in "Study on Risk Assessment and Management and Prevention of Conflicts of Interest in the Prevention and Fight against Betting-Related Match Fixing in the EU 28", *T.M.C. Asser Instituut,* (The Hague: T.M.C. Asser Instituut, 2014).

12 Article 10.2 and Explanatory Report, para 108.

13 Article 10.3, Macolin Convention.

14 Under Article 64 of the Swiss Federal Act on Gambling, 2019, there are obligations both on the two Swiss Lotteries (Swisslos and Loterie Romande) as well as sports association organizing sports to report any manipulation based on betting on during their organized events respectively to GESPA, the national platform in Switzerland.

15 An example of this is GESPA in Switzerland, see "Competition Manipulation – National Platform Annual Review 2022" GESPA (May 4, 2023) available at https://www.gespa.ch/en/news (September 23, 2023).

16 Explanatory Report, para 109.

Article 11

by

Surbhi KUWELKER

Article 11 – The fight against illegal sports betting

[1] With a view to combating the manipulation of sports competitions, each Party shall explore the most appropriate means to fight operators of illegal sports betting and shall consider adopting measures, in accordance with the applicable law of the relevant jurisdiction, such as:

a closure or direct and indirect restriction of access to illegal remote sports betting operators, and closure of illegal land-based sports betting operators in the Party's jurisdiction;

b blocking of financial flows between illegal sports betting operators and consumers;

c prohibition of advertising for illegal sports betting operators;

d raising of consumers' awareness of the risks associated with illegal sports betting.

I. Introduction and Purpose of Article 11

1. Illegal sports betting is defined under the Macolin Convention as "**sports betting activity whose type or operator is not allowed under the applicable law of the jurisdiction where the consumer is located**."[1] The global market of illegal betting is estimated to be in the trillions of US dollars[2]. This market has intersections with activities including money-laundering, organized crime groups, as well as newer modes of money

[1] Article 3.5.1, Macolin Convention.

[2] According to statistics published by the Asian Racing Federation, also quoted in the UNODC Global Corruption Report, 2021, which pegs the total value to be almost a trillion US dollars – see "Illegal bets add up to 1.7 trillion dollars each year: new UN report", available at https://news.un.org/en/story/2021/12/1107472 (March 23, 2023).

transfer such as cryptocurrency markets[3]. Geographically, as well as value wise, a large amount of such betting originates and is focused in Asia[4].

2. **Illegal sports betting operators represent a threat** in the area of manipulation of sports competitions, because they may operate without any control and may not co-operate with the sports movement[5]. This is particularly an issue in the case of online betting operators licensed in one jurisdiction but operating across several[6]. In addition, sports betting operators whose activities are illegal under the applicable law of the jurisdiction where their customers are located may be unwilling to share information highlighting the illegal nature of their activity[7].

3. These two issues together complicate the ability of state regulatory authorities and sports organisations to combat manipulation effectively, which, in turn, makes identifying all the sports competitions which might be endangered through match-fixing difficult and means they do not have full access to information about this illegal segment of the betting market[8].

4. Article 11 hence seeks to **encourage the parties to address, through the most suitable possible means, how they should deal with illegal betting operators, in accordance with the applicable law**[9].

II. Content of Article 11

5. The Explanatory Report clarifies for the purposes of Article 11, which encourages the establishment of measures to deal with illegal betting operators, that such measures shall be **defined, where appropriate, by each Party, in accordance with the applicable law**[10]. The various

3 See UNODC Global Corruption Report, 2021 at p. 259 and 260.

4 See VAN ROMPUY B., "The role of the betting industry", *Global Corruption Report: Sport, Transparency International* available at https://www.transparency.org/files/content/feature/4.2_RoleBettingIndustry_VanRompuy_GCRSport.pdf (March 25, 2023); see also UNODC Global Corruption Report, at p. 261.

5 Explanatory Report, para 110; see also UNODC Global Corruption Report, 2021, at p. 258, which highlights that such means are often used by transnational crime organizations to make proceeds of crime appear to be betting profits legally won, citing the example of Italian action against a large network of betting shops, sites and companies across Austria, Malta, Romania and Spain – *ibid*.

6 UNODC Global Corruption Report, 2021, at p. 257 and 258.

7 Explanatory Report, para 110.

8 Explanatory Report, para 110.

9 Article 11, Macolin Convention.

10 Explanatory Report, para 111.

suggested methods, which are listed inclusively in the article, are discussed below.

A. Closure or Restriction of Access

6. Under Article 11.1.a, the Macolin Convention provides that parties may explore various direct and indirect ways of **restricting access to physical and online operators**[11].

7. Examples of this provided in the Explanatory Report include closing down operators, forcing them to operate lawfully or blocking access to their websites[12]. **Licensing and restriction on activities remain a key way of distinguishing legal from illegal operators within betting**. Numerous countries include licensing regimes for this purpose under their applicable law, including Australia[13], and non-signatories such as Malta[14] and Austria[15], such regimes can be related to specific aspects of illegal gambling[16], as well to specific national bodies through whom betting may be channelized[17]. There has also been restriction of access by countries,

11 Article 11.1.a, Macolin Convention.

12 Explanatory Report, para 111.

13 Under the Interactive Gambling Act 2001 – further to the provisions of this act, states and territories individually regulate online gambling in their respective jurisdictions.

14 Malta has a three-tier framework of gambling legislation based on the Gaming Act, 2018, regulations published by the ministry responsible for gaming and directives for licensees and rules published by the Malta Gaming Authority.

15 Licensing operates at a federal level for each state with each differing substantially, needing operators to gain licenses per territory with no law at the time of writing for online betting, resulting in national and international betting providers operating with licenses issued in countries such as Malta and Austrian providers also providing illegal betting offerings – MORITZER S., NEUDECKER N., HALLMAN K., "A National Approach against Match-fixing: The Case of Austria" in: CONSTANDT B., MANOLI A. E. ed.s, *Understanding Match-fixing in Sport: Theory and Practice* (Routledge: London) 2023, 209 at 217.

16 In the United Kingdom, for example, the Gambling Commission has instituted guidelines for licence applicants with regard to the use of crypto-assets and blockchain technology as a currency for gambling or to fund a gambling business.

17 Singapore Pools is an example in a licensed betting house in Singapore for lotteries, horse racing and football related betting – WINSLOW M., CHEOK C., SUBRAMANIAM M., "Gambling in Singapore: An Overview of History, Research, Treatment and Policy: Overview of Gambling in Singapore", 110 *Addiction* 2015, 1383 at 1383, as also cited in HESSERT B., GOH C. L., "A Comparitive Case Study of Match-fixing Laws in Singapore, Australia, Germany and Switzerland", 17 *Asian Journal of Comparative Law* 2022, 286 at 292.

such as in Switzerland, or federal bodies to the domain names and websites of betting operators[18].

B. Blocking Financial Flow

8. Article 11.1.b suggests that parties may consider **blocking financial flows between illegal sports betting operators and consumers**[19].

9. A prominent example of this is the United States of America's Wire Act, 1961, which prohibits sports betting from occurring across state lines by making the transmission of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers and information assisting in the placing of bets and wagers offences punishable with a fine and imprisonment[20].

C. Prohibition on Advertising

10. Article 11.1.c recommends that parties consider **prohibiting advertising for illegal operators**[21]. Betting amounts to a very high percentage of the sponsors involved in sports and remains very visible among sports sponsors across various sports[22]. Thus, measures aimed at

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18 GESPA and the Federal Gaming Board in Switzerland have mandates to publish lists of blocked domain names where unlicensed betting activities are offered, which internet service providers are required to block – available at https://www.gespa.ch/en/fighting-illegal-gambling/access-blocking#:~:text=Gespa%20and%20the%20Federal%20Gaming,these%20domains%20(DNS%20blocking) (September 24, 2023).

19 Article 11.1.b, Macolin Convention.

20 18 US Code 1084 – Transmission of Wagering Information; penalties, sub-section (a).

21 Article 11.1.c, Macolin Convention.

22 DIXON, E., "Study: Gambling main shirt sponsorships rebound despite potential ban", August 4, 2022 available at https://www.sportspromedia.com/news/betting-gambling-shirt-sponsorship-soccer-football-cricket-rugby-ban-caytoo/?zephr_sso_ott=JoqBIu (March 23, 2023), wherein intelligence firm Caytoo's figures that 9.2% of all sponsorship rights across shirts worn by players in cricket, rugby and football in England were purchased by betting companies. This is second to automobile and just above retail sectors as sponsors. See also Rackham A, "Gambling: Who are the betting firms sponsoring your team?", BBC, March 14, 2023 available at https://www.bbc.com/news/entertainment-arts-64662006 (March 23, 2023).

curbing this would ostensibly impact the prevalence of betting on sport significantly.

11. A move toward **curbing the ability to conclude such sponsorship deals with betting companies** has already been introduced in certain countries, such as in Belgium[23]; albeit in a staggered manner, concluding finally with restriction on team sponsorship. In other nations, such as France, betting operators are to notify the regulator of sponsorship agreements concluded with organisers of sports events or their participants. The regulator then scrutinises the agreement to see whether it might conceal an indirect form of control by one party over the other[24]. Also of note is applicable Swiss law whereunder advertising for commercial offering of games of chance is disallowed if done obtrusively, made to minors or other prohibited persons, as well as of unlicensed games[25].

D. Raising Consumer Awareness

12. Finally, under Article 11.1.d, the Macolin Convention recommends that parties consider introducing measures to **raise consumers' awareness of the risks** associated with illegal sports betting[26].

13. Efforts in this regard, in addition to those mentioned in earlier parts of the commentary[27], include those in specific federations, such as Federation Internationale de Football Associations[28], as well as top down efforts from the IOC[29]. Finally, bodies connected to sport where there is a high incidence of such betting activity, including the Asian Racing

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23 The law would disallow advertising in media, print, television and online starting in June 2023, followed by stadiums in January 2025, and concluding with teams in January 2028 – see Strauss M., "Belgium bans gambling advertising from July 1", Reuters, March 9, 2023 https://www.reuters.com/world/europe/belgium-bans-gambling-advertising-july-1-2023-03-09/ (March 23, 2023).

24 VAN ROMPUY, *supra* note 4, citing T.M.C. Asser Instituut, 2014 at pp. 32–33.

25 Fines of up to CHF 5 million could be levied – see Articles 74 and 131 of the Gambling Act.

26 Article 11.1.d, Macolin Convention.

27 See examples discussed in Article 6, including from federations such as FINA, FEI and FIVB.

28 See https://www.fifa.com/legal/integrity/e-learning (March 23, 2023) open to all persons interested in football.

29 The IOC established in 2011, their Working Group on Irregular and Illegal Betting in Sport to strengthen cooperation on corruption between sports organizations, governments and betting agencies, with a focus on action in the areas of education among other aspects.

Federation[30] and International Tennis Integrity Agency[31], have their own sets of measures to tackle such activity, including the publication of best practice handbooks, setting up of bodies for monitoring and regular publication of reports[32].

[30] In 2021, Asian Racing Federation related to horse racing published Good Practices in Addressing Illegal Betting: A Handbook for Horse Racing and Other Sports to Uphold Integrity, see point 2.9, at p. 9.

[31] See "Tennis Integrity Unit delivers first combined anti-corruption and anti-doping education in preparation for Return to Tennis", available at https://www.itia.tennis/ news/press-releases/tennis-integrity-unit-delivers-first-combined-anti-corruption-and-anti-doping-educa tion-preparation-return-tennis/ (March 23, 2023).

[32] See, for example, the Asian Racing Federation's "Anti-betting and Related Financial Crime Bulletin: July 2020 to December 2022" available at https://assets-global.website-files.com/ 5fbe2bde2b2ef4841cd6639c/63e5b5efed4f5373d321ea48_Journal_final.pdf (September 24, 2023).

Article 12

by

Madalina DIACONU

Article 12 – Exchange of information between competent public authorities, sports organisations and sports betting operators

1 Without prejudice to Article 14, 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.

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.

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.

I. Purpose of Article 12

1. Article 12 aims to create a legal basis for (and facilitate) exchanges of information between all the relevant stakeholders who play a role in the fight against competition manipulation. This article is **closely linked (and serves as an introduction) to Article 13**, which announces the ground-breaking concept of interconnected national platforms.

2. As mentioned in the Explanatory Report, the fight against the manipulation of sports competitions requires **substantial exchanges of information between the relevant public authorities, including law enforcement and judicial authorities, sports organisations,**

competition organisers, sports betting operators and national platforms[1].

3. The general wording of this provision requires Parties, in compliance with the law, to **offer the maximum assistance to the other Parties** and the organisations 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[2].

4. As noted in the Explanatory Report, the wording of this article grants the Parties a **margin of discretion**. This provision does not involve a strict requirement to communicate specific types of information but provides a guide to the purpose of these exchanges[3].

II. The Contents of Article 12

A. First paragraph – the exchange of relevant information and mechanisms to ensure it

5. The first paragraph of Article 12 introduces the very principle of the exchange of information, as explained here above, defines the relevant information to be exchanged and mentions the Parties' obligations.

6. The relevant information gathered by each type of stakeholder may be useful in the undertaking of **risk assessment referred to in Article 5,** 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 (paragraph 1).

7. In this context, "relevant information" is **interpreted broadly** and could mean **any information gathered by a stakeholder which may be of interest to another stakeholder** due its involvement in the fight against the manipulation of sports competitions. Such information may, for instance, be the **volume of bets** registered for a particular competition, an **unusual change in odds or the geographical location of persons placing**

1 Explanatory Report, at 112.
2 Explanatory Report, at 112.
3 Explanatory Report, at 112.

irregular bets. It may also include **rumours** about manipulation received from a competition. The stakeholders may give consideration to jointly defining the type of such relevant information[4].

8. Under Article 12, the Parties undertake to facilitate such exchanges of information and overall co-operation between the stakeholders involved, **in compliance with the domestic legislation**. The latter naturally includes domestic law resulting from the implementation of international legal instruments and, where appropriate, the directly applicable provisions of international treaties. In particular, the standards relating to the **protection of personal data and the confidentiality of investigations** must be taken into account[5].

9. Accordingly, several countries have made adjustments to their legislation in order to facilitate information exchange, either within or outside the scope of a national platform. For example, **Norway** has granted the necessary exemptions from its relevant data protection laws to let its national platform function adequately[6]. In **France**, the bill concerning, among other things, the national platform foresees exemptions regarding professional secrecy for members of the platform. However, it will still be forbidden to share information or documents falling under confidentiality of investigations in that context.

10. In other states, information sharing is **possible outside the framework of a national platform**. For example, **Belgian** law provides that the public prosecutor's office may decide on the notification or the issue of a copy of investigative and judicial documents in disciplinary matters or for administrative purposes[7].

11. **Italy and Switzerland** have even taken it a step further by creating legislation which imposes on sports organisations the obligation to report instances of match manipulation to public authorities, even though they were not asked to provide that information[8].

12. The Swiss legislation is of particular importance because **the afore-mentioned obligation is incumbent to all sports organisations**

4 For the entire paragraph, see Explanatory Report, at 113.

5 Explanatory Report, at 112.

6 See VANDERCRUYSSEL L., VERMEERSCH A., VANDER BEKEN T., *Macolin and beyond: legal and regulatory initiatives against match manipulation*, ISLJ, 2022, https://doi.org/10.1007/s40318-021-00205-y.

7 Idem, with references.

8 Idem, with references.

seated in Switzerland, including international federations and organisations, such as the IOC, FIFA and UEFA, who are required to report suspicions of match manipulation to the intercantonal authority (Gespa), which functions as the Swiss national platform[9]. For example, in 2020, the FIFA reported to Gespa 41 cases of suspicious events, while the UEFA reported 4 such events[10].

13. Specifically, according to **Article 64(2) of the Swiss Gambling Act**[11], sports associations and organisations based in Switzerland that organize, conduct, or supervise a sports event or participate in it are obliged to report any suspicion of manipulation to Gespa, provided the event takes place in Switzerland or bets are offered on it in Switzerland. Equally, the two Swiss lottery companies (Swisslos & Loterie Romande) are legally obliged to inform Gespa about suspected manipulation in connection with sports competitions on which they offer bets (Art. 64(1) Gambling Act). Depending on the case at hand, Gespa will forward reports to law enforcement or other authorities, lottery companies, sports organisations and reporting offices abroad, in accordance with legal requirements.

B. Second paragraph – follow-up

14. Paragraph 2 of Article 12 embodies the principle of reciprocity by providing that, upon request, the authority or organisation which receives relevant information must inform the organisation which shared the information of the follow-up to the communication. Domestic legislation may, however, impose **restrictions**. For instance, a prosecutor investigating a criminal case on the basis of information communicated by private organisations would not be able to pass on certain information about the case to these organisations, due to the investigation or prosecution confidentiality[12].

9 See https://www.gespa.ch/fr/lutte-contre-les-activites-illegales/manipulations-de-competitions (12/07/2022).

10 Gespa, Manipulation of sports competitions –national platform annual review 2020, p. 2, available at gespa.ch.

11 RS 935.51.

12 Explanatory Report, at 114.

C. Third Paragraph – possible extension to the fight against illegal betting

15. The third paragraph of Article 12 aims to **open the door for creating a similar mechanism of exchange of information insofar as illegal sports betting is concerned**.

16. In this respect, Parties are required to explore possible ways of developing or enhancing co-operation and exchange of information in their (parallel) fight against illegal sports betting, as set out in Article 11 of the Convention. In practice, several national platforms (which will be presented in detail in the next chapter concerning Article 13) already provide the basis of such an extended exchange, given the close link between sports betting and the risk of manipulation of the respective competitions.

Article 13

by

Madalina DIACONU

Article 13 – National platform

1 Each Party shall identify a national platform addressing manipulation of sports competitions. The national platform shall, in accordance with domestic law, inter alia:

a. 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;

b. co-ordinate the fight against the manipulation of sports competitions;

c. 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;

d. 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;

e. co-operate with all organisations and relevant authorities at national and international levels, including national platforms of other States.

2 Each Party shall communicate to the Secretary General of the Council of Europe the name and addresses of the national platform.

I. Purpose of Article 13

1. Article 13 contains one of the main keys to understanding the Convention's architecture and aims. It also arguably embodies **the most prominent and useful tool in the global fight** against competition manipulation, i.e., national platforms.

2. The purpose of this article is, firstly, to provide for the creation or identification, by each Party, of a **national platform** responsible for the fight against the manipulation of sports competitions, with large tasks and

prerogatives. Secondly and importantly, such platforms are aimed to be, to a certain extent, **interconnected**, thus creating the concrete tools through which the fight against manipulation is expected to take its substance.

II. The Advent of Article 13

3. The raison d'être of Article 13 (and of the entire Chapter III – Exchange of information) starts from the basic (and accurate) idea that **each stakeholder has intelligence and information of its own, which could be useful to other bodies** involved in the fight against sports manipulation.

4. For example, **law enforcement agencies** have access to criminal files and records; **sports enforcement actors** have intelligence and information on players as well as special knowledge about the specificities of their sport; and **betting regulators** have expertise in the betting industry, including an understanding of sophisticated data. Furthermore, each of these actors has its own information collection toolkits. Law enforcement can wire-tap phones or computers, make searches and arrests; sports authorities can oblige their affiliates to "spontaneously" provide their telecommunication and data storage devices and can hear witnesses in more informal conditions than law enforcement agencies; and supervisors of betting operators can monitor and analyze significant amounts of data. For obvious reasons, increased sharing of information, know-how, and tools are in the best interest of the integrity of sport[1].

5. It thus made perfect sense to **centralize such knowledge and toolkits** at a national level and to provide for **close cooperation** between such bodies at an international level, including the exchange of information, experience, and expertise and allowing for the prevention, investigation, and prosecution of competition manipulation offences.

III. The Contents of Article 13

6. Article 13 comprises two paragraphs. The first, which is larger, lists the purposes and tasks of the National Platforms, ranging from

[1] For the entire para., see HENZELIN M., PALERMO G., MAYR T., *Why 'national platforms' are the cornerstone in the fight against match-fixing in sport: the Macolin Convention*, LawInSport, 18 June 2018, available at https://www.lawinsport.com/ topics/item/why-national-platforms-are-the-cornerstone-in-the-fight-against-match-fixing-in-sport-the-macolin-convention (24/06/2022).

collecting, centralizing, and sharing general knowledge and data on competition manipulation, like an information hub, to cooperating with other national and international bodies in advancing the fight against competition manipulation. The second paragraph, which is much more concise, contains the obligation of each Party to communicate to the CoE the names and addresses of their respective National Platforms.

7. Article 13 also clarifies that each Party can proceed, at its discretion, with the identification/creation of the body fulfilling the function of the national platform **in accordance with its national law**, taking into account existing structures and the distribution of national administrative functions[2]. The Explanatory Report seems to firmly favor the path of creating/identifying a **public authority**, which would provide a "neutral framework for cooperation between private stakeholders from different sectors and a suitable framework for the exchange of information"[3]. Therefore, national platforms are also implicitly covered by the generic references made to "competent public authorities". However, this feature is not explicitly specified in the provisions of the Convention, so as to give the Parties a margin of discretion in identifying their platform[4].

A. First paragraph – Purposes and Tasks of National Platforms

1. Information Hub

8. The national platform serves, firstly, as an **information hub, collecting, centralizing, and disseminating information** relevant to the fight against the manipulation of sports competitions to the relevant organizations and authorities (paragraph 1.a)[5].

9. As already mentioned, the types of information which are collected and disseminated on these platforms are very wide and comprise **any information gathered by a stakeholder which may be of interest to another stakeholder** in the context of its involvement in the fight against competition manipulation. They range from the volume of bets registered for a particular competition, an unusual change in odds or the

2 Explanatory Report, at 118.
3 Idem.
4 Idem.
5 Explanatory Report, at 119.

geographical location of persons placing irregular bets, to information about criminal prosecutions and rumors about manipulation received from a competition[6].

10. Obviously, the collection and dissemination of such information may raise issues of **confidentiality of proceedings** (especially in criminal cases) and of **data protection,** which are addressed in Article 14 and in Council of Europe Convention No. 108[7].

2. Coordination

11. Insofar as the utility of National Platforms goes, the key word is coordination. The national platform is responsible for the co-ordination of the fight against the manipulation of sports competitions at national level (paragraph 1.b) and must co-operate with all organisations and relevant authorities at national and international level, including national platforms of other states (paragraph 1.e). This may include **co-ordinating the diffusion of public information**. Given the transnational nature of the risks related to the manipulation of sports competitions, it is very important for information to be exchanged **quickly between the Parties**[8].

12. Importantly, each National Platform has identified a **dedicated contact person** who will represent the first contact point for other stakeholders in issues related to competition manipulation. In practice, such persons know each other and remain in regular contact through frequent follow-up meetings, seminars, or other events, making it easier to create a network of material contacts (the so-called Macolin Community[9]) instead of an anonymous or impersonal pool group.

13. The Convention thus establishes the premises of a **solid pattern of horizontal coordination between National Platforms**, which are themselves the focal points of coordination against match-fixing at national level.

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6 Explanatory Report, at 113.

7 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108).

8 Explanatory Report, at 121.

9 https://www.coe.int/en/web/sport/contribute-to-the-improvement-of-the-mapping-of-the-actors-involved-in-the-fight-against-the-competition-manipulation (26.06.2022).

3. Information and Alerts on Bets

14. In particular, the National Platform is responsible for receiving, centralizing and analyzing information on irregular and suspicious bets placed on sports competitions taking place on the territory of the concerned Party and, where appropriate, issuing alerts (Art. 13, para. 1.c). The information may, for instance, concern the **placing of bets by a person involved in the competition or irregular or suspicious bets**[10]. Benchmarking **e-sports betting** may be included in the scope of such alerts[11].

15. This feature entails the cooperation of **betting regulatory authorities** and, ultimately, of **betting operators** themselves, which are recognized as important stakeholders in the Convention (see also comment at Art. 3).

16. To give one example, the Olympic Movement Unit PMC, via its Integrity Betting Intelligence System (IBIS) and with the assistance of several partners (including the Group of Copenhagen), monitored sports betting 24/7 on all Olympic competitions at the Beijing 2022 Olympic Games (as per the IOC's rules, all accredited persons to the Olympic Games are prohibited from betting on Olympic events[12]). The IOC monitored irregular betting patterns or suspicious betting activities that could have implied competition manipulation. By sharing such knowledge and regularly coordinating with other stakeholders, including through the dedicated National Platforms[13], the IOC used an efficient model to tackle competition manipulation during its Olympic events.

17. Finally, we note that Article 13 does not involve a strict requirement to transmit specific types of information[14]. As already pointed out, such transmission must notably comply with the applicable domestic regulations and with international regulations on data protection.

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10 Explanatory Report, at 120.

11 https://rm.coe.int/t-mc-goc-2021-list-of-decisions-1st-meeting-22nov2021-en-final/1680a4a 295 (26.06.2022).

12 See in particular IOC Code of Ethics, Article 9.

13 https://olympics.com/ioc/news/behind-the-scenes-monitoring-of-sports-betting-at-beijing-2022 (26.06.2022).

14 Explanatory Report, at 120.

4. Communication of Infringements to Stakeholders

18. Once collected, the relevant information should be communicated to public authorities, sports organizations and/or sports betting operators, in connection with possible breaches of legislation or sports regulations (Art. 13, para. 1.d). This enables such stakeholders, especially prosecutors and disciplinary sports bodies, to **investigate, prosecute and sanction possible infringements that they would have otherwise ignored or not been able to address.**

19. For example, this type of communication through national platforms allowed in 2018 for a vast police operation in Belgium, resulting in the arrest of thirteen persons, including players, as part of an investigation into match-fixing in tennis. Importantly, Belgian authorities, with the involvement of its national platform, cooperated with their Bulgarian, Dutch, French, German, Slovakian, and US counterparts in this vast operation against tennis corruption[15]. Five persons were prosecuted, and an international criminal organization was exposed[16].

5. Cooperation with other National Platforms and Authorities

20. A key feature of Article 13 is the possibility of wide horizontal cooperation between National Platforms and other authorities. This includes ongoing technical cooperation projects, such as **FLAGS**[17] (football-specific information and alert network developed with the FIFA) and the newly created Addressing Competitions' Manipulation Together (**ACT**[18]), alongside the implementation of these topics through the Draft Action Plan 2022-2025. Another project called **MotivAction** aims to motivate athletes, referees and coaches, when approached to fix a match,

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15 https://www.bbc.com/news/world-europe-44366357 (26.06.2022).

16 https://www.smh.com.au/sport/tennis/the-shady-maestro-behind-europe-s-massive-match-fixing-scandal-20190117-p50ruh.html (26.06.2022).

17 Through this project, the Council of Europe has teamed up with FIFA, Confederations, National Football Associations, INTERPOL, the Prosecutor's network and the Group of Copenhagen to create a robust information and alert network to detect and stop football match-fixing https://www.coe.int/en/web/sport/-/launch-of-the-football-local-alerts-global-strategy-flags-project (22.06.2022).

18 https://rm.coe.int/t-mc-goc-2022-4-list-of-decisions-2nd-meeting-20220408/1680a62071 (26.06.2022).

to report it to their national platform[19]. The findings of this project will be presented to all National Platforms for dissemination.

21. Again, when the information exchanged constitutes personal data, it should be processed subject to the relevant **national and international personal data protection laws and standards**, as set out in Article 14 of the Convention, in particular those defined under the Convention[20].

B. Second paragraph – Communication to the CoE

22. Paragraph 2 of Article 13 requires the Parties to communicate to the Secretary General the names and addresses of the national platform.

23. According to the practice on such notifications, Parties are expected to notify this information, by means of a declaration addressed to the Secretary General of the Council of Europe, at the time of signature or when depositing its instrument of ratification, acceptance, or approval. They subsequently may, at any time and in the same manner, change the terms of their declaration[21].

C. Detailed Mapping of National Platforms

24. As of June 2022, 17 National Platforms were operational under Article 13. While the Convention does not prescribe any particular form or legal nature for such platforms, there are some common basic recommendations for their setup and structured mechanisms. After a brief presentation of such recommendations, a few examples will be presented hereunder to illustrate the functioning of National Platforms.

1. Basic Recommendations for National Platforms

25. According to the Keep Crime Out of Sport (KCOOS) Guidebook[22], the following features should constitute the basic requirements for the setup of a national platform:

19 https://rm.coe.int/t-mc-goc-2022-4-list-of-decisions-2nd-meeting-20220408/1680a62071 (26.06.2022).
20 Explanatory Report, at 122.
21 Explanatory Report, at 123.
22 KCOOS Guidebook, December 2017, pp. 49-50.

- The national platform would become official once its existence is legalized nationally and addressed to the Secretary General of the Council of Europe.
- The Parties may choose the leading body for the national platform, taking into account existing structures and the distribution of national administrative functions.
- The Convention advises that a public authority be the leading stakeholder for ease and neutrality, although it is not a requirement, as long as the stakeholder is recognized as being in accordance with national law.
- The national platform having a legal status is important because one of the main functions according to the Convention (Article 13(b) and (c)) is to be able to collect, analyse and disseminate relevant information to public and private stakeholders alike on irregular and suspicious bets for example placed on competitions taking place on the territory of the Party, as well as, where possible, issuing alerts.

26. The KCOOS Guidelines also contain indications as to establishing a **structured mechanism** for the functioning of a national platform. Thus, in order to best proceed towards effective coordination and cooperation, countries are advised to consider the following points[23]:

- identifying the stakeholders – who sits in the National platform, regularly or spontaneously, existence of all relevant public authorities (regulatory authority, relevant ministries, etc.);
- gathering the stakeholders around a table – actually getting the stakeholders to sit together;
- giving the platform a legal status – the platform needs to be given legal status nationally or at least have the sufficient powers to execute necessary actions to tackle the manipulation of sports competitions. In order to be official under the Convention, per article 13, notification to the Council of Europe is needed with the nomination of contact points;
- identifying main priorities – need to identify main priorities nationally (betting-related? Money laundering? Serious and organised crime? Etc.);

[23] For all the KCOOS Guidelines content reproduced here, see KCOOS Guidebook, December 2017, pp. 49-50.

- gap analysis and legislative analysis – national legislation and all relevant international legislation – conducting analysis on national measures and legislation in existence on the current status;
- identifying the method of coordination and a single point of contact – the leading stakeholder may not be the same as the entity coordinating the platform. The Convention remains flexible on the entity coordinating and the method of coordination of national actors;
- identifying the leading stakeholder – the Convention does not specify a stakeholder, nor whether it needs to be public or private: it simply has to be a stakeholder recognised by national law;
- tackling coordination – how to overcome financial and human resources and engage all stakeholders regularly;
- tackling financial resources – how to optimise available resources;
- tackling human resources – how to optimise available resources.

2. A Step Further – The Group of Copenhagen

27. National Platforms exist or are emerging in different states and are taking different forms. These first experiences represent valuable references for all other countries.

28. The **Network of National Platforms (the "Group of Copenhagen")** was established by the Council of Europe in 2016 as a framework for the exchange of information, experience, and expertise in support of the implementation of the standards contained in the Macolin Convention.

29. The Group of Copenhagen is the Advisory Group of the Macolin Convention's Follow-up Committee, set up to enhance the establishment, operation, and development of National Platforms. It pools the representatives of National Platforms, functioning as a global network of operationally engaged experts, working together, and supporting each other to detect, sanction, and prevent sports competition manipulation, as defined in the Macolin Convention. The Advisory Group operates under the authority of the Follow-up Committee and is in close cooperation with the Council of Europe Secretariat. Its main tasks include the formulation and development of proposals to strengthen the governance and

operational capacity of National Platforms as well as the broader Macolin community. For these, the Group can also support capacity-building initiatives as well as propose and undertake research and surveys on general and specific topics[24].

30. Regarding the composition and working methods of the Group of Copenhagen, it is coordinated by the Advisory Group Bureau and works through plenary meetings. The Advisory Group may invite observers to attend its meetings, which take place at least two times per calendar year, and participate in its work, without right to vote[25].

31. The Bureau, comprising the Chair, the Vice-Chair and five other elected members representing public authorities with a two-year mandate, meet at least four times per calendar year. The Bureau may decide to hold consultations or hearings with stakeholders not included in the Advisory Group and can set up thematic working groups to advise on and/or to implement specific programs and activities[26].

3. Examples of National Platforms

32. Insofar as the National Platforms are concerned, **there is no "one size fits all" approach**. As the Convention does not prescribe a specific format or standard way of functioning of the platforms, States have modeled their respective bodies on their own needs as well as to be consistent with the local culture and legal framework[27].

33. Below, we will present a few examples of such National Platforms, in alphabetical order (as of June 2022):

- In **Australia**, since November 2017, the Sports Betting Integrity Unit (SBIU) has performed the role of the Australian National Platform and is Australia's representative within the Group of Copenhagen[28]. Its main priority is to centralize the collection, collation, analysis, and dissemination of betting-related information and intelligence and protect Australian sport from criminal infiltration, match-fixing, and betting-related

[24] https://www.coe.int/en/web/sport/macolin-parties-and-bodies (26.06.2022).
[25] https://www.coe.int/en/web/sport/network-of-national-platforms-group-of-copenhagen- (24.06.2022).
[26] Idem.
[27] See HENZELIN M., PALERMO G., MAYR T., *supra*.
[28] https://rm.coe.int/t-mc-2019-3-national-platform-factsheet-australia/168096b928- (22.06.2022).

corruption. Already in June 2011, all governments in Australia agreed to the National Policy on Match-Fixing in Sport[29].

- In **Belgium**, law enforcement agencies coordinate the national platform, which was created in 2016 by a memorandum of understanding concluded between the Ministry of Justice, the Ministry of the Interior, the General Prosecutor's office, the federal prosecutor, and the Commissioner General of the Federal Police[30]. This platform incorporates a whistleblower hotline on the Police website[31].
- In **Denmark**, the national platform is embodied since 2016 by the Anti-Doping Agency. This is a self-governing public institution and a public authority under the Ministry of Culture. This platform has a few particularities, namely four dedicated employees (out of 14 full-time staff) and an operational whistleblower hotline (stopmatchfixing.dk). It also cooperates with the Players' Union on a hotline called "Athletes Red Button", and its secretariat receives, validates and registers "nice to know" data, which is then passed on to relevant parties. Via its online platform, reports on suspicious activities can be shared easily and safely with the Group of Copenhagen partners[32].
- In **France**, the platform was set up in 2016 by the State Secretary for Sports and was integrated into the French Gambling Surveillance Authority (ARJEL)33. It brings together representatives of the French National Olympic Committee (CNOSF), the Ministry of Sports, the Ministry of Justice (Agence française anticorruption – AFAC), the Ministry of Interior (Service central des Courses et Jeux – SCCJ), the Ministry of Finance (TRACFIN), Française des jeux, Athletes representatives and Sports competitions' organisers. The platform has notably issued uniform guidelines as to the

29 https://www.sportintegrity.gov.au/sites/default/files/National%20Policy%20on%20Match-Fixing%20in%20Sport%20%28FINAL%29.pdf (22.06.2022).

30 https://rm.coe.int/t-mc-2017-32bel-copenhagen-group-belgium-fact-sheet/1680a66d69 (23.06.2022).

31 https://www.police.be/5998/fr/questions/fraude-sportive/disposez-vous-dinformations-concernant-une-fraude-dans-le-milieu-du-sport (24.06.2022).

32 https://rm.coe.int/t-mc-2017-32dk-countryfactsheet-denmark/16809ed4b9 (22.06.2022).

33 https://rm.coe.int/convention-on-the-manipulation-of-sports-competitions-group-of-copenha/1680723834 (21.06.2022).

definition of alert levels (green, yellow, orange ad red), which provide each stakeholder with guidance as to their specific roles and responsibilities in case of case-specific alerts.

- In the **Netherlands**, the National Platform fosters collaboration between the sports sector, the betting and gaming sector, law enforcement and the public prosecution service in the area of tackling competition manipulation. It is structured in three levels: the strategic level, relating to general direction and scope; the policy level, relating to the creation or reform of policies to fight manipulation; and the signals level, where information is generated, collated and analysed, and where official cases are dealt with[34].
- In **Norway**, which was among the first states to ratify the Convention, the national platform is operated by the Ministry of Culture and hosted by the Norwegian Gaming Authority. It provides opportunities for information-sharing between stakeholders, conducts risk assessments and generates proposals to enhance the prevention betting-related crimes[35]. Notably, Section 11-20 of the Act relating to the Norwegian Olympic and Paralympic Committee and Confederation of Sports contains special provisions on the manipulation of sport competitions. It is a criminal offence not to report cases of such manipulation[36].
- In **Switzerland**, while coordinating the fight against competition manipulation and other political aspects are the responsibility of the Federal Office of Sport, the Federal Act on Gambling assigns to the intercantonal authority (previously Comlot, Gespa from 1 January 2021) the task of a "national platform" acting as a reporting office. Gespa as a reporting office ensures the flow of information between all parties involved (sports associations, law enforcement authorities, foreign reporting offices, betting operators, etc.) – thus playing a central role when it comes to investigating suspected cases. Sports associations and organisations based in Switzerland that organise, conduct or supervise a sports event or participate in it are obliged by law to report any suspicion of manipulation to

34 UNODC Global Report on Corruption in Sport, 2021, p. 93.
35 UNODC Global Report on Corruption in Sport, 2021, p. 93.
36 See also https://rm.coe.int/convention-on-the-manipulation-of-sports-competitions-group-of-copenha/168072383a (22.06.2022).

Gespa, provided the event takes place in Switzerland or bets are offered on it in Switzerland (Art. 64(2) Gambling Act). Also, the two lottery companies (Swisslos & Loterie Romande) are legally obliged to inform Gespa about suspected manipulation in connection with sports competitions on which they offer betting (Art. 64(1) Gambling Act). Depending on the case at hand, Gespa will forward reports to law enforcement or other authorities, lottery companies, sports organisations and reporting offices abroad in accordance with legal requirements[37]. In 2019, Gespa received 263 suspicious reports concerning 192 events; in 2020, due to the COVID-19 pandemic, the number of reports decreased to 125 for 97 sports events. The sports events concerned were, in overwhelming majority, football matches; other alerts were received on ice-hockey and tennis events, but also darts and snooker[38].

- In the **UK**, betting regulators take charge of operating the national platforms; they comprise the Sports Betting Intelligence Unit (SBIU) which was formed in 2010, and the Sports betting Integrity Forum (SBIF) which was formed in 2012[39]. The SBIF brings together representatives from sports governing bodies, betting operators, sport and betting trade associations, law enforcement, and gambling regulation. The SBIU is a unit within the Gambling Commission that manages reports of betting-related corruption. It is at the heart of Britain's approach to dealing with suspected cases of sports betting integrity. It receives reports and develops intelligence about potentially corrupt betting activity from a range of sources including betting operators, sports governing bodies, law enforcement, the public, and the media. Notably, betting operators are obliged to report suspicious activity to the SBIU, as part of their license conditions, if they suspect it may relate to the commission of an offence under the Gambling Act (2005).

37 GESPA, *Manipulation of sports competitions – national platform annual review 2020*, May 2021, https://www.gespa.ch/download/pictures/6b/v0tcbbwadm0v9mlos81p9mzcx9dsqt/21-05-06_wkm_-_jahresruckblick_2020_en.pdf (26.06.2022).

38 Idem, p. 4.

39 https://rm.coe.int/t-mc-2019-3uk-goc-np-factsheet-united-kingdom-2019/1680923e89 (22.06.2022).

Article 14

by

Surbhi KUWELKER

Article 14 – Personal Data Protection

1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that all actions against the manipulation of sports competitions comply with relevant national and international personal data protection laws and standards, particularly in the exchange of information covered by this Convention.

2 Each Party shall adopt such legislative or other measures as necessary to guarantee that the public authorities and organisations covered by this Convention take the requisite measures in order to ensure that, when personal data are collected, processed and exchanged, irrespective of the nature of those exchanges, due regard is given to the principles of lawfulness, adequacy, relevance and accuracy, and also to data security and the rights of data subjects.

3 Each Party shall provide in its laws that the public authorities and organisations covered by this Convention are to ensure that the exchange of data for the purpose of this Convention does not go beyond the necessary minimum for the pursuit of the stated purposes of the exchange.

4 Each Party shall invite the various public authorities and organisations covered by this Convention to provide the requisite technical means to ensure the security of the data exchanged and to guarantee their reliability and integrity, as well as the availability and integrity of the data exchange systems and the identification of their users.

I. Introduction and Purpose of Article 14

1. Under Article 14, the Macolin Convention addresses the measures parties must take to **address concerns relating to the security of data** that

result when 'data' is 'processed'[1] in connection with the measures taken under the Macolin Convention to combat manipulation.

2. The Explanatory Report notes that there is an element of exchange of data across all sectors of activity addressed in the Macolin Convention[2]. Specifically, it emphasizes that the focus on **exchanges of information between a wide variety of entities** (public authorities, online betting operators, sports organisations in the broad sense, national, federal and international, and competition organisers) results in various entities handling large amounts of data[3].

3. In particular, the **National Platforms** sought to be set up under Article 13, established with the objective of serving as information hubs, collecting and disseminating information that is relevant to the fight against manipulation, and receiving, centralising and analysing information on irregular and suspicious bets, while transmitting information on infringement of laws and coordinating efforts between various authorities[4], tend to deal heavily in data. This could be personal data relating to athletes, their support personnel, event organizers or members of the public, in connection with efforts to prevent, investigate, prosecute and sanction those engaged in the manipulation of sport[5].

4. It is thus considered important to ensure the protection of such personal data through requisite the legislation and other means – this task has been recognized as **among the more important concerns** regarding the implementation of the frameworks mentioned in the Macolin Convention, notably certain countries having expressed concerns on data security grounds[6].

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1 See discussion on the definition on 'data' and 'processing' under section II, part A of the commentary to this section below.

2 The Explanatory Report makes note of the following - administrative co-operation, consumer protection, child protection, combating fraud and money laundering, tackling identity theft and other forms of cybercrime, ensuring the security of gambling equipment, safeguarding the integrity of sport and combating matchfixing – Explanatory Report, para 124.

3 Explanatory Report, para 124.

4 See Article 13, as well as commentary to Article 13, above.

5 See Data Protection Principles, *infra* note 11, p. 1

6 Portugal has been noted as reluctant to share information due to the number of ratifications the Macolin Convention has received – see HENZELIN M., PALERMO G., MAYR T., "Why National Platforms are the cornerstone in the fight against Match-fixing in sport: the Macolin Convention", *LawinSport*, available at http://www.la

5. Accordingly, it is also important to note that, under Article 2 of the Macolin Convention, **data protection has also been made a guiding principle**[7].

II. Particulars of Article 14

A. Compliance with Relevant National and International Law

6. Further to the purposes of this Article described above, paragraph 1 of Article 14 states that every party shall adopt such legislative and other measures as may be necessary to ensure that **all actions taken to further compliance with the Macolin Convention adhere to relevant national and international personal data protection laws and standards**, particularly concerning the exchange of information between public authorities and organizations covered by the Macolin Convention[8], with the consequent paragraphs emphasizing specific data protection principles that such measures must abide by[9].

7. In this vein, it is to be noted that the Group of Copenhagen[10] adopted the **Macolin Convention Data Protection Principles in 2020**

live.ch/data/publications/Why_national_platforms_are_the_cornerstone.pdf (February 10, 2022).

7 Within Article 2.1.d, see commentary to Article 2, above.

8 Article 14, para 1, Explanatory Report, para 125. This has also been noted in para 122 of the Explanatory Report in the specific context of maintaining compliance with internally applicable regulations when National Platforms deal with data – see *infra* note 10.

9 Article 14, para 2, 3 and 4.

10 The Group of Copenhagen, which pools the representatives of National Platforms, to coordinate global efforts under the Macolin Convention, refers to the Network of National Platforms (national platforms are established under Article 13 of the Macolin Convention) established pursuant to the provisions of the Macolin Convention, as the advisory group of the Follow-up Committee to the Macolin Convention which in turn is provided for and established under the provisions of Articles 29, 30 and 31 of the Macolin Convention. The Group of Copenhagen consists of representatives of the national platforms, functioning as a global network of operationally engaged experts, working together, and supporting each other to detect, sanction and prevent sports manipulation in furtherance of the provisions of the Macolin Convention – see Network of National Platforms (Group of Copenhagen), available at https://www.coe.int/en/web/sport/network-of-national-platforms-group-of-copenhagen- (January 31, 2023).

("Data Protection Principles")[11], which comprise a set of high level requirements, grounded in international data protection frameworks, which National Platforms are expected to comply with when processing personal data[12]. These are intended to be a "*baseline set of data protection requirements which guarantee an appropriate level of protection for individuals while facilitating the free flow of data among them*", with parties free to establish more stringent principles, though the Data Protection Principles themselves set a higher bar than is in existence in most countries, being in line with international instruments[13].

8. These instruments, as referred to in the Data Protection Principles and the Explanatory Report, at the regional and international level, include, in particular, **Convention 108**[14] **and the amending protocol CETS 223**[15] (together, Convention 108) thereto regarding supervisory authorities and transborder data flows, with the Explanatory Report specifying that implementation of the Macolin Convention shall not, in any way, prejudice the implementation of Convention 108 by the parties who might have ratified the latter already[16].

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11 Group of Copenhagen, Strasbourg, June 5, 2020, T-MC(2020)55 available at https://rm.coe.int/t-mc-2020-55-wg-data-protection-macolin-convention-data-protection-pri/ 16809ed7ab (January 31, 2023).

12 Data Protection Principles, *supra* note 11, p. 1.

13 Data Protection Principles, *supra* note 11, p. 1.

14 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 181, 1981.

15 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 223, 2018.

16 Explanatory Report, para 125. It is important to note that the principles in Convention 108 are also precursors to those stated in other European Union regulations such as the European Union's Data Protection Directive (Directive (EU) 95/46/EC), which was superseded by the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR"). The 2018 amendments to original Convention 108 were born alongside the evolution of instruments such as the GDPR. Further, the GDPR was said to give substance and amplify principles of Convention 108, as well as take into account accession to Convention 108, notably with regard to international transfers of data – see Explanatory Report to Convention 108, para 3, p. 15, available at https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention_108_EN.pdf (January 30, 2022). While Convention 108 thus does not include all the specificities that the GDPR lays down, such as a data protection officer, privacy impact assessment or the principle of accountability of data controllers, it is consistent with most of the GDPR requirements, making accession to Convention 108 make a party comply with most GDPR requirements – see GREENLEAF G., "'Modernised' Data Protection Convention 108 and the GDPR", 154 *Privacy Laws &*

9. Under Convention 108 as well as the Data Protection Principles, **personal data refers to any information relating to an identified or identifiable individual** ("data subject")[17]. **Data processing**, in turn, refers to **any operation or set of operations performed on personal data**, such as the collection, storage, preservation, alteration, retrieval, disclosure, making available, erasure, or destruction of, or the carrying out of logical and/or arithmetical operations on such data[18]. Where automated processing is not used, data processing refers to any operation or set of operations performed upon personal data within a structured set of such data which are accessible or retrievable according to specific criteria[19].

B. Data Protection Principles in Paragraph 3

10. Under paragraph 2 of Article 14 of the Macolin Convention are enshrined **important data protection principles**. As seen above, the Explanatory Report recognizes the risk that arises given that the organisation of sports competitions and the activities of sports betting operators generate a large volume of personal data, acknowledging that this creates potential for data beyond the purposes pursued being dealt with, or of the data being kept longer than necessary[20].

Business International Report 22-3, UNSW Law Research Paper No. 19-3 (2018); see also E. BERTONI, "Convention 108 and the GDPR: Trends and Perspectives in Latin America", *Computer Law and Security Review: The International Journal of Technology Law and Practice,* 2020 available at https://doi.org/10.1016/j.clsr.2020.105516 (January 31, 2023).

17 Article 2.a, Convention 108 and section 2.a, Data Protection Principles, *supra* note 11, p. 3.

18 Section 2.b of the Data Protection Principles, *supra* note 11, p. 3; the Data Protection Principles define processing just as Convention 108 does now, whereas originally prior to its amendment, Convention 108's definition was only restricted to 'automated processing', under Article 2.c thereof.

19 Section 2.c, Data Protection Principles, *supra* note 11, p. 3. Two other important definitions included in the Data Protection Principles are those of a "data controller", in section 2.d, being the natural or legal person, public authority, service, agency or any other body which, alone or jointly with others, has decision-making power with respect to data processing; a "processor", in section 2.f, being a natural or legal person, public authority, service, agency or any other body which processes personal data on behalf of the controller; and a "recipient", in section 2.e, being a natural or legal person, public authority, service, agency or any other body to whom data are disclosed or made available. These terms are also applicable to sports bodies (controllers and processors), with athletes and other persons in their jurisdiction being data subjects.

20 Explanatory Report, para 127.

11. Accordingly, this paragraph states that each Party shall adopt such legislative or other measures as are necessary to guarantee that the public authorities and organisations covered by the Macolin Convention take the requisite measures in order to ensure that, when personal data is processed[21], irrespective of the nature of those exchanges, due regard is given to certain principles. The aforementioned four principles stated in Article 14 include **lawfulness, adequacy, relevance, and accuracy,** and in addition, the article also states that due regard is to be provided to **data security and the rights of data subjects**[22]. These principles are to be read in consonance with paragraph 3 of Article 14, which emphasizes that there is **need to only share the necessary minimum amount of data required** for the purposes of achieving the objectives of the Macolin Convention[23].

12. **These principles echo those present in Article 5 of Convention 108 and in the GDPR**, which mentions that data must be obtained and processed fairly and lawfully; be stored for specified and legitimate purposes and not used in a way incompatible with those purposes; be adequate, relevant, and not excessive in relation to the purposes for which they are stored; be accurate and, where necessary, kept up to date; and be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored[24].

13. The Data Protection Principles further elaborate on principles to be followed, stating that these include "*principles of lawfulness, purpose limitation, necessity and proportionality, high level of data quality, transparency, accountability and also to data security and the rights of data subjects as well as an effective, independent oversight*"[25].

14. While these principles are directed semantically at the National Platforms, it may be inferred that they should be universally applicable

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21 The Explanatory Report states that processing of personal data (a generic term covering the collection, recording, alteration and exchange, of the data) is actually the vital tool for the international co-operation on which the fight against the manipulation of sports competitions should be based – see Explanatory Report, para 126.

22 Article 14, para 2.

23 Article 14.3.

24 Article 5.4 of Convention 108 on the "Legitimacy of data processing and quality of data". It may be noted that Article 5 of Convention 108 which contains data protection principles is structured differently from Article 6 of the GDPR, which is however also included in the Data Protection Principles as discussed further in this section.

25 Data Protection Principles, *supra* note 11, p. 1

principles for all 'controllers'[26] and 'processors'[27] of data in the context of the Macolin Convention. These principles and their explanation in the Data Protection Principles are hence discussed below as applicable to all data (not merely that dealt with by National Platforms) and are discussed in this Chapter as categorized within the Data Protection Principles.

1. Purpose Limitation and Legal Basis

15. It is under paragraph 3 of Article 14 that the Macolin Convention reiterates the first principle of data protection law, i.e. that each Party shall provide in its laws that the public authorities and organisations covered by the Macolin Convention are to ensure that the exchange of data for the purpose of the Macolin Convention **does *not* go beyond the *necessary minimum for the pursuit of the stated purposes* of the exchange** (emphasis supplied)[28]. Through the previous paragraph as well as this one, the Macolin Convention, which here reiterates what may be found in Article 5 of Convention 108, as seen above, emphasizes that parties must pass legislation so that the stakeholders ensure that data is exchanged solely for the purposes of the Macolin Convention and that the data sharing does not go beyond the strict minimum needed for the pursuit of the stated objectives of the sharing[29].

16. The Data Protection Principles further elaborate on this principle by stating that this purpose or objective must be **specified, explicit and legitimate, and data is not to be used for purposes incompatible with the purposes for which it was originally collected**, including statistical or research purposes[30]. This language echoes that of Article 5 of Convention 108, which clarifies that any further processing for archiving purposes in the public interest, scientific or historical research purposes or

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[26] Being a natural or legal person, public authority, service, agency or any other body which, alone or jointly with others, has decision-making power with respect to data processing – Section 2.d, Data Protection Principles, *supra* note 11, p. 3.

[27] Being a natural or legal person, public authority, service, agency or any other body which processes personal data on behalf of the controller, as defined in Section 2.d – Section 2.f, Data Protection Principles, *supra* note 11, p. 3.

[28] Article 14.3.

[29] Explanatory Report, para 127.

[30] Section 4, Data Protection Principles, *supra* note 11, p. 3; see also, for example, MONDSCHEIN C. F., MONDA C., "The EU's General Data Protection Regulation (GDPR) in a Research Context", In: KUBBEN P., DUMONTIER M., DEKKER A. (eds), *Fundamentals of Clinical Data Science* (Springer: Cham, 2018), 55-71.

statistical purposes is, subject to appropriate safeguards, compatible with those purposes[31].

17. This remains interconnected with the **principles of proportionality, integrity and retention,** whereby processing of personal data is to be limited to what is necessary and proportionate given the purposes for which such data is processed, and all reasonable means must be taken to keep personal data accurate, complete, up-to-date and reliable for its intended use[32]. Any incorrect or inaccurate personal data is to be erased or rectified without delay and personal data must be kept for no longer than is necessary given the purpose or purposes for which it is processed[33]. These are also principles derived from Article 5 of Convention 108, which concludes by referring to adequacy, accuracy and preservation[34].

18. The Data Processing Principles thereafter **borrow from the language found in Article 6 of the GDPR**, rather than that of Article 5 of Convention 108. Summarizing the conditions for lawful processing, they state that processing shall be carried out (including, but not limited) to comply with a legal obligation, fulfil a contractual obligation owed to the data subject, pursue a legitimate interest of the data controller or of a third party (except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject), or with the free, specific, informed and unambiguous consent of the data subject[35].

19. Assuming that the principle is hence to be interpreted in light of Article 6 of the GDPR, it may be concluded that **data is to be processed only if one or more of the situations mentioned in Article 6 of the GDPR are fulfilled**[36], namely –

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31 Article 5.4.b of Convention 108.

32 Section 5, Data Protection Principles, *supra* note 11, p. 3.

33 Section 5, Data Protection Principles, *supra* note 11, p. 3.

34 Article 5.4.c, 5.4.d and 5.4.e of Convention 108.

35 Section 4, Data Protection Principles, *supra* note 11, p. 3.

36 See Article 6 of the GDPR which states the conditions under which the purpose for which data is being processed shall be considered legitimate. It is to be noted that the contents of Article 6.4 are not reflected in the Data Protection Principles however, which provide for exceptions being a situation where there is data processing for a purpose other than that for which the personal data have been collected which is not based on the data subject's consent or on a European Union or GDPR defined 'Member State' law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives. In such cases, the data controller is to take into account certain factors to determine whether such data may be collected in line with the

a. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
b. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
c. processing is necessary for compliance with a legal obligation to which the data controller is subject;
d. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
e. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; or
f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child; this would, however, not apply to processing carried out by public authorities in the performance of their tasks.

20. The Data Protection Principles also clarify that **'sensitive' personal data**[37], being a sub-set of personal data, as defined in the Data Protection Principles and other instruments and as defined under applicable laws, is only to be **processed, in accordance with Article 6 of the Convention 108**, **when it is provided for by law and where appropriate safeguards and measures complementing these principles (for**

permissible purpose – see Article 6.4.a to Article 6.4.e of the GDPR. Certain such exceptions are discussed as exampled in Section 11 of the Data Protection Principles, *supra* note 11, p. 5, as discussed below.

[37] Categories of such data as defined in Article 6.1 of Convention 108 include genetic data; personal data relating to offences, criminal proceedings and convictions, and related security measures; biometric data uniquely identifying a person; personal data for the information they reveal relating to racial or ethnic origin, political opinions, trade-union membership, religious or other beliefs, health or sexual life. Under the GDPR, such data is referred to as 'special category' data, notably including health, as also seen under Convention 108.

instance, the explicit consent of the individual concerned) are in place. Such measures shall be proportionate to the risk presented by the processing and shall prevent or minimise the privacy risks to individuals, especially the risk of discrimination[38].

21. To this end, the Explanatory Report provides that parties 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[39].

22. Last, the Data Protection Principles also suggest, in the context of National Platforms, **that National Platform members only disclose personal data to other members of the same National Platform where the disclosure serves the purposes of the Macolin Convention** to eliminate sports manipulation and is in accordance with applicable data protection laws and the Data Protection Principles themselves. The National Platform members are thus to only disclose such data to other stakeholders, outside the National Platform, for a legitimate purpose, on a case-by-case basis, and only if there are lawful grounds for doing so. This would include instances where such data is required by law or compulsory legal process (including disclosures to law enforcement, tax, immigration or other authorities in connection with the performance of their statutory functions), to protect the interests of the National Platform, or with the free, specific, informed and unambiguous consent of the individual concerned[40].

23. In such cases, **the minimum amount of personal data shall be shared** given the purposes to be served by the disclosure. The use of cooperation agreements, memoranda of understanding and similar safeguards for this purpose are encouraged by the Data Protection Principles. Accordingly, National Platforms are also to refrain from disclosing personal data where they reasonably believe the recipient cannot or will not comply with the Data Protection Principles[41].

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38 See Article 6.2 of Convention 108, and Section 4, Data Protection Principles, *supra* note 11, p. 4.

39 Explanatory Report, para 127.

40 Section 7, Data Protection Principles, *supra* note 11, p. 4.

41 Section 7, Data Protection Principles, *supra* note 11, p. 4.

24. It has been previously opined that in the context of **disciplinary offences, data transference and the questions around establishing a basis for this are increasingly relevant**[42]**.** In offences such as manipulation and doping, sporting bodies would need to ensure that they have a legal basis for, *inter alia*, gathering and transferring of data as potential evidence (i.e. personal data). Similarly, issues may arise concerning the basis for the use of personal data in situations involving publications of internal sports body decisions, relating to players, athletes and other persons, for example[43].

25. In such cases, as consent is unlikely to be forthcoming and thus not a ground, where specific legislation does not exist[44], justification based on legitimate interests (i.e. the sports organization pursuing the objective of maintaining sport integrity in its own, its participants' and wider public's interest) is more likely an argument to be made to process data, though still difficult in case of 'sensitive' personal data processed by an employer sports body[45]. Consent is unlikely to be valid when there is imbalance of power between a sports body and an individual, it may be withdrawn at any time, and an individual may not be subject to a detriment when consent is later withdrawn[46]. **A case by case balance of interests is hence advocated**[47].

2. Rights of Data Subjects, Fairness and Transparency

26. Under the Data Protection Principles, there is a requirement **to ensure that there is effective processing of requests that data subjects make in relation to their rights**, such as rights relating to access, correction, restriction or objection, as enshrined in Article 9 of Convention

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42 "Clubs, Sports Bodies and the GDPR", available at https://www.lexology.com/library/detail.aspx?g=9646849d-bee3-4699-8761-31e649e5431f (February 17, 2023).

43 *Id*.

44 Such legislation is commonly seen in the context of other offences such as doping.

45 See generally RUSSELL K., "Why Sports Teams Should Avoid Relying on Consent To Comply with GDPR", *LawinSport*, August 15, 2018 available at https://www.lawinsport.com/topics/item/why-sports-teams-should-avoid-relying-on-consent-to-comply-with-gdpr#sdfootnote7 sym (February 16, 2023), where this argument is made based on Article 9 of the GDPR.

46 *Ibid*.

47 See also, *infra* note 78.

108[48]. It is important to recognize that while earlier instruments presented the paradigm of data protection as procedural or good governance regulations for data controllers, latter instruments such as the GDPR framed the discourse in terms of rights of the data subjects[49], which in turn is reflected in section 6 of the Data Protection Principles[50].

27. Of the rights in Article 9 of Convention 108, the Data Protection Principles emphasize certain ones more specifically. **There is to be only entirely automated decision-making** involving personal data that may have legal or equivalent effects on the individual where, first, it is so provided for by applicable laws, and second, where the process allows individuals to request a human intervention when there is a decision made of data processing that significantly affects such individual without having their views taken into consideration[51]. The concerned authorities or National Platforms will respond to requests aiming at obtaining knowledge of the reasoning underlying data processing where the results of such processing are applied to the data subject[52].

28. Under the Data Protection Principles, a separate specific mention is made of the need for personal data to be **processed fairly and transparently**, borrowing the language used in Convention 108[53]. The framing on this principle from a rights perspective means that the data subject would have rights to fairness and transparency – while Convention

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48 Article 9 of Convention 108 enshrines rights of a data subject, including that to not be subject to a decision significantly affecting them based solely on an automated processing of data without being heard under Article 9.1.a, to obtain information on data processed under Article 9.1.b, reasoning underlying such processing under Article 9.1.c, to object to processing save for when legitimate grounds are demonstrated under Article 9.1.d, to obtain data in case of violations of conditions under which they may be obtained under Article 9.1.e, to have remedy under Article 12 of Convention 108, under Article 9.1.f, among others.

49 See for example LYNSKEY O., "Deconstructing data protection: The Added Value of a Right to Data Protection in the EU Legal Order", 63(3) *International and Comparative Law Quarterly* 2014, 569 at p. 572; see also VAN DER SLOOT B., "Do data protection rules protect the individual and should they? An assessment of the proposed General Data Protection Regulation", 4(4) *International Data Privacy Law* 2014, 307 where the prospective GDPR's replacement of the Data Protection Directive of 1995 is discussed; see generally MCDERMOTT Y., "|Conceptualizing the right to data protection in an era of Big Data", *Big Data and Society*, January 1, 2017, available at https://doi.org/10.1177/2053951716686994 (February 3, 2023).

50 Section 6, Data Protection Principles, *supra* note 11, p. 4.

51 Based on Article 9.1.a of Convention 108, discussed above, *supra* note 11.

52 Section 6, Data Protection Principles, *supra* note 11, p. 4.

53 Article 5.4.a of Convention 108.

108 does provide further details, the elaboration within the Data Protection Principles on what this principle consists of in practice may be said to be based on the rights provided to data subjects within the provisions of the GDPR to some extent[54].

29. The Data Protection Principles elaborate that, in practice, this includes informing data subjects about the purposes of any data processing that occurs, the identity of data controller(s), or the equivalent concept under applicable data protection laws, the legal basis and the purposes of the intended processing, the categories of personal data collected, to whom it will be disclosed, the rights of the data subjects and the means to exercise them, how to contact the National Platform or other concerned party authorities with any inquiries or complaints, how to obtain redress and the possibilities and means offered for limiting use and disclosure of personal data as well as any necessary additional information in order to ensure fair and transparent processing of the personal data[55]. One may note that **these correspond to rights of data subjects connected to fairness and transparency** within Chapter 3 of the GDPR[56].

3. Exceptions and Restrictions to Principles and Rights

30. In the same vein, as provided in Article 23 of the GDPR and referred to in Article 9 of Convention 108[57], there **are exceptions to such rights or process best practices**. Such exceptional situations, or 'restrictions' on the rights of a data subject, include when data needs to be obtained in a matter of national security, defence, public security, judicial proceedings, enforcement of civil law claims, protections of the data subject's/other's rights, among others[58]. The Data Protection Principles also address exceptions and restrictions, adopting the language used in the

[54] Chapter 3 within the GDPR addresses transparency and its modalities (Article 12), when and where information must be provided (Articles 13 and 14), the right to access data (Article 15), rights of reflection and erasure (Articles 16 to 20), and the right to object in certain instances (Articles 21 and 22).
[55] Section 3, Data Protection Principles, *supra* note 11, p. 3.
[56] See *supra* note 45, above.
[57] See *supra* note 42, above.
[58] See Article 23.1 on restrictions on rights, within the GDPR.

GDPR, and emphasize that such **exceptions and restrictions may be made only if provided for by law**[59].

31. More importantly, as **relevant to manipulation offences, exceptions in national law may include situations** when data is needed for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security[60], important objectives of general public interest, including economic, financial or public health[61], prevention, investigation, detection and prosecution of breaches of ethics for regulated professions[62], and the monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority[63].

32. The potential issues relating to the **clash of rights and restrictions thereon that may arise in a data protection and specifically disciplinary offence** or manipulation context have been described in prior literature[64]. For instance, the right of a data subject to ask for erasure of data may come into conflict with the needs of governing bodies, involved in investigations, or those of law enforcement, particularly in the area of integrity and sports betting. The legitimate and public interest justifications in monitoring data around betting and gambling are likely to clash with such individual data subject rights.

4. Data Security, Protection and Redress

33. Under paragraph 4 of Article 14, the Macolin Convention attributes the responsibility for **undertaking appropriate technical means and the facilitation of data protection to state parties, through**

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59 Section 11, Data Protection Principles, *supra* note 11, p. 5. As noted above in section B.1, and as seen in Article 5 of Convention 108, the Data Protection Principles reiterate in section 11 on as a restriction that in cases where the processing of the personal data is purely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, the rights of data subjects, as described above, as well as the transparency obligations, also described above, may be limited or restricted by law provided this does not give rise to a risk of harm to the rights and fundamental freedoms of data subjects.

60 Article 23.1.d of the GDPR.

61 Article 23.1.e of the GDPR.

62 Article 23.1.g of the GDPR.

63 Article 23.1.h of the GDPR.

64 See *supra* note 42 and *supra* note 45.

their stakeholders – being public authorities and organizations covered by the Macolin Convention[65].

34. It mentions **four aspects** where such technical facilitation is desirable:

1. to ensure the security of the data exchanged;
2. to guarantee the reliability and integrity of the data exchanged;
3. to guarantee the availability and integrity of data exchange systems[66]; and
4. for the identification of users of such data[67].

35. The Explanatory Report states that paragraph 4 attempts to encourage parties to put in place such technical means because the security of the systems and exchanges can be a tricky issue **given that the overall mechanism is only as secure as the lowest level of security adopted by the stakeholders**[68]. It further states that consultation committees may be tasked with checking the security of the systems and exchanges[69].

36. The Data Protection Principles go one step further and require that **appropriate administrative, technical, and physical measures be implemented to protect personal data from accidental or unauthorised access, destruction, loss, use, modification or disclosure**[70]. These measures are to take into account the state of the art systems for security, the costs of implementation and the nature of the undertaken processing, as well as, the risk of harm to the individual arising from a breach of security[71].

37. In the event of a breach of security giving rise to a risk to the affected data subjects, termed as a 'data breach' by the Data Protection Principles, **the competent authorities are to be notified**[72] and, where the relevant risk is serious, the data subjects concerned without undue delay[73].

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65 Article 14, para 4.

66 It is to be noted that the Explanatory Report uses the term 'computer' interchangeably with data exchange systems – Explanatory Report, para 128.

67 See Article 14, para 4.

68 Explanatory Report, para 128.

69 *Id*.

70 Section 9, Data Protection Principles, *supra* note 11, p. 4 and 5.

71 Section 9, Data Protection Principles, *supra* note 11, p. 5; see also *infra* note 78.

72 The responsibility for this is placed on the National Platform by the Data Protection Principles, but in theory, could potentially be any body that is notified of, aware of or is alerted to such breach.

73 Section 9, Data Protection Principles, *supra* note 11, p. 5.

Each party and/or their National Platform is to maintain a record of Data Breaches that will be made available to competent regulatory authorities upon request[74].

38. The Data Protection Principles also note that National Platforms, and by extension the respective parties to the Macolin Convention, must **provide for or cooperate in good faith with any supervisory authority of a competent jurisdiction** as well as inform individuals about the possibility of their **lodging a complaint** with any competent authority responsible for the protection of personal data or seeking judicial redress under law[75].

5. Accountability

39. The Data Protection Principles require that National Platforms take **all appropriate measures to comply with applicable data protection obligations** and keep internal records to demonstrate their compliance with the provisions, such as through internal policies and procedures as well as audit or assessment reports[76].

40. This includes the **obligation to showcase that the data processing was designed to prevent or minimise the risk** of interference with data subjects' rights and to ensure the data minimisation principle (also in respect of the access to the collected data) and that the introduction of new processing of data is preceded by a prior assessment on its likely impact on data subjects' rights. The internal policies that constitute examples of best practices should be published where such a publication does not compromise the security of the party, concerned body or National Platforms[77].

41. It is important to note in this light that **all public and private bodies**, including sports bodies within parties' domestic jurisdictions, at least within the European Union or those dealing with data connected to the European Union, **are required to apply the principles of the GDPR**[78],

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74 Section 9, Data Protection Principles, *supra* note 11, p. 5.
75 Section 12, Data Protection Principles, *supra* note 11, p. 5.
76 Section 10, Data Protection Principles, *supra* note 11, p. 5.
77 Section 10, Data Protection Principles, *supra* note 11, p. 5.
78 It is important to note that in the context of sports organisations based in Switzerland, the GDPR will have extra-territorial applicability to the extent that if such an organisation wishes to process data of a data subject in the European Union, European Union law i.e. the GDPR would apply. Thus, in most sports matters where there is a

with non-compliance making a body liable to fairly severe sanctions[79]. The principles underlying the GDPR, applicable to most European Union nations, as well as the national Swiss data protection law to which numerous international bodies based in Switzerland are subject, and now the Macolin Convention and Data Protection Principles, remain fairly uniform and hence possible to comply with[80].

C. Transnational Flow of Data

42. The **transnational nature of competition manipulation, has been noted before in this commentary and in literature**[81]. While undefined specifically in the Macolin Convention, Data Protection Principles and Convention 108, the GDPR defines cross-border processing as the processing of personal data which takes place in the context of the activities of establishments in more than one state of a controller or processor where the controller or processor is established in more than one state, or as the processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor but which substantially affects or is likely to substantially affect data subjects

European Union connection, sports organisations and businesses will need to consider and review procedures in order to comply with the GDPR. Additionally, the Swiss Data Protection Act, 2018 – see ULDRY G., RAMSEY R., "GDPR and the revised Swiss Data Protection Act: the impact on sports organisations and businesses in Switzerland", available at https://www.lexology.com/library/ detail.aspx?g=eec4f5e5-4165-49fa-b4bf-7c805c430b7a (November 1, 2023).

79 This would be a maximum fine of the higher of €20 million or 4% of turnover of such a body for a major offence, or €10m or 2% of an organisation's global turnover for a minor offence (pursuant to Article 84 of the GDPR and connected recitals 149 to 152), as well as the independent ability of data subjects to claim compensation for breaches of their data protection rights, even where they have suffered no financial loss. Under the Swiss Data Protection Act, 2018, the fine remains lower at CHF 250,000.

80 See also *supra* note 78, above; see also KLEINER J., ETTER C., "Implementing the GDPR in Switzerland: Legal Issues and Challenges for International Sports Bodies", *LawinSport* (May 19, 2019) available at https://karmarun-res.cloudinary.com/image/upload/v1600794500/baer-karrer/Implementing_the_GDPR_in_Switzerland_legal_issues_and_challenges_for_internatio.pdf (February 19, 2023).

81 See section II.B.1 of the Preamble where the Explanatory Report's explanation on how the link between manipulation and transnational organised crime also thus poses a direct threat to public order and the rule of law discussed.

in more than one state[82]. As noted above[83], this is likely to take place due to the nature of manipulation, betting and other related activities, which are often not restricted to one jurisdiction for various reasons.

43. The Data Protection Principles elaborate that parties, or their National Platforms that are party to Convention 108, will transfer personal data to other National Platforms or third parties residing in another state that is also party to Convention 108 according to provisions laid down within Convention 108, notably in Article 14. The National Platforms will only transfer or disclose personal data internationally, whether to other National Platforms or third parties, **in accordance with applicable law**[84] and where an **appropriate level of protection** based on the provisions of the Convention 108 is ensured[85].

44. This echoes as well the principle behind when data transfer is permissible under the GDPR, which relies on the adequacy of protection in the law of the country to which the data is being transferred[86]. Such appropriate level of protection can also be **guaranteed by the law** of the receiving state, including international treaties applicable (such as the

82 Article 4.23 of the GDPR.

83 See section II.B.5 in the context of the European Union and Switzerland, for example, as discussed in *supra* note 78.

84 Under Article 14.2.1, a party may not, for the sole purpose of the protection of personal data, prohibit or subject to special authorisation the transfer of such data to a recipient who is subject to the jurisdiction of another party to Convention 180; such party may, however, do so if there is a real and serious risk that the transfer to another party, or from that other party to a non-party, would lead to circumventing the provisions of Convention 180. A party may also do so if bound by harmonised rules of protection shared by States belonging to a regional international organisation.

85 Based on Article 14.2.2 of Convention 180.

86 Article 45 of the GDPR. This criteria, elucidated under Recital 104 thereto, includes taking into account clear and objective criteria, such as specific processing activities and the scope of applicable legal standards and legislation in force in the third country, alongside factors such as whether the third country should offer a guarantee ensuring an adequate level of protection essentially equivalent to that ensured within the European Union, in particular where personal data are processed in one or several specific sectors. At a higher level, a party is to take into account how a particular third country respects the rule of law, access to justice as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law.

Macolin Convention), **or by *ad hoc* or approved standardized safeguards** provided by legally binding and enforceable instruments[87].

45. The Data Protection Principles also specify, based on Convention 108, that **personal data can also be transferred in specific cases where the data subject has given free, specific, informed and explicit consent**, including being informed of the risks arising in the absence of appropriate safeguards; or **where the specific interests of the data subject require such transfer**; or **where there are prevailing legitimate interests**, in particular where important public interests will be served by the transfer or the transfer is provided for by law and constitutes a necessary and proportionate measure in a democratic society[88].

46. **The provisions of this article on data protection would need to also be read, therefore, in consonance with provisions of the Macolin Convention** which address international cooperation and mutual assistance[89].

[87] These provisions in the Data Protection Principles are based on Article 14.3.a and 14.3.b of Convention 108; under the GDPR, an elaborate set of safeguards is laid down under Article 46.

[88] This is based on Article 14.4 of Convention 108; see Section 8, Data Protection Principles, *supra* note 11, p. 4.

[89] See commentary to Chapter V and Chapter VII of the Macolin Convention below.

Article 15

by

Madalina DIACONU

Article 15 – Criminal offences relating to the manipulation of sports competitions

Each Party shall ensure that its domestic laws enable to criminally sanction manipulation of sports competitions when it involves either coercive, corrupt or fraudulent practices, as defined by its domestic law.

I. Purpose of Article 15

1. Generally, the purpose of Articles 15 to 18 of the Convention is to make sure that the manipulation of sports competitions is covered by the domestic legislation of the Parties in such a way that manipulation of sports competitions may be punished in accordance with its seriousness, when it involves certain conduct[1].

2. Article 15, more specifically, seeks to make sure that manipulation of sports competitions may be **criminally sanctioned when it either involves coercion, corruption or fraud**, as defined by domestic law. Articles 15 to 18 thus represent the Convention's backbone of criminal law provisions.

3. This recommendation towards the criminalization of the most significant aspects of competition manipulation was followed by approximately fifty countries, which have adopted specific provisions penalizing match-fixing. Such countries include Algeria, Argentina, Australia, Brazil, Bulgaria, People's Republic of China, Denmark, El Salvador, France, Germany, Greece, India, Italy, Japan, Republic of Korea, Latvia, Malta, New Zealand, Paraguay, Poland, Portugal, the Russian

[1] Explanatory Report, at 129.

Federation, South-Africa, Spain, Switzerland, Turkey, Ukraine, the United Kingdom, the United States of America, etc.[2].

4. The Macolin Convention is not the only international binding instrument which tends to encourage criminalization of competition manipulation. Similarly, other instruments suggest varied definitions and provisions under which manipulation offences might be prosecuted. For example, this can be incriminated as passive bribery in the private and public sector and passive trading in influence through provisions in the **United Nations Convention Against Corruption**[3], which are utilized to prosecute manipulation offences[4]. Similarly, transnational crime may be brought under the **United Nations Convention against Transnational Organized Crime**.

5. Acknowledging these instruments and the Macolin Convention, in 2016, the IOC and the UNODC issued **Model Criminal Law Provisions for the Prosecution of Competition Manipulation**[5], which suggest wording for criminal law provisions in order to include "any person who, directly or indirectly, promises, offers or gives" and "directly or indirectly, solicits or accepts any undue advantage to another person, for himself, herself or for others, with the aim of improperly altering the result or the course of a sports competition"[6].

6. Finally, we note that at a **regional level** certain legal instruments on corruption may also be relevant[7], i.e. the Council of Europe Criminal Law Convention on Corruption (ETS 173) with the additional Protocol (ETS 191), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the EU Convention

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2 See a detailed analysis in the UNODC-IOC 2017 Study, pp. 23 et seq, as well as Annex 1 ("National Legislation Providing a Specific Match-Fixing Offence"), updated in 2021 in UNODC, *Legal Approaches to to Tackling the Manipulation of Sports Competitions: A Resource Guide* (hereinafter, "UNODC Legal Approaches (2021)"), p. 17.

3 See Karen L. Jones, The applicability of the "United Nations convention against corruption" to the area of sports corruption (match-fixing), International Sports Law Journal, vol. 3-4, 2012, 57, and IOC-UNODC, 2017, quoted in footnote 12, 13.

4 Articles 15 and 16 of the United Nations Convention Against Corruption, United Nations Organization on Drugs and Crime, New York 2004.

5 https://www.unodc.org/documents/corruption/Publications/UNODC-IOC_Model_Criminal_Law_Provisions_for_the_Prosecution_of_Competition_Manipulation_Booklet.pdf (17.09.2022).

6 Idem, p. 19.

7 See IOC-UNODC Study (2013), pp. 276-278.

on the Protection of the European Communities' Financial Interests with additional protocols, the EU Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, the Inter-American Convention against Corruption, and the Arab Anti-Corruption Convention.

II. Main Reasons for the Criminalization of Competition Manipulation

7. In practice, cases of sport corruption show that the issues at stake are often complex and require the use of **appropriate tools, such as police expertise, phone-tapping, formal police interviews, witness protection programmes, prosecutions and trials**[8].

8. Indeed, it is apparent that the manipulation of sports competitions is often **not a mere breach of sporting rules**, which can be sanctioned through the independent sanctioning system created by national and international sports organisations. On the contrary, it is often necessary to resort to criminal justice in order to efficiently tackle this phenomenon, as it frequently constitutes an offence against public order in a broader sense.

9. Moreover, perpetrators are sometimes outside the reach of sports organisations and cannot therefore be sanctioned by the latter. At times, the scale of these unlawful activities is so wide that it surpasses the investigative and disciplinary powers of sports organisations. For example, during EUROPOL's operation "Veto"[9], a total of 425 officials, players, and criminals, from more than 15 countries, were suspected of being involved in the manipulation of more than 380 professional football matches in Europe, Africa, Asia, and South and Central America[10]. More importantly, these activities were part of a sophisticated organized crime network, which generated over € 8 million in betting profits and involved over € 2 million in corrupt payments to those involved in the matches[11].

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8 KEA report (2012), p. 16.

9 See https://www.europol.europa.eu/content/results-largest-football-match-fixing-investigation-europe.

10 Idem.

11 See also CARPENTER K., *Match-Fixing—The Biggest Threat to Sport in the 21st Century?*, available at https://www.lawinsport.com/topics/anti-corruption/item/match-fixing-the-big gest-threat-to-sport-in-the-21st-century-part-1.

10. Such cases prove that **only cooperation with criminal justice, at national and international levels, can be effective in fighting competition manipulation**. In practice, the police and public prosecutors are co-operating with sporting bodies, without any prejudice to the independent sports sanction systems[12].

11. Furthermore, **precedents of such cooperation exist in the fight against doping**, where criminal justice mechanisms were created for this purpose[13].

12. In light of the above, it is conjectured that the approach in Article 15 relies on the premise that the most deterrent approach in combatting match-fixing consists in the establishment of criminal liability for such behavior at national level. Despite the clarification provided in the Explanatory Report[14], it appears from the implementation of such offence in practice (section IV) that many states preferred creating a *specific* criminal offence for the manipulation of sport events as a more effective approach, rather than relying on general provisions incriminating corruption or fraud.

III. The Contents of Article 15

13. Article 15 is remarkably short compared to its capital importance. Containing only one paragraph, its text is relatively concise.

14. This article evidently seeks to make sure that manipulation of sports competitions may be **criminally sanctioned when it either involves coercion, corruption or fraud**, as defined by domestic law.

15. The Convention does not require per se the establishment of a specific and uniform offence for the manipulation of sports competitions. Depending on the definition of existing offences and the related case law, the Parties may decide to rely on existing general criminal legislation (e.g. on extortion, corruption or fraud), or to establish new offences (e.g. on manipulation of sport competitions) so that the conduct concerned (alternatively of manipulations involving either coercion, corruption or fraud) is covered appropriately[15]. However, as recent practice shows (see

12 KEA report (2012), p. 16.

13 For details, see McNamee M., Møller V., (Eds.), Doping and Anti-Doping Policy in Sport Ethical, Legal and Social Perspectives, Routledge, 2011.

14 Explanatory Report, at 130.

15 For entire paragraph, see Explanatory Report, at 130.

Section IV), the most dominant tendency seems to be the creation of a specific offence incriminating competition manipulation at a national level.

16. Importantly, with the exception of a few elements described hereunder, **the Convention does not prescribe any specific conditions for the criminalization of competition manipulation,** notably the objective and subjective elements are not prescribed, nor the recommended sanctions. These remain **fully in the hands of national legislators**, which has in practice brought about a wide variety of solutions (see Section IV).

17. Naturally, the term of "manipulation of sports competitions" is understood **as defined in Article 3.4** of the Convention[16].

18. As the Explanatory Report clearly mentions, some acts relating to the manipulation of sports events are in principle already covered by existing criminal offences. This may apply to acts such as **extortion, blackmail, poisoning or violence** to which competition stakeholders, both athletes and otherwise, and those around them may be subjected. Such acts, which may be described with the generic term "coercion", are generally already covered by existing offences. In Article 15, this reference serves mainly as a reminder that such conduct is among the methods employed in certain manipulations of sports competitions[17].

19. **Corrupt practices** are also frequent when it comes to the manipulation of sports competitions. For example, offering a bribe to an amateur referee in exchange for him influencing the course of the game in favour of a competitor, or influencing a competitor to accept to lose a game in exchange for a promise to play for another team the next season, may – in coherence with domestic law – constitute such corrupt practices[18].

20. The Explanatory Report also contains a clarification of the subjective element of the offence, making clear that, insofar as national criminal regulations refer to the definition of manipulation of sports competitions which itself includes an element of **intent**, such an element is necessary to characterise these criminal offences[19]. As we will see further, this element has been widely implemented in practice, with numerous national legislations expressly making intent (sometimes paired with gross negligence) a requirement for the existence of the manipulation offence.

16 Explanatory Report, at 131.
17 Explanatory Report, at 132.
18 Explanatory Report, at 133.
19 Idem.

21. As pointed out in the Explanatory Report – irrespective of practices of coercion or corruption – the manipulation of sports competitions may take the form of **agreements** freely entered into[20], bridging this concept with the notion of "**arrangement**" used in Article 3. Indeed, in layman's terms, an arrangement is an agreement between several parties (at least two) who agree on certain elements[21]. As such, this element demonstrates that **competition manipulation always requires the existence of at least two perpetrators** (unlike doping, for example, which one can commit alone). In sports, a multitude of arrangements are conceivable, including the location and/or the date of an event and the identity of the referee, but also improper arrangements, such as fixing the score, the number of red or yellow cards, or of corners, etc.[22]

22. Such situations may fall under existing domestic law on **fraud**, in particular when there is fraudulent intent to secure, without right, an economic benefit for the offender or for a third party, causing a loss of property to another person. Such a benefit could take the form, for example, of a bonus paid to the winner by the competition organiser, a bonus paid to a competitor by their employer, winnings from a sports bet placed on the relevant competition, or a capital gain realised by the owner of a qualified club who sells their shares. Victims of fraudulent behavior, i.e., those who suffer a loss due to the relevant fraudulent manipulation, may be, for example, other persons having placed bets, the opposing team, or, where applicable, the national or international federation responsible for organising the competition[23].

IV. Implementation of Article 15

A. A Wide Implementation at World Level

23. Although the number of ratifications of the Macolin Convention is still relatively modest (nine, as of September 2023), the actual reach of its

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20 Explanatory Report, at 134.

21 See, for example, "Arrangement" in Cambridge Dictionary (Cambridge University Press), 2022, https://dictionary.cambridge.org/dictionary/english/arrangement (17.09.2022).

22 See DIACONU M., KUHN A., KUWELKER S., *The Concept of "Manipulation" under the Macolin Convention*, CausaSport no.2/2022, September 2022.

23 For entire paragraph, see Explanatory Report, at 135.

Article 15 is purportedly much wider. As a 2017 study mandated by the IOC and the UNODC shows, dozens of national legislations criminalized competition manipulation in at least one form, with a significant number (28 at the time of that study) having adopted or enacted *specific* legislation criminalizing the manipulation of sports competitions[24]. Many of these offences were proposed and/or enacted *after* the Macolin Convention had been drafted and adopted by the Council of Europe, suggesting the Convention's unofficial influence on these legislative processes.

B. Generalities About National Offences Criminalizing Competition Manipulation

24. As a general remark, the existing national offences criminalizing competition manipulation are unsurprisingly very different, both at a formal and at a material level.

25. At a formal level, as it was already mentioned[25], certain legislators opted for a **separate specific offence criminalizing the manipulation of sport competitions.** The technical and legislative approach as to the introduction of this offence varies widely; some countries, such as Australia, Bulgaria, France, New Zealand, Spain and Ukraine, have introduced a specific offence on the manipulation of sport results **in their Criminal Codes or Crimes Act**, whilst others, such as Argentina, Brazil, Greece, Italy, Korea, Malta, Poland, Portugal, Switzerland and the United Kingdom, have inserted a specific offence **into their sports laws**[26].

26. At a substantive level, too, the picture is far from being uniform. The specific national offences incriminating competition manipulation are **extremely varied insofar as their subjective and objective elements, as well as their sanctioning system**, are concerned. The **imprisonment sanctions**[27] present perhaps the most striking disparity, with the minimum sanction ranging from 1 or 2 months in Argentina and France to 2 years in Brazil, El Salvador and Italy, and a maximum sanction (for non-aggravated offences) ranging from 1 year in Denmark to 10 years in Australia, Greece and Poland[28].

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24 IOC-UNODC Study (2017), updated in 2021.
25 KEA Report (2012), pp. 33 et seq.
26 See IOC-UNODC Study (2017).
27 Concerning specifically sanctions, see the commentaries at Articles 22 to 25 hereinafter.
28 Idem.

27. However, and while being very different, all these regulations include a number of common features and, more importantly, have a main common goal, which is to tackle as effectively as possible the manipulation of sport events and competitions.

C. Main Features of National Offences Criminalizing Competition Manipulation

28. Hereunder we will identify and briefly describe some of the main features found in the several dozens of national legislations currently incriminating competition manipulation through specific offences.

1. Applicability to all sports / only to certain sports

29. Even though certain sports seem to be particularly affected by an increasing number of manipulation scandals (notably cricket, football and tennis)[29], it is important to keep in mind that *all* sport can be affected. Cases do exist in snooker, basketball, chess, sumo or rugby, for example[30]. Both collective and individual sports are at risk; also, the level of sport practice seems to be of little importance and manipulation may occur in either professional or amateur contexts, in higher and lower leagues[31].

30. In most national jurisdictions[32], the scope of the offences criminalizing competition manipulation includes **all sports** and competitions. Greek legislation, for instance (as amended in 2012), explicitly criminalizes the manipulation concerning "any team or individual sport" (Art. 13 of Law 4049/2012). In Italy, the law refers rather to all sports recognized by the national federations or associations[33].

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29 KEA Report (2012), p. 10.

30 Idem.

31 Idem.

32 Argentina, Brazil, Bulgaria, People's Republic of China, Denmark, Germany, Greece, India, Italy, Latvia, Malta, Paraguay, Poland, Portugal, the Russian Federation, the Republic of South Africa, Turkey, Ukraine, and the United States of America.

33 Art. 1 of Law nº. 401 of 1989, as amended lastly by Law-Decree nº. 119 of 2014, provides that the match-fixing offence applies only to sports competitions organized by the associations recognized by the Italian National Olympic Committee (CONI), the Italian National Horse Breeding Union (UNIRE) or any other State-recognized sports body and its member associations.

31. However, a few states have preferred a more sport-specific approach. In those legislations, **the scope of application of the special match-fixing offence is limited**, for example, to:

- **Professional sports or competitions having an important economic or sporting impact**. This is the case, for example, in El Salvador and in Spain, where national criminal codes refer only to professional sport competitions, respectively to a sporting event, meeting or competition having a special economic or sporting importance[34].
- **Certain designated sports**, such as football. This seems to be the case in Japan, where the Sports Promotion Lottery Act 1998, as amended, limits the scope of match-fixing offences to "soccer games as defined in Article 24", which implies *inter alia* that the participants be remunerated for their participation in that game or competition.
- **Competitions on which bets are proposed.** This is the case in several jurisdictions, such as Australia, France, Korea, New Zealand, Switzerland and the United Kingdom. However, this does not imply that non-betting related competition manipulation is not criminalized in these countries; rather, such offences (i.e., manipulations not related to betting purposes) are captured by separate criminal or administrative offences, such as the general provisions on corruption, fraud, bribery, etc. This issue is further clarified here below.

2. Betting and Non-Betting Offences

32. Irregular betting has been long associated with competition manipulation, being highly publicized in the press, notably on the occasion of "big sporting cases"[35]. Already in 1774, one of London's newspapers, The Morning Chronicle, deplored the way in which cricket had been

[34] IOC-UNODC Study (2017), pp. 43 et seq. A *competition having a special economic* is defined as being one where the majority of the participants receive any type of remuneration, compensation or economic revenue for their participation. A *competition having a special sporting importance* is defined as one which is part of the annual sporting calendar approved by the respective sports federation corresponding to an official competition of the highest level of that discipline or specialty (Art. 286 bis para. 4 of the Spanish Criminal Code).

[35] KEA Report (2012), p. 10.

"perverted" and affected by corruption and excessive gaming[36]. One of the first proven cases of betting motivated manipulation was the "Black Sox Scandal" in 1919 which involved the Chicago White Sox baseball team, considered one of the best in the United States at that time. During one game, this team surprisingly lost 9:1 to the Cincinnati Reds and one year later players admitted to deliberately thwarting the World Series with the involvement of a gambling syndicate[37]. More recent cases include the Europol's "Operation Veto", involving a total of 425 officials, players, and criminals, from more than 15 countries, who were suspected of being involved in attempts to fix more than 380 professional football matches in Europe[38], for betting purposes. In addition, another 300 suspicious matches were identified outside Europe, mainly in Africa, Asia, South and Central America. 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[39].

33. Many national legislators have taken into account the close relationship between betting and competition manipulation, adopting **wide-ranging offences** designed to cover all possible situations. For example, in at least 22 jurisdictions[40], **the offence refers to any sport event or competition**, **regardless of whether bets are proposed in relation to that event or competition**.

34. In several countries, such as South Africa and Germany, for example, the law even provides for **two separate offences**: 1) the manipulation of a sport event (for South Africa, in Section 15 of the Prevention and Combating of Corrupt Activities Act 2004; for Germany, in Art. 265d Criminal Code); and 2) the manipulation of a bet (for South

36 See MUNTING R., An Economic and Social History of Gambling in Britain and the USA, Manchester University Press 1996, p. 17.

37 KEA Report (2012), p. 10.

38 See https://www.europol.europa.eu/content/results-largest-football-match-fixing-investigation-europe.

39 See also CARPENTER K., *Match-Fixing—The Biggest Threat to Sport in the 21st Century?,* available at: http://www.lawinsport.com/articles/anti-corruption/item/match-fixing-the-biggest-threat-to-sport-in-the-21st-century-part-1.

40 Quoted in the IOC-UNODC Study (2017), pp. 45 et seq: Argentina, Brazil, Bulgaria, People's Republic of China, Denmark, El Salvador, Germany, Greece, India, Italy, Japan, Latvia, Malta, Paraguay, Poland, Portugal, the Russian Federation, Spain, the Republic of South Africa, Turkey, Ukraine, and the United States of America.

Africa, in Section 16 of the Prevention and Combating of Corrupt Activities Act 2004; for Germany, in Art. 265c Criminal Code)[41].

35. It is nevertheless important to note that, in several jurisdictions (such as Bulgaria, Greece, Italy, Poland, Spain, and Turkey) **fixing a competition for the purpose of betting gain is an aggravating factor** for the main offence. In other words, in these countries, competition manipulation offences incriminate all the manipulations of a sport competition but provide a more severe sanction for perpetrators who use the match-fix in the context of a bet[42].

36. Finally, a few legislators (notably in Australia, France, Korea, New Zealand, Switzerland, and the United Kingdom) preferred **limiting the scope of the competition manipulation offence to competitions on which bets are offered**. In other words, these legislations specifically criminalize fixing only in the context of betting manipulation. Consequently, in these cases, non-betting related match-fixing may only be prosecuted under the general provisions on corruption, fraud, bribery, deception, etc.

3. Act / omission

37. In line with the definition provided in Article 3.4 of the Convention, all national legislators recognize that the manipulation of a sport event can occur both by act and by omission. In the latter case – which is very difficult to prove – a competition participant could for instance wilfully fail to perform according to his duties and his potential, e.g., a football player who deliberately misses a decisive penalty or a referee who deliberately fails to call one[43].

4. Active / passive manipulation

38. As previously mentioned, fixing a competition or an event involves at least two people, playing respectively an active and a passive role. In line with this, all national legislators who criminalized competition manipulation included **both active and passive roles** associated with the manipulation of a sport event or competition (active and passive bribery,

41 IOC-UNODC Study (2017), pp. 43 et seq.
42 Idem.
43 Idem.

corruption, etc.). Thus, both the corruptor/bribe-giver (directly or through an intermediary) and the corrupted person, who is a participant to a sport competition or event (directly or through an intermediary), incur criminal liability according to applicable national laws[44].

5. Manipulation for self/ for a third party

39. Equally, in all jurisdictions where competition manipulation is criminalized, the perpetrator incurs criminal liability even if the manipulation was perpetrated in the interest of a third party.

6. Manipulation through intermediaries

40. Establishing the middlemen liability is essential, as sportspersons (players, referees, officials, sport managers and agents, in addition to people beyond sport circles[45]) are not the only people involved in match-fixing[46]. In this respect, all national legislations criminalizing competition manipulation provide for middlemen liability, which represents an essential element to ensure effectiveness in the fight against match-fixing. This feature is particularly important in cases of organized crime, where one or several intermediaries may intervene in the manipulation process[47].

7. Manipulation for material / non-material gain

41. As recognized in Article 3.4 of the Convention, match-fixers' primary aim may consist of an unlawful economic gain or achieving a "mere" sporting advantage. "Sporting motivations" may involve winning a match or a competition, escaping relegation or qualifying for a higher level of the competition[48]. This is for example the case of the "end-of-season-phenomenon" when deals may be made for avoiding relegation or keeping a club in a competition[49]. Whilst economic benefits are not the primary objective in these cases, this usually results in a second step because maintaining a position in a division or qualification for higher

44 Idem.
45 KEA Report (2012), p. 11 and the quoted references.
46 KEA Report (2012), p. 11.
47 IOC-UNODC Study (2017).
48 KEA Report (2012), p. 10.
49 Idem.

competition has financial consequences, whether for public subsidies, TV rights or sponsorship contracts[50].

42. The first documented case of sporting-motivated match-fixing seems to be that of the boxer Eupolos of Thessaly who, at the Olympic Games of 388 BC, bribed three of his competitors to allow him to win a gold medal[51]. In modern sport, suspicions surrounded the EURO 2004 match between Denmark and Sweden, where the two teams were accused (but not proven) of having fixed the 2-2 result in order to eliminate Italy from the competition[52].

43. Research shows that, with a few exceptions (Argentina, Korea, Malta, and Turkey[53]), all legislations which incriminate competition manipulation refer to any **undue advantage, be it material** ("gift", "present", "consideration", "allotment", "material/pecuniary/financial advantage") **or non-material** (any other undue advantage or benefit). This undue advantage concerns the sporting participant (athlete, coach, director, agent, referee, etc.) who receives or accepts such undue gain in order to manipulate a given sport event[54].

44. We should however note that several legislations are more nuanced when it comes to the nature of the benefits expected by the corruptor/bribe-giver (that is, the corruptor's motivation, which may include material gain or not). Most of these legislations do not mention this aspect at all, thus increasing the scope of application of their respective offences. For the legislations criminalizing match-fixing in the context of betting manipulation (e.g., Australia, France, Korea, New Zealand, Switzerland, the United Kingdom, etc.) the corruptor's objective is linked to an unlawful gain at betting[55].

8. Manipulation of overall result / partial event

45. Certain national legislations (such as Italy, Poland, Portugal, Spain and Turkey) seem to only expressly sanction the alteration of the **result** of

50 Idem.
51 Idem and quoted references.
52 https://www.theguardian.com/football/blog/2012/jun/18/euro-2012-sweden-denmark-2-2 (17.09.2022).
53 These legislations limit the scope of their respective match-fixing offences to manipulation perpetrated in exchange for receiving a material gain.
54 IOC-UNODC Study (2017), pp. 43 et seq.
55 IOC-UNODC Study (2017), pp. 45 et seq.

a game or competition, but not of its course, i.e., of its partial/intermediary events or elements[56]. However, such elements (e.g., half-time result of a match, number of yellow or red cards, number of corners, team to kick-off the match, who will score the next goal, number of free kicks, etc.) may be very attractive for manipulators in view of the fact that these events can be bet upon. Indeed, it is commonly assumed that these "side bets" or "micro bets" (i.e. bets on a specific subset of a game) pose substantial integrity risks because an individual can easily manipulate them and the breach of integrity would be difficult to prove[57]. Moreover, since this type of manipulation ("spot fixing") has a smaller impact - and in some cases even no impact whatsoever - on the outcome of the game, the financial, ethical, and sporting sacrifices for sports-cheaters would be diminished[58].

9. Perpetrators' position or qualifications

46. Numerous national legislations[59] refer in **general terms** to the corruptor/bribe-giver (e.g. "any person" who gives/promises the undue advantage, directly or through intermediaries) and to the corrupted person, i.e., the participant to the sport competition (in Malta, "any player, official or organizer"; in France, any "sporting actor"; in Italy, any "participant in competition"; in Portugal, any "sport agent"; in Korea, "player, coach and umpire", etc.).

47. However, in a few jurisdictions (Bulgaria, El Salvador, Greece, Russian Federation, Spain, Portugal, and Turkey), **the perpetrator's position or qualifications have been defined more precisely**, notably by distinguishing between the direct participants to the competition (players and referees) and their professional entourage[60].

48. For example, in Spain, the law distinguishes between the "directors, administrators, employees or collaborators of a sporting entity" (including coaches), on the one hand, and the "sportspeople, arbiters or judges" on the other hand (Art. 286 bis para. 4 of the Spanish Criminal Code). In Bulgaria, Portugal and Turkey, criminal sanctions are aggravated

56 IOC-UNODC Study (2017), pp. 44 et seq.
57 TMC Asser Institute Report (2015), p. 5.
58 Idem.
59 Quoted in the IOC-UNODC Study (2017), pp. 44 et seq: Argentina, Australia, Brazil, People's Republic of China, Denmark, France, Germany, India, Italy, Japan, Korea, Latvia, Malta, New Zealand, Paraguay, Poland, the Republic of South Africa, Switzerland, Ukraine, the United Kingdom, and the United States of America.
60 IOC-UNODC Study (2017), pp. 44 et seq.

if the perpetrator is a "sports director, referee, agent or club" (Portugal - Art. 12 para. 1 of Law no. 50/2007); a "member of the management or control body of a sport organization, a referee, a delegate or anyone acting while discharging their duties or function" (Bulgaria – Art. 307d Criminal Code); "agents or representatives of clubs or athletes, technical or administrative managers or presidents or members of general assembly or board of directors of sports clubs or legal entities that are operating in the field of sports as well as federations" (Turkey – Art. 11 para. 4b of Law 6222/2011 as amended). According to the Russian legislation, the passive perpetrator is any "athlete, coach, team manager or any other participant of an official professional sports competition as well as any participant of an entertainment profitmaking competition" (Russian Federation – Art. 184 Criminal Code). In Greece, the distinction applies not only to the athlete's professional entourage (trainer, referee or administrator) but also to "any other person associated in any way with the athlete, the referee, the club, the Sport Incorporated Company, the Department of Paid Athletes" (Greece – Art. 13 of Law 4049/2012). In El Salvador, the perpetrator's qualification as the country's representative (national selection) in individual or collective sports leads to aggravated sanctions of imprisonment from 4 to 6 years and special prohibition of rights for the same period (El Salvador – Art. 218A Criminal Code).

49. Finally, in Bulgaria, the law particularly protects competitions involving **young players (under 18)** by providing an aggravating factor (imprisonment from 2 to 8 years and increased fine) for the corruptor of such players (Bulgaria – Art. 307d Criminal Code).

10. Intention / recklessness

50. Insofar as this element in concerned, research shows that most legislations which incriminate competition manipulation[61] do not explicitly mention the intentional or reckless nature of the perpetrator's action or omission (which is subject to their general criminal law principles). The two exceptions are Australia (where the law specifically covers both

[61] Quoted in the IOC-UNODC Study (2017), p. 40: Argentina, Brazil, Bulgaria, People's Republic of China, Denmark, El Salvador, France, Germany, Greece, India, Italy, Japan, Korea, Latvia, Malta, New Zealand, Poland, Portugal, the Russian Federation, the Republic of South Africa, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States of America.

intentional and reckless behavior) and Spain (where the law explicitly requires "deliberate" behavior)[62].

11. Applicable criminal sanctions

51. As previously mentioned, the Convention leaves it to the national legislators to provide the appropriate sanctions for competition manipulation, according to their national regulations and criminal law principles. In practice, research shows that sanctions vary largely, ranging from **imprisonment to a fine or another type of financial penalty**. In certain jurisdictions (Bulgaria, El Salvador, Portugal, Russian Federation, Spain, and Ukraine), other specific sanctions are provided, such as **depravation of certain rights**, notably of the right to exercise a certain profession, activity or industry, or **special confiscation**[63].

52. As already noted, minimum and maximum imprisonment sanctions vary largely from one jurisdiction to another, with the **minimum sanction ranging from 1 or 2 months** in Argentina and France to 2 years in Brazil, El Salvador and Italy, and **a maximum sanction ranging from 1 year (in Denmark) or 2 years (in Malta and the United Kingdom) to 10 years (in Australia, Greece and Poland).**

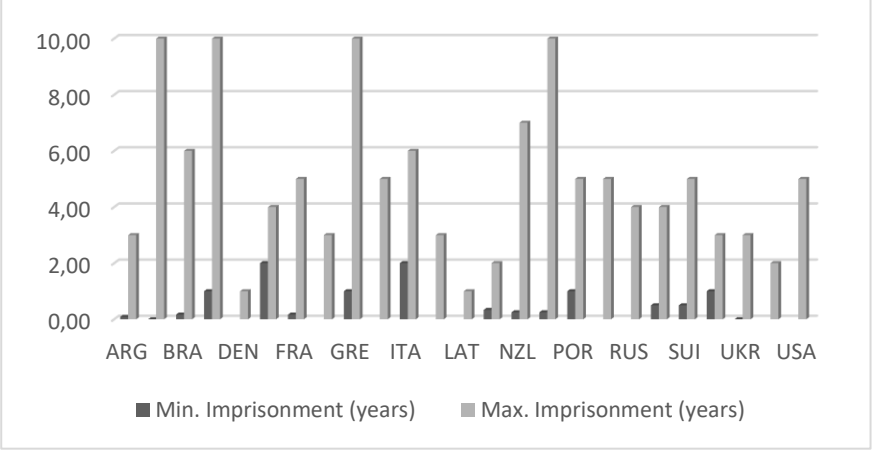

Table: Minimum and maximum imprisonment sanctions (non-aggravated offence) – extracted from the IOC-UNODC Study (2017), p. 42.

62 IOC-UNODC Study (2017), p. 40.
63 IOC-UNODC Study (2017), pp. 42 et seq.

12. Mitigating / aggravating factors

53. Finally, and similarly to sanctions, the Convention does not provide any guidance as to the applicable mitigating or aggravating factors[64], which remain entirely within the discretion of national legislators. In practice, several legislators provided for **specific mitigating factors**, where the imprisonment sanction can be reduced (e.g., in Turkey) or even replaced by a fine (e.g., in Poland)[65]. Such a mitigating factor includes, in Poland, cases of lesser significance, and in Turkey, the presence of incentive bonuses promised or given with the sole intention of promoting success of a team[66].

54. National legislators are more specific when it comes to **aggravating factors,** which may be related to the flowing circumstances:

- Competition on which **bets** are offered – in Bulgaria, Greece, Italy, Poland, Spain and Turkey;
- Manipulation of an **important competition** (national or international) – in Spain, El Salvador;
- The participant's **age** (under 18) – in Bulgaria;
- **Importance of the loss caused** by the fix (in Poland, Spain, New Zealand) **or of the unlawful gain** (in Switzerland);
- The **plurality of participants** (2 or more) – in Bulgaria;
- The **perpetrator's position in a sports organization** (manager, director, coach, referee, agent, etc.) – in Bulgaria, El Salvador, Portugal, the Russian Federation, and Turkey;
- In the presence of a **particularly serious offence** – in Bulgaria, Spain;
- As a form of participation to **organized crime or conspiracy** – in Bulgaria, Portugal, Spain, Switzerland, and Turkey;
- In a context of **recidivism** – in Bulgaria, Malta[67].

64 For more details about mitigating and aggravating factors, see the commentaries at Articles 22 to 25 hereinafter.
65 IOC-UNODC Study (2017), pp. 40 et seq.
66 Idem.
67 Idem.

Article 16

by

Madalina DIACONU

Article 16 – Laundering of the proceeds of criminal offences relating to the manipulation of sports competitions

1 Each Party shall adopt such legislative or other measures as may be necessary to establish as criminal offences under its domestic law the conduct as referred to in Article 9, paragraphs 1 and 2, of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS No. 198), in Article 6, paragraph 1 of the United Nations Convention against Transnational Organized Crime (2000) or in Article 23, paragraph 1 of the United Nations Convention against Corruption (2003), under the conditions referred to therein, when the predicate offence giving raise to profit is one of those referred to in Articles 15 and 17 of this Convention and in any event, in the case of extortion, corruption and fraud.

2 When deciding on the range of offences to be covered as predicate offences mentioned in paragraph 1, each Party may decide, in accordance with its domestic law, how it will define those offences and the nature of any particular elements that make them serious.

3 Each Party shall consider including the manipulation of sports competitions in its money laundering prevention framework by requiring sports betting operators to apply customer due diligence, record keeping and reporting requirements.

I. Purpose of Article 16

1. The purpose of Article 16 of the Convention is to ensure that another important aspect of competition manipulation, namely its **potential to be part of a money-laundering scheme**, is criminalized by the Parties under their domestic laws.

2. Money laundering is the **processing of criminal proceeds** (often originated from illegal arms sales, smuggling, and the activities of

organised crime, including, for example, drug trafficking and prostitution rings) **to disguise their illegal origin**. The "laundering" process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source[1].

3. Money-laundering thus always involves a **predicate offence**, i.e., an offence from which the unlawful proceeds originate.

4. For many years, anti-laundering efforts focused on **drug** proceeds, but recent international instruments, including the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990, ETS No. 141, hereafter "Convention 141"), the Convention 198 and also the 40 Recommendations of the Financial Action Task Force (FATF)[2], recognise that a **wide range of offences (e.g. fraud, terrorism, trafficking in stolen goods and arms) can generate proceeds which may need to be laundered** through subsequent recycling in legitimate businesses. Convention 141 already applies to the proceeds of any kind of criminal activity, including **corruption**, unless a Party has entered a reservation to Article 6, thereby restricting its scope to proceeds from particular offences or categories of offences. The authors of Convention 141 felt that, given the proven close links between corruption and money laundering, it was of primary importance that the convention also criminalised the laundering of corruption proceeds[3].

II. The Link Between Money-Laundering and the Sports Sector

5. The sporting industry is one of the many sectors that are attractive to criminals for money laundering purposes, with **football being particularly vulnerable** in this respect[4], mainly due to its surge of commercialisation, the unprecedented internationalisation of its labour market, the considerable sums of money flowing in (notably from broadcasters and sponsors), and massive cross-border investments by sponsors, including sometimes by "super-rich" private investors. Other

1 https://www.unodc.org/romena/en/money-laundering.html (30.10.2023).
2 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/The40recommendationspublishedoctober2004.html (30.10.2023).
3 Explanatory Report, at 140.
4 FATF-GAFI, Money Laundering through the Football Sector, 2009, p. 2.

sports are also targeted, such as **cricket, rugby, horse racing, motor racing, car racing, ice hockey, basketball and volleyball**[5].

6. The link between the manipulation of sports competitions, sports betting and money-laundering has been the subject of several publications and initiatives. A recent report by the European Union Agency for Law Enforcement Cooperation (Europol) on the involvement of organized crime in sports corruption notes that money-laundering through sports corruption can be a straightforward activity, where smaller amounts of money are laundered directly through betting with illegal funds and turned into legitimate betting wins[6].

7. According to EUROPOL[7], the characteristics of **sports betting platforms** that make them a unique conduit for laundering the proceeds of crime, such that they emerge as legitimate business revenue, include the following:

- They involve **anonymity and high liquidity**;
- **Cash flow is fluid**, often online and easily transferred across jurisdictions;
- Offline betting often deals with **large cash sums** and is **partially anonymous**, with physical betting retailers often connected to online websites, which creates direct money-laundering possibilities;
- There is a **diversity of sports betting laws and regulatory frameworks**, with many regulated and unregulated bookmakers available to process bets;
- Betting winnings are tax free and/or can be easily diverted offshore in some jurisdictions;
- **Payout percentage is high relative** to investment returns available in other financial services industries;
- The application of **weaker sanctions or no sanctions** for competition manipulation makes money-laundering through sports betting particularly attractive to criminal organizations,

5 Idem, p. 8. See also VERSCHUUREN P., KALB C., *Money Laundering: the Latest Threat to Sports Betting?*, IRIS Editions, 2013.

6 UNODC, *Legal Approaches* (2021), pp. 32 et seq., and the referenced literature.

7 EUROPOL, The involvement of organised crime in sports corruption: situation report (August 2020), p. 19.

representing a lower-risk investment when compared to other types of crime that are more severely sanctioned[8].

III. The Contents of Article 16

A. First Paragraph

8. The first paragraph of Article 16 requires Parties **to criminalize, in their domestic law, conduct involving money laundering** (as defined, for example, in one of the three international conventions mentioned below), **when the predicate offence giving rise to profit is one related to competition manipulation (referred to in Articles 15 and 17 of the Convention), and, in any event, in the case of extortion, corruption and fraud**[9].

9. As is apparent from its wording, Article 16 (1) of the Convention relies on the **three customary definitions of money-laundering**, given in Article 9, paragraphs 1 and 2, of Convention 198 (on Money-Laundering)[10]; in Article 6, paragraph 1, UNTOC[11]; and in Article 23, paragraph 1, UNCAC[12]. The offences of extortion, corruption and fraud are included in Appendix 2 to Convention 198, which sets out **a minimum range of offences to be regarded as predicate offences of money laundering**. These offences are also covered in the recommendations of the Financial Action Task Force (FATF), laying down the international standards in this area[13].

B. Second Paragraph

10. Paragraph 2 allows the Parties, when deciding on the range of offences to be covered as predicate offences under each of the categories mentioned in paragraph 1, to decide, in accordance with their domestic law, how they will define those offences and the nature of any particular

8 Idem.
9 Explanatory Report, at 135.
10 https://rm.coe.int/168008371f (17.09.2022).
11 https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (17.09.2022).
12 https://www.unodc.org/unodc/en/treaties/CAC/ (17.09.2022). See Explanatory Report, at 136.
13 Explanatory Report, at 137.

elements of those offences that make them serious[14], thus leaving a **large margin of discretion** to the Parties in this respect.

C. Third Paragraph

11. The purpose of paragraph 3 is to require Parties to consider including the manipulation of sports competitions in their money laundering **prevention framework**. This prevention framework, which includes requirements of due diligence with respect to consumers, keeping records and reporting, corresponds to measures such as those mentioned in Article 13 of Convention 198, in Article 7 of the UNTOC or in Article 14 of the UNCAC[15].

12. Although Article 16.3 is not a provision of substantive criminal law nor a law enforcement co-operation, it was, however, kept together with the other provisions on money laundering to ensure unity[16].

IV. Implementation of Article 16

13. In 2021, the UNODC conducted a study covering *inter alia* the implementation of Article 16 of the Convention. The review identified four jurisdictions (El Salvador, Finland, Panama and Switzerland) that have applied laws related to tackling money-laundering as part of cases related to the manipulation of sports competitions[17].

14. One jurisdiction (United Kingdom) was found to have applied laws related to unexplained wealth and revenue and tax fraud as part of cases related to the manipulation of sports competitions[18].

15. In addition to these, the IOC-UNDOC Study of 2017 also identified a noteworthy initiative in Paraguay, where a bill was proposed in 2015 for the modification of the domestic law against money laundering (law nº 1015/97). The bill aimed at including sports clubs, federations, and other entities in the scope of application of this law and at imposing transparency and integrity obligations on these entities. The bill was

14 Explanator Report, at 141.
15 Explanatory Report, at 143.
16 Explanatory Report, at 143.
17 UNODC, Legal Approaches (2021), p. 32.
18 UNODC, Legal Approaches (2021), pp. 32 et seq.

debated in the Parliament in 2016, but its adoption was postponed. It was finally approved by the Senate in July 2022[19].

[19] http://www.senado.gov.py/index.php/noticias/noticias-presidencia/9984-el-senado-se-ratifico-en-proyecto-que-incluye-a-tabacaleras-y-clubes-deportivos-como-sujetos-obligados-2022-07-07-20-44-47 (17.09.2022).

Article 17

by

Madalina DIACONU

> ***Article 17 – Aiding and abetting***
>
> *Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the aiding and abetting of the commission of any of the criminal offences referred to in Article 15 of this Convention.*

I. Introduction

1. Crimes can be committed by one or several perpetrators, with or without the support of accomplices. However, criminal courts and tribunals impose criminal liability on any person who "commits" a crime[1]. Consequently, it is important to define who has "committed" a crime and, more specifically, **under which circumstances *participation* to a crime also constitutes a conduct for which the participator's criminal liability may be engaged**.

2. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) explained[2]: "Most of these crimes do not result from the criminal propensity of single individuals but constitute **manifestations of collective criminality**: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although some members of the group may physically perpetrate the criminal act [...], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the

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1 See DE HEMPTINNE J., ROTH R., VAN SLIEDREGT E., CUPIDO M., VENTURA M.J., YANEV L. (eds), *Modes of Liability in International Criminal Law*, Cambridge, Cambridge University Press, 2019), pp. 173-256.

2 *ICTY Prosecutor v Dusko Tadic*, Appeals Chamber Judgment (IT-94-1-A) 191.

acts in question. To hold an individual liable for her conduct, it is necessary to determine her **degree of participation in a crime**".

3. This is particularly important in the case of competition manipulation, as **competition manipulation activities often imply the participation of several persons and are even carried out by organised crime networks**[3].

4. As an important preliminary remark, we note that **the French and English versions of the Convention are not perfectly identical on this point**. Indeed, the French text uses the term "*complicité*", generally covering the activity of an "accomplice", which in certain jurisdictions (France, Switzerland, Romania, etc.) does not include the person who provides moral support to the author and/or instigates him/her to commit the crime. In these jurisdictions, such person is called an "instigator", constituting a different category of participant. However, in the English version of the Convention, the term "*abetting*", which is complementary to "*aiding*", usually includes the latter actions. Thus, the English terminology used in Article 17 (referring to aiding *and* abetting) appears to be more encompassing than its French counterpart, which only refers to "*complicité*". We will hereinafter refer to this wider notion in English.

5. Thus, in the Convention, aiding and abetting represent an accessorial mode of responsibility whereby a person is accused of having facilitated the commission of an offence which was mainly committed by others.

6. It consists of two forms of activity:

- "aiding", which usually refers to the **provision of a form of practical or material assistance** to the main perpetrators of a crime; and
- "abetting", which involves the **provision of moral support**, **encouragement or instigation** to the main perpetrators of an offence[4].

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3 Explanatory Report, at 146.

4 In international criminal proceedings, these two forms of participation to a crime have been scrutinized, for example, in *ICTR Prosecutor v Jean-Paul Akayesu*, Trial Chamber Judgment (ICTR- 96- 4) 484; *ICTY Prosecutor v Tihomir Blaškić*, Trial Chamber Judgment (IT- 95- 14-T) 284, footnote 510; *ICTY Prosecutor v Miroslav Kvocka et al*, Trial Chamber Judgment (IT- 98- 30/ 1-T) 254; *ICTY Prosecutor v Semanza*, Trial Chamber Judgment (ICTR- 97- 20-t) 384; *ECCC Prosecutor v Kaing Guek Eav*, Trial Chamber Judgment (001/18-07- 2007-ECCC/ TC/ E188) 533; *ICC Prosecutor v Bemba et al,* Trial Judgment (ICC- 01/ 05- 01/ 13- 1989- Red) 88- 9.

7. From a philosophical perspective, accomplices and instigators deserve punishment in order to rebalance the moral ledger, express disapprobation in ways that shore up the community's common condemnation of prohibited conduct, or to respect their own dignity[5].

8. For these reasons, it was paramount for the Macolin Convention to make clear that aiding and abetting in relation to the crimes provided in Article 15 were to be criminally sanctioned by each Party, according to their national laws.

9. Also, understanding the potentially varied roles that different participants may play in a competition manipulation scheme (including providing strategic inside information to main perpetrators, facilitating their introduction to players or referees, or facilitating the financial transactions aimed at rewarding main perpetrators) is key to the efficiency of **educational and preventive measures** to be implemented mainly by sports organisations, according to Chapter 2 of the Convention.

II. Purpose of Article 17

10. The purpose of Article 17 is to determine the Parties to **establish aiding and abetting as criminal offences provided in the Parties' domestic law, in relation to the offences covered by Article 15 of the Convention**[6].

11. Importantly, this provision reflects the one in **Article 5.1.b UNTOC**[7], which extends the convention offences to any person who aids and abets by organizing, directing, aiding, abetting, facilitating or counselling the commission of the offences[8].

12. Also – and even if the Explanatory Report does not mention it – Article 17 is to be read together with **Article 27 UNCAC**, which

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5 STEWART J.C, *Complicity* (October 24, 2013). *Oxford Criminal Law Handbook*, DUBBER M., HÖRNLE T. (eds.), Oxford University Press, 2014, Available at SSRN: https://ssrn.com/abstract=2344957, p. 3.

6 Explanatory Report, at 143.

7 Art. 5.1.b. UNTOC reads: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: […] b. organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group".

8 Explanatory Report, at 145.

criminalizes the fact of knowingly acting as an accomplice, assistant or instigator in a corruption offence[9].

III. The Contents of Article 17

13. As already pointed out, the manipulation of sports competitions is **often carried out by organised crime networks comprising numerous individuals**, each of whom contribute in their own way, either directly or indirectly, to the commission of the illegal activities. While **accomplices** help or assist the main perpetrators commit the acts which qualify as competition manipulation (as defined under Articles 3 and 15), **instigators** are often the masterminds behind the manipulation scheme, frequently working in the shadows through other, more visible, perpetrators. Indeed, masterminds seldom "pull the trigger"; their role is more strategical, consisting of planning the manipulation, prompting others to commit the material acts leading to such manipulation or recruiting the executants of the offence.

14. That was why it was important to include in the Convention's offences all acts that deliberately contribute to the offences[10]. Indeed, as pointed out in the Convention and in its Explanatory Report, liability for aiding or abetting arises where the person who commits a crime referred to in this convention is aided by another person who **knowingly** aids and abets by facilitating the preparation or commission of the offence. Therefore, aiding or abetting **must be committed intentionally**[11].

15. Several national legislations and jurisprudences reflect cases of aiding and abetting in competition manipulation.

16. In Switzerland, for example, **Articles 24 and 25 of the Swiss Criminal Code** generally provide that aiding and abetting and instigating the commission of a crime or offence are punishable by criminal penalties. To this purpose, the fact that aiding is punished less severely does not change the criminal nature of the act. Importantly, this also specifically

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9 Art. 27 UNCAC – Participation and attempt: "1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.[…]".

10 Explanatory Report, at 146.

11 Explanatory Report, at 144.

applies to complicity and instigation in the field of manipulation of sports competitions, as long as such manipulation can be classified as a crime or quasi-crime (qualified offence). These two offences also constitute a predicate offence for money laundering[12].

17. As of 2015, **Greek** law specifically criminalizes any "intervention" in a sporting contest to influence its course or outcome. This provision covered, for instance, the conduct alleged in the 2011 Greek soccer match-fixing prosecution where the corrupt actors bombed a referee's bakery because he refused to slant his calls to favor one team[13].

18. The **Latvian** Sports Law defines the criminal offence of manipulation of sports competition as "any activity that focuses on violating the unpredictability of the course of the competition or its results"[14], which includes participation from accomplices and instigators.

19. In **Germany**, the notorious case of a football referee[15] also illustrates aiding and abetting in the field of sports corruption: the Federal Supreme Court of Justice sentenced him to two years and five months in prison for aiding fraud, in six cases where he had assisted a Croatian organized crime group to fix the result of football matches (*inter alia* by communicating them early confidential information regarding the identity of other referees appointed for upcoming matches), in exchange for financial rewards.

20. Finally, it is important to mention that **the Convention is silent as to the sanctions to be applied to accomplices and instigators.** Indeed, the Convention leaves it up to the Parties to provide, according to their domestic legal framework, such sanctions and to establish their severity as compared to that of sanctions applicable to main perpetrators.

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12 See also commentary to Article 16.

13 See HALLMANN K. et al., Match-Fixing and Legal Systems-An Analysis Of Selected Legal Systems In Europe And Worldwide With Special Emphasis On Disciplinary And Criminal Consequences For Corruption In Sport And Match-Fixing (6 Oct. 2019), https://d-nb.info/ 1204295867/34 (30/10/2023).

14 Quoted by BALSAM J., Criminalizing Match-Fixing as America Legalizes Sports Gambling, 31 Marq. Sports L. Rev. 1 (30).

15 Case referenced in ROTSCH T., *Concerning the hypertrophy of law: a plea for the harmonization between theory and practice*, Zeitschrift für Internationale Strafrechtdogmatik, vol. 3 (2009), pp.89–96; and FELTES T., *Match fixing in Western Europe*, in Match-Fixing in International Sports: Existing Processes, Law Enforcement and Prevention Strategies, M.R. Haberfeld and Dale Sheehan, eds. (Cham, Switzerland, Springer, 2013).

Article 18

by

Madalina DIACONU

Article 18 – Corporate liability

1 Each Party shall adopt such legislative or other measures as may be necessary to ensure that legal persons can be held liable for offences referred to in Articles 15 to 17 of this Convention, committed for their benefit by any natural person, acting either individually or as a member of an organ of the legal person, who has a leading position within the legal person, based on:

a. a power of representation of the legal person;

b. the authority to take decisions on behalf of the legal person;

c. the authority to exercise control within the legal person.

2 Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

3 Other than in the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable when lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of an offence referred to in Articles 15 to 17 of this Convention for the benefit of that legal person by a natural person acting under its authority.

4 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

I. Introduction

1. Organized criminal groups often use corporations, businesses, charitable organizations or other entities to commit crimes. Such organisations can be used to mask individual involvement in offences, notably by **occulting ownership and transactions or by preserving, transferring and laundering the proceeds of crime.** Such structures may also be used to protect individuals from personal liability.

2. However, **corporate liability is not easy to conceptualise, and it is not universally recognized** (especially criminal liability)[1]. Moreover, even in States which recognize corporate criminal liability, this concept is a (relatively) **recent phenomenon**: for example, the Czech Republic introduced criminal liability of legal persons in 2012; in Spain, the first legal provisions concerning criminal liability of legal persons were installed in 2010; the same goes for Slovakia and Luxembourg; in Portugal, it was installed in 2007; in Poland, in 2002; in Belgium, in 1999; in France, in 1994[2].

3. Indeed, the attribution of responsibility to an artificial entity is a particularly complex challenge for many jurisdictions because most legal systems base their criminal laws on a combination of physical conduct and mental states[3]. In particular, **the attribution of mental states, such as "intention" or "knowledge" to a legal person is quite complex**[4]. In this context, some countries decided to make the liability of the entity dependent upon the liability of individuals. Thus, in jurisdictions that adopted this approach, a company may be held liable for a criminal offence committed by an officer or employee of the organization. Other countries, sought to reflect the culpability of the organization itself and, for instance, identified the responsibility of the organization in the way in which it is structured, its policies and its failure to supervise its employees or agents[5]. Finally, in many countries, the **principle of subsidiary liability** is applied, meaning that companies may be held liable for criminal offences if it is not possible to attribute this act to any specific natural person.

4. According to the Council of Europe, **the main arguments for the necessity of complementing the liability of natural persons with the liability of legal persons** are[6]:

- corporations often tend to be involved in bribery either deliberately, or by tolerating a culture of corruption; as such,

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1 For a synopsis of legal systems within the Council of Europe, see *Liability of Legal Persons for Corruption Offences*, Council of Europe Publications, May 2020. For EU Member States, see VERMEULEN G., DE BONDT W., RYCKMAN C., *Liability of legal persons for offences in the EU*. Antwerpen | Apeldoorn | Portland, Maklu 2012.

2 VERMEULEN G., DE BONDT W., RYCKMAN C., quoted above, p. 32.

3 See also https://www.unodc.org/e4j/en/organized-crime/module-4/key-issues/liability-legal-persons.html (17.11.2022).

4 Idem.

5 Idem.

6 For entire paragraph, see Council of Europe, *Liability of Legal Persons for Corruption Offences*, Council of Europe Publications, May 2020, p. 8.

they should be liable by the simple reason that justice requires so.

- it may be unfair to apportion blame to one specific individual when a complex, diffuse decision-making structure is involved.
- corruption as a social phenomenon cannot be prevented if it is not tackled at one of its sources: corporate profit corrupting the state.
- prevention at a corporation level can be more effective: they tend to think more rationally about the economic risks of an offence than individuals do. Such risks can be considerable: American firms facing bribery-enforcement action lose on average 9% of their market value.
- corporate liability provides an incentive for legal persons to install anti-corruption measures.
- corporations "are frequent vehicles for the payment of bribes and are readily adaptable to the purpose. The use of elaborate financial structures and accounting techniques to conceal the nature of transactions is commonplace".
- confiscation of proceeds from corruption is facilitated if one includes corporate liability.
- sanctions imposed under the liability of legal persons regime can generate substantial source of funding for the public budget; the general public, which in the end is the victim of corruption, thus receives some redress for the offence.
- as bribes are not tax-deductible, the liability of a legal person for a bribe will regularly entail additional tax revenue for the state following a bribery investigation.
- as there is often no plaintiff in such cases, there is no cause or sufficient evidence to make a civil claim for the overall economic damage from acts of bribery. Civil liability for damages would therefore not be enough. A competitor would have to prove that without the bribe he would have won the contract and the state that awarded the contract to the bribing company would have to prove that it would have awarded the contract to another bidder if it had not been for the bribe. The situation is even more complicated when competitors colluded with the bribing company in order to benefit from subcontracts with the bribing company.

- evidence investigated for liability of legal persons is often useful for establishing liability of natural persons; often such evidence would not be available had there not been a proceeding against the legal person.

5. Finally, on this point, it should be made clear that in systems that recognize (criminal) corporate liability, individuals who perpetrate the offences are not exempt from personal liability. In other words, when an individual commits crime on behalf of a legal entity, **it must be possible to prosecute and sanction both the individual and the legal entity**.

6. In the field of sports, several studies have **linked competition manipulation to legal entities** and provided examples of how such entities can contribute to the match-fixing process[7].

7. This is the context in which the authors of the Convention considered it paramount to establish the liability of legal entities which used or benefited from competition manipulation schemes.

II. Purpose of Article 18

8. The purpose of Article 18 is to include in the Convention the usual references to corporate liability and link them to the main provisions applicable to the manipulation of sports competitions[8].

9. Naturally, one of the main references is the **UNTOC**, whose **Art. 10** deals specifically with the liability of legal persons and recognizes the important role that legal persons might play in the commission or facilitation of transnational organized crime. Using the same language as the Macolin Convention, this article requires that State parties establish the liability of legal persons, while also providing that, subject to the legal principles of the State party, this liability may be criminal, civil or administrative.

10. Art. 18 of the Macolin Convention thus echoes the same purpose as Art. 10 UNTOC and leaves it up to the Parties to decide under which form (criminal, civil or administrative) they want to address this issue.

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7 See, for example, HALLMANN K., MORITZER S., ORLAINSKY M., NAYDENOVA K., FÜRST F., *Matchfixing and legal systems. An analysis of selected legal systems in Europe and worldwide with special emphasis on disciplinary and criminal consequences for corruption in sport and match-fixing*, October 2019, Cologne: German Sport University, Institute of Sport Economics and Sport Management ISBN 978-3-00-064119-0.

8 Explanatory Report, at 147.

Indeed – and despite the 20-year existence of the UNTOC, which has now been ratified by over 190 States – national legal regimes remain quite diverse in the ways in which they recognize liability of legal persons, how they attribute responsibility or guilt and determine sanctions, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal measures.

11. There is also a direct reference to the Council of Europe's **Criminal Convention on Corruption (Convention 173)**[9], entered into force in 2002, whose Art. 18 is very similar to Art. 18 of the Macolin Convention.

III. The Contents of Article 18

12. Article 18 is structured in four paragraphs and uses certain definitions derived from other international conventions.

13. The term "**legal person**" within the meaning of Convention 173 refers to **any entity having such status under the applicable national law**. For the purpose of active corruption offences, however, the definition should **exclude the state or other public bodies exercising state authority, such as ministries or local government bodies, as well as public international organisations** such as the Council of Europe. The exception applies to the different levels of government: State, regional or local entities exercising public powers. The reason is that the responsibilities of public entities are subject to specific regulations usually embodied in administrative law or, in the case of public international organisations, in agreements or treaties. It is not, however, aimed at excluding the responsibility of public enterprises[10].

A. First Paragraph

14. Under **Article 18 para.1**, legal persons shall be held liable if the following conditions are met[11]:

15. Firstly, **the offence is one of those referred to in Articles 15 to 17** of the Convention, i.e., manipulation of sports competitions, money

9 https://rm.coe.int/168007f3f5.
10 Explanatory Report, at 148.
11 Explanatory Report, at 149.

laundering in relation to competition manipulation, and aiding and abetting[12]. Indeed, since the Macolin Convention only deals with competition manipulation, its provisions on corporate liability are naturally limited to this main offence.

16. Secondly, **the offence must have been committed for the benefit of, or on behalf of, the legal person by any natural person, acting either individually or as a member of an organ of the legal person, who has a leading position within the legal person**. This condition links the behavior of the natural person who concretely commits the offence (for ex., by offering a bribe to a player or to a referee) to the legal entity used for the manipulation scheme or which will ultimately benefit from the offence.

17. The "leading position" assumed to exist in the three situations described in this paragraph (a power of representation or authority to take decisions or to exercise control) demonstrates that such a natural person is legally or in practice able to engage the liability of the legal person.

B. Second Paragraph

18. As already pointed out, **Article 18 para. 2** leaves it to the Parties' domestic law to decide if the liability of a legal person shall be **criminal**, **civil or administrative**[13]. This provision is paramount as it takes into account the **diversity of domestic legal landscapes addressing the issue of corporate liability**.

19. Indeed, as previously mentioned, historically, the principle that corporations cannot commit crimes (*societas delinquere non potest*) was universally accepted before being abandoned, first in common law countries, and, more recently, in civil law jurisdictions. Naturally, among the three types of liability mentioned in Article 18, **criminal liability reflects the highest level of condemnation** that the State can impose. Consequently, such offences are typically heard by courts or equivalent bodies and are subject to the highest levels of procedural protection. For those countries that do not recognize the criminal liability of legal persons, **civil or administrative liability can provide an effective alternative**.

20. For example, under U.S. law, companies are considered to be legal persons capable of committing crimes. The principle of *respondeat*

[12] See comments to Art. 15, 16 and 17 here above.
[13] Explanatory Report, at 150.

superior[14] makes companies generally responsible for the actions of their employees and agents under their control. There is no requirement for any imputed "mental element" by the "mind" of the company and it is therefore irrelevant whether the conduct has been allowed, condoned, or even condemned by the management at a particular level[15].

21. In **Switzerland**, the Swiss Criminal Code was modified in 2003 to impose criminal liability on companies. Previously, only the managers, board members or the employees of the company could be prosecuted for criminal offences. At present, Article 102 of the Swiss Criminal Code (SCC) provides for two types of criminal liability for companies:

> 1) according to the principle of subsidiary liability, **companies may be held liable for criminal offences if it is not possible to attribute this act to any specific person**. According to Article 102 § 1 of the SCC, such liability only exists if: (i) a felony or misdemeanor is committed within a company; (ii) it is done in the exercise of commercial activities in accordance with the objectives of the company; (iii) it is not possible to attribute this act to any specific individual; and (iv) it is due to the inadequate/inefficient organization of the company;
>
> 2) primary liability is levied for certain offences exhaustively listed in Article 102 § 2 of the SCC (participation in criminal or terrorist organizations; financing terrorism; money laundering; bribery; granting an advantage to a public official; bribery of foreign public officials; and bribery of private individuals), which provides that **the company is responsible if it fails to take all the reasonable organizational measures that were required in order to prevent** such an offence.

22. Concerning **administrative liability** of legal entities, a study noted that this type of liability is also **not universally recognized**. For example, almost one third of EU Member States do not apply

[14] Under this principle, a company can be held liable for misconduct by its directors, officers, employees or agents who are acting within the scope of their employment with the intention, at least in part, of benefitting the company. See Council of Europe, *Liability of Legal Persons for Corruption Offences*, Council of Europe Publications, May 2020, p. 23.

[15] Council of Europe, *Liability of Legal Persons for Corruption Offences*, Council of Europe Publications, May 2020, p. 23.

administrative liability of legal persons for offences in their national law systems[16].

23. In **Bulgaria**, where the law does not recognize the existence of corporate criminal liability, a hybrid concept of "**administrative-criminal liability**" was created for legal entities[17].

24. Finally, **civil liability** is meant to allow potential damages to be compensated swiftly (be it through a purely civil or combination of criminal and civil system). Arguably, this type of liability precedes the other types in many jurisdictions. In **Denmark**, for example, the civil liability system of legal persons has had its present form since 1900[18].

C. Third Paragraph

25. **Article 18 para. 3** expressly mentions the Parties' obligation to extend corporate liability to cases where the **lack of supervision** within the legal person makes it possible to commit the offences referred to in Articles 15 to 17. This paragraph seeks to hold **legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinates** acting on behalf of the legal person (**lack of due diligence**).

26. This provision is meant to enhance the efficiency of the fight against competition manipulation in jurisdictions which did not introduce the so-called 'strict liability'-regime (where the legal entity's liability can be engaged without having to prove a lack of supervision or control on behalf of the company's management).

27. Besides Convention 173, a similar provision also exists in the **Second Protocol to the European Union Convention on the Protection of the Financial Interests of the European Communities**[19]. Like in para 1, the nature of the liability is to be decided by the Contracting Party itself[20].

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16 Idem, p. 33.

17 See VERMEULEN G., DE BONDT W., RYCKMAN C., *Liability of legal persons for offences in the EU*, p. 26.

18 Idem, p. 37.

19 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41997A0719%2802%29 (17/11/2022).

20 Explanatory Report, at 151.

D. Fourth Paragraph

28. Finally, **Article 18 para. 4** provides that the liability of legal persons is **without prejudice to the criminal proceedings against natural persons** who are perpetrators of, or accessories to, the criminal offences referred to in para. 1[21].

29. According to this paragraph, the liability of natural persons who perpetrated the acts exists **in addition to any corporate liability** and must not be affected by the latter. Thus, when an individual commits a crime on behalf of a legal entity, it must be possible to prosecute and sanction **both the individual and the legal entity**.

30. Naturally, this paragraph does not preclude the application of the universally recognized principle of **ne bis in idem**, which guarantees the right to be free from double jeopardy.

IV. Sanctions

31. Finally, we note that, unlike Art. 10 UNTOC which provides in its para. 4 that the Parties should adopt "effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions", **Art. 18 of the Macolin Convention does not address the issue of sanctions applicable to legal entities**. Instead, this topic is dealt with in **Art. 23 and 24**[22].

32. In practice, as will be discussed in Art. 23, the level of penalties varies largely across jurisdictions, but there are certain common trends. The most common penalties imposed on corporate entities are **fines**, the most severe sanction being the **dissolution of the company** (Romania, Hungary, Slovakia, the Czech Republic, etc.). In addition, if a company is prosecuted it can also face a number of harsh interim measures, which include **suspension of commercial activities, prohibition on participating in public tenders or asset forfeiture**[23].

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21 Explanatory Report, at 152.

22 See our commentaries on Art. 23 and 24.

23 CMS, The CEE guide to the criminal liability of corporate entities, May 2021, p. 4.

Article 19

by

Surbhi KUWELKER

Article 19 – Jurisdiction

1 Each Party shall adopt such legislative or other measures as may be necessary to establish jurisdiction over the offences referred to in Articles 15 to 17 of this Convention where that offence is committed:

a in its territory; or

b on board a ship flying its flag; or

c on board an aircraft registered under its law; or

d by one of its nationals or by a person habitually residing in its territory.

2 Each State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, the rules on jurisdiction laid down in paragraph 1, subparagraph d of this article.

3 Each Party shall take the necessary legislative or other measures to establish jurisdiction over offences referred to in Articles 15 to 17 of this Convention in cases in which an alleged offender is present on its territory and cannot be extradited to another Party on the basis of his or her nationality.

4 When more than one Party claims jurisdiction over an alleged offence referred to in Articles 15 to 17 of this Convention, the Parties involved shall, where appropriate, consult each other with a view to determining the most appropriate jurisdiction for the purposes of prosecution.

5 Without prejudice to the general rules of international law, this Convention does not exclude any criminal, civil and administrative jurisdiction exercised by a Party in accordance with its domestic law.

I. Introduction

1. Article 19 lays down various requirements whereby Parties **must legislate to establish jurisdiction** over the offences with which the convention is concerned[1]. The provisions under article 19 are consistent with those seen across other Council of Europe conventions on the establishment and requirements of jurisdiction in connection with the subject matter they seek to govern, particularly in a criminal context[2].

2. Article 19 also encapsulates commonly accepted and used **principles governing jurisdiction** in international law, but it is important to note that these categories across Article 19.1, 19.2 and 19.3 (and exceptions to them) are **not exhaustive**, with Parties advised to legislate to also establish additional types of jurisdiction over offences under the Macolin Convention[3].

II. Purpose of Article 19

3. Ordinarily, when all components of an offence lie in one country, establishing jurisdiction in a Party's domestic law does not assume much significance as territorial links provide for jurisdictional clarity, as seen in section III.C.1 below. Yet, **what constitutes Party territory** assumes significance. As well, certain crimes are often committed **across territories**, particularly those involving digital components, and are faced with certain unique problems, as occurs often in case of manipulation – the presence of persons placing bets in one jurisdiction on a match being held in another through a platform located in a third, is not uncommon[4].

4. While the Macolin Convention does not contain a specific definition of a manipulation offence that occurs across borders, despite jurisdiction provisions showing that it is envisioned that this might occur, other instruments which define transnational crime provide useful reference. For instance, the United Nations Convention against Transnational Organized Crime ("UNTOC") defines **offences of a transnational nature** as those which (a) are committed in more than one country; (b) are committed in one country but a substantial part of their

1 Explanatory Report, para 153.
2 See, for example, the Council of Europe's Cybercrime Convention of 2014, CETS 185 under section 3, and Article 22.
3 See Article 19.5, described further in section III.B below.
4 See for example, Explanatory Report, para 233.

preparation, planning, direction or control takes place in another; (c) are committed in one country but involve an organized criminal group that engages in criminal activities in more than one country; and/or (d) are committed in one country but have substantial effects in another[5].

5. The **transnational nature of manipulation** and corruption related crimes and offences has been widely noted[6]. This is also particularly the case as offences are increasingly 'artificial', i.e. in non-territorially demarcated space or cyberspace and use computer systems[7]. To this extent, the relevance of instruments which provide guidance on what law shall address crimes taking place across jurisdictions such as the Macolin Convention and that contain provisions to address consequent jurisdictional issues that arise may be highlighted; a response to such offences, particularly when committed digitally, requiring "*durable solutions*", including "*…through strengthened international cooperation, based on the principles of shared responsibility and in accordance with international law*."[8]

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5 Article 3, UNTOC.

6 Explanatory Report, para 159; see also, for example, UNODC, Legal Approaches to tackling the Manipulation of Sports Competitions: A Resource Guide, p. 2.

7 See RYNGAERT C., "Territorial Jurisdiction over Cross-frontier Offences: revisiting a Classic Problem of International Criminal Law", 9(1) *International Criminal Law* Review 2009, 187; RYNGAERT C., "The Territoriality Principle", *Jurisdiction in International Law* (Oxford Public International Law, Oxford University Press: Oxford, 2015), in section 3.4 on Territorial Jurisdiction over Cross-border Offences; see also RYNGAERT C., "The Concept of Jurisdiction in International Law" available at https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf (April 30, 2022); by way of example, numerous virus attacks, fraud and other violations committed through the internet target matches and function through persons and platforms in other countries – Explanatory Report to the Cybercrime Convention, para 239. C. Ryngaert also cites the Cybercrime Convention (*supra* note 2), as well as numerous other EU instruments which address internet based criminality which prioritize territoriality as the basis for jurisdiction, including Article 8.1.a in Council Framework Decision 2004/68/JHA, Article 9.1.a in Council Framework Decision 2008/913/JHA and Article 10.1.a in Council Framework Decision 2005/222/JHA, basing jurisdiction on the commission of the offence 'in whole or in part' on the territory of an EU member state.

8 UNODC, Legal Approaches to tackling the Manipulation of Sports Competitions: A Resource Guide, *ibid*. at p. 49 citing UN General Assembly Resolution 74/177 entitled "Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity".

III. The Contents of Article 19

A. Commonly understood concept of Jurisdiction in Criminal Law

6. Article 19 and, similarly, any jurisdiction provisions within conventions such as the Macolin Convention facilitate and provide guidance to Parties to such conventions to legislate effectively, such that there is clarity within their domestic law on which state shall be able to prosecute offences covered in that specific instrument.

7. Relevant to this consideration is the very concept of **commission**, or **the place where the crime is committed.** While the concept may vary by jurisdiction, the location or place of commission is considered to include *both* the place where the offence is committed by the perpetrator concerned as well as the place where the offence has taken effect[9].

8. Additionally, principles which ordinarily govern jurisdiction of a country in **national criminal law** are relevant. Usually, and perhaps simplistically, ***first***, is the **principle of territoriality**, commonly accepted international law standards being satisfied with requiring that **either the criminal act or its effects** ('constituent elements'), as defined within domestic law, have taken place within a State's territory for the State to legitimately exercise territorial jurisdiction, irrespective of the domestic law's characterization of the act or its effects[10]. This remains the first of three categories of jurisdiction originally put forth, the others being **quasi-territorial** and **personal**, as seen below[11].

9. Accordingly, under the ***second***, states may expand jurisdiction outside of their territories, primarily, in what are considered **'quasi-territorial' domains**[12]. This would include legal entities on the territory of

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9 An example of this is Article 8 of the Swiss Penal Code which states (translated) that have been committed both at the place where the author acted or should have acted and at the place where the result occurred.

10 RYNGAERT C., "The Territorial Principle", *supra* note 7, under section 3.4 on "Territorial Jurisdiction over Cross Boarder Offences".

11 Original suggested in the 1959 paper "Crimes on Board an Aircraft", 12 *Current Legal Problems* 1959, 177; see also, SCHWARZENBERGER G., *A Manual of International Law*, vol. 1(1), 1960 p. 85 as cited in CHENG B., "The Extra Territorial Application of International Law", *Current Legal Problems* 1965, 132 at 135 and 136.

12 CHENG B., *ibid.*, p. 135; see also GRANT J. P., BARKER J. C., *Encyclopaedic Dictionary of International Law* (3rd edn., Oxford University Press: Oxford, 2009).

another country, or on the seas, in the air or in outer space (and all the persons and things therein, the last, for example, not expressly dealt with under this section of Article 19), with Parties having, as well, personal jurisdiction over all nationals and persons thereon under that state's protection, as well as over their property[13].

10. The ***third*** category of jurisdiction is **'personal', extending to persons**, **being individuals or legal entities**, within a state's nationality, enjoying its protection or otherwise having alliance to it[14]. Such jurisdiction could also be sub-categorized into active jurisdiction over actors or perpetrators of crime and passive, over those affected by the crime or victims.

11. ***Finally***, jurisdiction could also extend to **'extra-territorial'** domains[15] through the application of certain principles such as nationality, 'aut dedere aut judicare' (extradite and prosecute) and that of universal jurisdiction, whereby non-territory-based nexus are used to justify jurisdiction in the instance of an offence. Often, assertions of extra-territorial jurisdiction are made even when rooted loosely within the principles of territoriality, with cases being made for both the decreasing as well as enduring relevance of territoriality given the new nature of cross border crimes, though territoriality does not yet seem to be shed as the primary principle used[16]. Concepts such as the use of jurisdictional reasonableness, requiring taking into account other states' interests, are therefore increasingly proposed[17].

12. The nuances of all the above principles, as present under Article 19 of the Macolin Convention, are discussed below, including instances where the Article and Explanatory Report seemingly deviate from popularly accepted classification through their use of categorization.

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13 See "Acts and occurrences on aircraft", available at https://www.britannica.com/topic/air-law/Acts-and-occurrences-on-board-aircraft (April 30, 2022).

14 CHENG B., "The Extra Territorial Application of International Law", *supra* note 11, p. 135.

15 RYNGAERT C., "The Territorial Principle", *supra* note 7, under section 3.10.

16 BUXBAUM H. L., "Territory, territoriality and the Resolution of Jurisdictional Conflict", 57 *American Journal of Comparative Law*, 2009, 631 at 666.

17 RYNGAERT C., "The Territorial Principle", *supra* note 7, under section 3.10.

B. Illustrative Nature of Article 19

13. Within Article 19, Article 19.5 **permits Parties to establish, in conformity with their domestic law, and without prejudice to international law, any criminal, civil and administrative jurisdiction at its discretion**[18]. The Explanatory Report states that it is due to this that some countries could adopt a broad reading of their territorial and what the Macolin Convention terms as 'personal' jurisdiction[19]. By way of example, the Explanatory Report highlights how the principle of **effectiveness** in international law allows a country to be competent in terms of establishing jurisdiction in respect of an offence committed abroad by a foreigner but only when the offence has effects/consequences in that country's own territory[20].

14. Given the free reign to establish jurisdiction under this provision, jurisdiction **covering residual instances** which may not be brought under the principles discussed in this chapter may be foreseen. This includes what is known as the 'passive personality' principle, a part of personal jurisdiction (mentioned in section III.A above) within international law whereunder a state can prosecute a foreign national for a crime committed against its citizen in a foreign country – that is, the citizenship of the victim (or potentially of the consequences of the crime in a manipulation context) is of consequence, irrespective of the territory in which a crime occurs, or the nationality of the offender[21].

C. Territoriality under Article 19

1. The Principle of territoriality

15. The recognised international law **principle of territoriality** in the establishment of jurisdiction is codified within Article 19.1.a. Parties are required to establish jurisdiction for the offences, i.e. punish the

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18 See also, Explanatory Report, para 160.

19 See sections III.C and III.D below on both principles of territoriality and personal jurisdiction respectively.

20 Explanatory Report, para 160.

21 WATSON G. R., "The Passive Personality Principle", 28 *Texas International Law Journal* 1993, 1 at p. 2 – accessed as part of the CUA Law Scholarship Repository available at https://scholar ship.law.edu/cgi/viewcontent.cgi?article=1410&context= scholar (April 29, 2022).

commission of offences under Article 15 to 17 of the Macolin Convention that take place or are committed in their territory[22], **territory** being defined, in international law, as that part of the globe which is devoted and subject to a specific state's sovereignty[23]. In the air, while different concepts as to the limitation of a sovereign state's boundaries are proposed, the most vehemently asserted is often the Karman Line, a fictitious line extended above the surface of the earth[24]. For nations bordering water bodies, the limit of sovereign territory is said to extend to 22 kilometres (12 miles) or the mid-point between two countries if they are separated by less than 24 kilometres[25].

16. This principle, considered the most straightforward and certain way of delimiting competence between states in international law[26], allows for jurisdiction to be obtained over acts which have been committed within a country's territory. However, historically, jurisdiction based on personality[27], rather than territoriality, had been the most commonly used principle of jurisdictional order[28]. Under the territoriality principle, while the establishment of jurisdiction is usually a function of the constituent elements of a crime being present in a country's territory, what constitutes a constitutive element of a crime remains a matter of each country's domestic law[29].

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22 Explanatory Report, para 154.

23 See section 1 on the Concept of International Law within the section on The Nature of International Law in "Ch. 1 Foundation of International Law", *Oppenheim's International Law*, Vol 1, 9th edn, (Sir R. Jennings QC, and Sir A. W. KCMG QC ed.s, Oxford University Press: Oxford, 2008).

24 Defined to be 275,000 feet or approximately a 100 km from the Earth's surface – see TAUBENFELD H. J., "Outerspace: The "Territorial" Limits of Nations", 38:1 *Fordham Law Review* 1969 at p. 5.

25 See Section 2 on Limits of the Territorial Sea, in Part II on Territorial Sea and Contiguous Zone of the United Nations Convention of the Law of the Sea, available at https://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm (June 20, 2022).

26 See BUXBAUM H. L., *supra* note 17; the concept is also codified in other international statutes – see for example its mention in the first part of Article 12.2(a) of the Rome Statute of the International Criminal Court albeit only applicable to war crimes, *inter alia* (1988, amended in 1999) available at https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (April 30, 2022).

27 Discussed in section III.D below.

28 RYNGAERT C., "The Territoriality Principle", *supra* note 7, p. 49.

29 RYNGAERT C., "Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law", 9 *International Criminal Law Review* 2009, 187.

2. Transnational offences and territoriality

17. As noted in section II, there is increasing likelihood of the offences committed under the Macolin Convention **transgressing country borders**, resulting in more than one country having jurisdiction. In such crimes or other acts over which a country may wish to assert jurisdiction but that cross over another's borders – the act may be initiated in another country but be completed or cause effects in a country's own territory ('objective territoriality'), or *vice versa* ('subjective territoriality'), and is usually not a single offence but a combination of offences[30]. In such cases, the use of constitutive elements-based territoriality becomes difficult as the chances of there being more than one *locus delicti* are high[31]. Accordingly, in criminal law, it is commonly accepted that it is necessary and sufficient that just one constituent element of the act or situation be consummated in the territory of the country wishing to exercise jurisdiction[32].

18. While most states' domestic laws still provide territory-based jurisdiction, some have jurisdiction specific to the subject (for example, technology) or other relevant factors, based on links that may exist to their territories[33]. Relevant to the Macolin Convention, it has been observed that common law countries have more emphasis on the territoriality principle than is seen in continental Europe, as in the latter, substantive justice has been considered more important than evidentiary due process standards

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30 RYNGAERT C., "The Concept of Jurisdiction in International Law", *supra* note 7 p. 5; see also RYNGAERT C., "The Territorial Principle", *supra* note 7, under section 3.4.

31 *Id*.; see also WOLSWIJK H. D., "*Locus Delicti* and Criminal Jurisdiction", 46(3) *Netherlands International Law Review* 2009.

32 RYNGAERT C., "The Territoriality Principle", in section 3.4 on Territorial Jurisdiction over Cross-border Offences, quoting Dutch criminal jurist Matthaus's 1962 work *De criminibus*, where this was defended on the grounds that it prevented criminality with impunity – *supra* note 7. See also BUXBAUM, *supra* note 17 where arguments are made for the increasing need to abandon territoriality – p. 633; see also BERMAN P. S., "Globalization of Jurisdiction", 151 *University of Pennsylvania Law Review* 2002, 311 at p. 322.

33 Such as sections 4 and 5 of the United Kingdom's Computer Misuse Act, 1990 (requiring a 'significant link' with the domestic jurisdiction) and Article 9.a of the Danish Penal Code (establishing jurisdiction over an online criminal act that has a relation to Denmark); see survey results in KLIP A., "International Criminal Law Information Society and Penal Law General Report", 85 *Revue Internationale de Droit Pénal*, 2014, 381; the principle whereby jurisdiction could be established by substantive interest of a state or that involving its citizens was also laid down in jurisprudence such as the *Case of The S. S. "Lotus"* (*France* v. *Turkey*) before the Permanent Court of International Justice, Judgement No. 9, judgement of September 7, 1927.

(needing to be tried where the crime was committed), making extra territorial jurisdiction, which is more common in civil law countries, infrequent in common law countries[34].

3. Requirement to consult under Article 19.4

19. In situations such as those discussed immediately above, as stated under **Article 19.4**, to avoid duplication of procedures, inconvenience for witnesses, competition among law enforcement officials and otherwise facilitate the efficiency or fairness of proceedings, the involved Parties **are required to consult each other** to determine the most appropriate jurisdiction for the purposes of prosecution[35]. While in some cases it would be most effective to select a single jurisdiction, in other situations, it may be best for one country to prosecute some participants, while one or more other countries pursue others[36]. This Article's provision encapsulates within it the criminal law principle of *ne bis in idem*, which requires that no person be sanctioned for commission of the same offence more than once[37].

20. Any of these outcomes are envisioned as permissible under the provisions in Article 19.4. Termed '**jurisdictional reasonableness**', application of a sub-set of rules under the broader jurisdictional principles discussed above, taking into account interests of other states along with territoriality, to avoid jurisdictional conflict, is desirable[38]. Accordingly, the Macolin Convention provides that if one of the countries involved knows that consultation is not necessary (e.g., it has received confirmation that the other country is not planning to take action), or if a country is of the view that consultation may impair its own independent investigation or proceedings, it could delay or decline such consultation[39]. Ultimately, this

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[34] RYNGAERT C., "The Territoriality Principle", in section 3.10 on Concluding Observation, *supra* note 7.

[35] Article 19.4 and Explanatory Report, para 159 and Explanatory Report to the Cybercrime Convention, para 239.

[36] Explanatory Report, para 159.

[37] See, for example, the Council of Europe's document on the Case Law by the Court of the European Union on the principle of ne bis in idem in criminal matters, April 2020 available at https://www.eurojust.europa.eu/sites/default/files/2020-05/2020-04_Case-law-by-CJEU-on-NeBisInIdem_EN.pdf (June 21, 2022).

[38] This is concluded in literature on the subject – see, for example, RYNGAERT C., "The Territoriality Principle", *supra* note 7, in section 3.10 on Concluding Observation

[39] Explanatory Report, para 159.

obligation to consult other countries is not absolute but is to take place wherever found 'appropriate'[40].

D. Jurisdictional principles under Articles 19.1.b and 19.1.c

1. Article 19.1.b and Article 19.1.c

21. It may be said that the Explanatory Report to the Macolin Convention incorrectly states that Articles 19.1.b and Article 19.1.c encapsulate the principles of '**personal**' **jurisdiction** of a state in the Macolin Convention, another well-established principle in international law[41]. A strict reading of this section could be interpreted as providing that a party's exercise of this 'personal' jurisdiction over those constituent elements of an offence (which lie beyond the specific elements which strictly come within concept of its geographical territorial jurisdiction discussed above in section III.C.1) is envisioned.

22. Under the Macolin Convention, Article 19.1.b and Article 19.1.c, respectively, allow for each party to assert its jurisdiction over offences committed on **board ships flying that Party's flag or aircrafts registered under the law** of that party[42]. Ordinarily, the registration of a ship or an aircraft in a particular jurisdiction establishes that vessel's nationality, that of the registering country, to whose laws such vessel or aircraft is then subject[43].

23. This basis of jurisdiction is primarily intended to apply when the ship or aircraft is located in a maritime area or airspace that is not within the jurisdiction of any country (on the high seas[44], for example). If,

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40 Explanatory Report, para 159.

41 Explanatory Report, para 155; see also, for example, its mention in other international instruments the second half of Article 12.2(a) of the Rome Statute, *supra* note 27.

42 Explanatory Report, para 155; see also on criminal jurisdiction Article 4 on Ships and Aircraft in Supplement: research in International Law, 29 *American Journal of International Law* 1935, 508 at 508 – 519.

43 See, for example, SHUBBER S., "Chapter III - Jurisdiction over Crimes on Board Aircraft under International Law" in *Jurisdiction Over crimes on Board Aircraft* (Springer: Dordecht, 1973), p. 48; see also the UNODC, "Maritime Crime: A Manual for Criminal Justice Practitioners", 2017 available at https://www.unodc.org/documents/Maritime_crime/UNODC_GMCP_-_Maritime_Crime_-_A_Manual_for_Criminal_Justice_Practitioners_2017_2.pdf (April 30, 2022).

44 Under Article 1 of the Geneva Convention on the High Seas, which came into force in September 1962, "*means all parts of the sea that are not included in the territorial sea*

however, an offence is committed on board a ship flying the flag of one country but within the territorial waters of another country, the latter may exercise its territorial jurisdiction[45] and article 19.4 would apply.

2. Link between territoriality and Article 19.1.b and Article 19.1.c

24. When looked at in the context of section III.A and III.C.1 above, the Explanatory Report's labelling of jurisdiction pursuant to Articles 19.1.b and 19.1.c, discussed in section III.D.1 immediately above, as 'personal' jurisdiction could then be considered inaccurate. It remains strictly within what can be considered a country's own territory and is based on a Party needing to establish jurisdiction over offences within its own territory. At best, such jurisdiction, when established, could be considered as to be held over elements within what is termed as 'quasi-territorial' jurisdictional limits, described in section III.A above.

25. 'Quasi-territorial' jurisdiction is not, however, expressly provided for under this part of Article 19. Instead, when Article 19.1.a, Article 19.1.b. and Article 19.1.c are read together with Article 19.1.d (nationality and habitual presence in section III.E below) and Article 19.3 (see section III.F.1 below), discussed below, the various stages of territoriality and gradual progression to what is termed as 'universal' jurisdiction as well as Party discretion to establish any other residual jurisdiction, also discussed below in Section III.B.5, are arguably all brought within the scope of the Macolin Convention.

26. To conclude, **it may be inferred that the categorization of elements mentioned in Article 19.1.b and 19.1.c as elements of territoriality, and not 'personal' jurisdiction, is more appropriate**.

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or in the internal waters of a State." Under Article 2 thereof, the Geneva Convention states that the high seas being "*open to all nations*", no country can validly purport to subject any part of them to its own sovereignty. Freedom of the high seas is exercised under the conditions laid down by the convention and by the other rules of international law.

45 Explanatory Report, para 155.

E. Jurisdictional principles under Article 19.1.d

1. Scope of the first part of Article 19.1.d

27. The first part of Article 19.1.d encapsulates the **nationality principle** in the Macolin Convention, another well-established principle in international law[46]. The nationality theory is most frequently applied by countries following civil-law tradition and requires that nationals of a country are obliged to comply with its law even when they are outside its territory, i.e. under this provision, if one of a country's nationals commits an offence abroad, that country is obliged to have the ability to prosecute him/her[47].

28. This principle hence complements the above principle of territoriality to add an extra layer by including additional actors, based on nationality, irrespective of the territory in which a crime is committed, over which a Party should extend its jurisdiction. The principle mainly makes it possible to prosecute nationals who commit offences abroad and who cannot be extradited because nationals are generally not extradited.

29. It has however been said, at least in certain instances, that this requirement to prosecute is limited to cases where the conduct is also an offence under the law of the country in which it was committed or the conduct has taken place outside the territorial jurisdiction of any country[48].

2. Scope of the second part of Article 19.1.d

30. The second part of Article 19.1.d applies to persons who have their **habitual residence** in the territory of the Party but do not have the nationality of said Party. It provides that Parties shall establish jurisdiction to investigate acts committed abroad by persons having their habitual residence in their territory.

31. This provision would thus apply to offences, as described under the Macolin Convention, committed by actors having their habitual residence in one country but who have committed an offence, as laid down under that Party's laws, say during a competition, in another country[49]. The

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46 Also codified in other international instruments, see, for example Article 12.2(b) of the Rome Statute, *supra* note 27.

47 Explanatory Report, para 156.

48 See Explanatory Report to the Cybercrime Convention, para 236.

49 Explanatory Report, para 156.

nexus to the country is thus limited to there being a mere presence within that country due to residence but no other connection (such as of location of the offence, citizenship or otherwise).

32. This could be considered **akin to the principle of universal jurisdiction** (discussed in the last paragraph under section III.F.2 below) rather than being rooted in the 'nationality' principle, *per se*. Thus, the Explanatory Report's labelling both paragraphs of Article 19.1.d together could be considered an inaccurate description of the actual provision.

3. Reservations to the Nationality Principle

33. Finally, the second paragraph of Article 19 permits Parties to provide for **exceptions/make reservations**[50] to the jurisdictional rules laid down in Article 19.1.d[51]. Parties to the Macolin Convention or the European Union could do so either *at* the time of signature or when depositing its instrument of ratification, acceptance or approval.

[50] Reservations to the Macolin Convention are made through procedure present under Article 37.

[51] Explanatory Report, para 157.

34. Of the 32 signatories and seven country ratifications to the Macolin Convention, as of November 2023, Greece[52], Italy[53], Poland[54], Portugal[55] and Switzerland[56] have made reservations under Article 19.2 read with Article 19.1.d.

[52] On June 16, 2020 – "In conformity with Articles 37, paragraph 1, and 19, para 2, of the Convention, the Hellenic Republic declares that it reserves the right to apply the rules of jurisdiction laid down in Article 19, para 1.d, of the Convention only with respect to offences committed abroad by one of its nationals, under the terms and conditions of Article 6 of the Greek Penal Code. In particular: 1. Greek penal laws shall apply to offences under Articles 15-17 of the Convention committed by a Greek national abroad if the said offences, with their particular features, are punishable also under the laws of the country where they were committed or if they were committed in a constitutionally unsettled country. 2. Prosecution for the same acts shall also be turned against an alien who was Greek at the time when the act was committed. It shall also be turned against a person who acquired the Greek nationality after the act was committed. 3. For offences under Articles 15-17 of the Convention, which, in accordance with the Greek penal laws, constitute misdemeanours, namely that are punishable by imprisonment of up to 5 years, by confinement in an establishment for the detention of adolescents, or solely by pecuniary penalty or by community service, even when prosecuted ex officio, the provisions of the previous paragraphs shall apply only when there is a complaint by the victim or a request by the Government of the country where the misdemeanour was conducted."

[53] On June 11, 2019 – "In conformity with Articles 37, para 1, and 19, para 2, of the Convention, the Italian Republic reserves the right not to apply Article 19, para 1.d, of the Convention."

[54] On July 7, 2015 – "On the basis of Article 19, para 2, of the Convention, the Republic of Poland declares that it shall not apply Article 19, para 1.d of the Convention in full where it provides for the establishment of the jurisdiction of the republic of Poland over the offences committed by a person habitually residing in its territory."

[55] On September 29, 2015 – "The Portuguese Republic declares that, with regards to the provisions contained in Article 19, para 1.d, of the Convention, it reserves the right not to apply the provisions thereof established, considering that the Portuguese criminal law establishes more rigorous and encompassing jurisdiction rules than the ones established in the said provision of Article 19."

[56] On May 16, 2019 – "In conformity with Articles 37, para 1, and 19, para 2, of the Convention, Switzerland reserves the right not to apply Article 19, para 1.d, of the Convention."

F. Principle of "aut dedere aut judicare"

1. Explanation of the principle

35. Article 19.3 incorporates the principles of '**aut dedere aut judicare**' (meaning extradite or prosecute[57]) within the Macolin Convention. Ordinarily, states' territorial jurisdiction remains sacrosanct, and they cannot typically assert jurisdiction extra-territorially over affairs in the domain of another state as that would involve violating their sovereign equality. More recently, however, the 'positive' obligation to do so (reflecting the move of international law toward cooperation and not just co-existence) is included in instruments, including the Macolin Convention, for example, by obliging states to exercise jurisdiction extra-territorially in certain instances - the principle of '*aut dedere aut judicare*' being one such instance seen across newer international conventions[58].

36. Effective **fulfilment of this principle**, i.e., of the obligation to extradite or prosecute, requires undertaking necessary national measures to first criminalize the relevant offences, then establishing jurisdiction over the offences and the person present in the territory of that country, followed by investigating or undertaking primary inquiry, apprehending the suspect, and submitting the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extraditing, if an extradition request is made by another country with the necessary jurisdiction and capability to prosecute the suspect[59].

37. Accordingly, Parties to the Macolin Convention may establish jurisdiction on the basis of this sub-article, as it is necessary to ensure that Parties which refuse to extradite a national have, within their law, the legal ability to undertake investigations and proceedings domestically in place of such extradition, if so asked by the Party which requested (and was

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57 See "The Obligation to Extradite and Prosecute: Final Report of The International Law Commission", *Yearbook of the International Law Commission*, United Nations, vol. II (part 2), 2014 available at https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf (April 29, 2022).

58 RYNGAERT C., *supra* note 7, at 4; see also International Court of Justice, Questions Concerning the Obligation to Prosecute or Extradite (*Belgium* v. *Senegal*), judgment of July 20, 2012, paras 92-95 ("*Belgium* v. *Senegal*").

59 "The Obligation to Extradite and Prosecute: Final Report of The International Law Commission", *supra* note 58, para 17, p. 8.

denied) extradition under the terms of applicable international instruments[60].

2. Article 19.3 and 'Universal' Jurisdiction

38. **First establishing jurisdiction** is a logical initial step to applying this principle[61]. If an offence was allegedly committed abroad, with no nexus to the country trying to prosecute, the obligation to extradite or prosecute would necessarily reflect an exercise of what is termed in international law as **'universal' jurisdiction**, which is "*the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events*"[62] where neither the [victims] nor alleged offenders are nationals of that country and no harm was allegedly caused to that country's own national interests. However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction on other bases, in which case universal jurisdiction may not be invoked in fulfilment of the obligations to extradite or prosecute under this principle[63].

39. Thus, the principles of universal jurisdiction and those of *aut dedere aut judicare* perhaps overlap when a country has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory[64].

IV. Conclusion

40. The above provisions within the Macolin Convention require Parties to legislate to provide themselves a wide range of jurisdiction including over:

(1) Offences within their territory, including in quasi-territorial regions such as on ships or planes registered in their territory;

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60 Explanatory Report, para 158.

61 In *Belgium* v. *Senegal*, *supra* note 59, para 74.

62 International Court of Justice, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), judgement of February 14, 2002 in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 42.

63 The Obligation to Extradite and Prosecute: Final Report of The International Law Commission", *supra* note 58f at para 18, p. 8 and 9.

64 INAZUMI M., Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law (Intersentia, 2005), p. 122.

(2) Transnational offences with an element establishing nexus to their own territory;
(3) Offences committed by nationals including in territories outside of its own territory;
(4) Offences committed by persons habitually residing within their territory, but who are not nationals, when they commit offences outside its own territory;
(5) Offences based on which they might be obligated to extradite and prosecute if they occur within the territory of another country, the Macolin Convention not delimiting the extent of such jurisdiction;
(6) Miscellaneous jurisdiction Parties may establish pursuant to Article 19.5.

Article 20

by

Surbhi KUWELKER

> ***Article 20 – Measures to secure electronic evidence***
>
> *1. Each Party shall adopt legislative or other measures to secure electronic evidence, inter alia through the expedited preservation of stored computer data, expedited preservation and disclosure of traffic data, production orders, search and seizure of stored computer data, realtime collection of traffic data and the interception of content data, in accordance with its domestic law, when investigating offences referred to in Articles 15 to 17 of this Convention.*

I. Purpose of Article 20

1. Manipulation offences are often intricately **intertwined with cybercrime** – the use of information and communication technologies is prevalent, and the commission of acts, contingent on the applicable law, could be violations of existing standards set in laws applicable to cybercrime[1]. Outside of the use of information technology and communication systems to commit offences directly or indirectly, such technology can record information which can be relevant evidence in manipulation offences (or establishing facts) and can aid investigation into such offences[2].

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1 Explanatory Report, para 161; examples provided include illegal interception of data for the purposes of blackmail, computer-related forgery aimed at altering the publication of information on sports competitions or related betting, illegal system interference aimed at cancelling a betting transaction in the case of an unsuccessful manipulation, use of information and communication technologies to commit an offence such as passing on instructions to an accomplice to intimidate a competition stakeholder or to place a bet – see paras 161 and 162.

2 Examples include – unexplained variation of odds, unusual transactions by customers located in the same region, or the records of incorrect transmission of results of certain sports competitions – see Explanatory Report, para 163.

2. Further, cybercrime or offences which are undertaken largely digitally are plagued by specific **issues,** including the lack of criminal law statutes, the lack of procedural powers and the lack of mutual assistance provisions across jurisdictions[3]. This is magnified by the sheer volume of use, whether persons, commerce or products, and the emergence of newer domains such as the internet of things, for example[4]. Thus, specific codified legislation facilitating the ability to access, store and utilize safely for legitimate means types of data is significant.

II. Relation to other Data Protection Provisions under the Macolin Convention

A. Article 14

3. **Data protection principles** are also addressed **under Article 14** of the Macolin Convention, where Parties are required to ensure compliance through the adoption of legislative or other measures with national and international data protection laws and standards, particularly in exchange of information covered by the Macolin Convention[5].

4. This includes **measures** to ensure that where data is collected, processed and exchanged, irrespective of the nature of exchanges, there is observance of **principles** of lawfulness, adequacy, relevance and accuracy, without the exchange of data beyond the necessary minimum for the stated purpose under the Macolin Convention[6]. The Article also requires that the various public authorities and organisations covered by the Macolin Convention are provided requisite **technical means** to ensure security of any exchanged data and to guarantee its reliability and integrity, in addition to the availability and integrity of the data exchange systems and the identification of their users.

5. While Article 14 seeks to thus ensure that data is *protected*, Article 20 operates 'within' this framework, so to speak, by guiding Parties to

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3 WEBER A. M., "Council of Europe's Convention on Cybercrime", 18:425 *Berkeley Technology Law Journal* 2003, 425 at 426-427; see also CLOUGH J., "A World of A Difference: The Budapest Convention on Cybercrime and the Challenges of Harmonisation", 40:3 *Monash University Law Review* 2014, 698.

4 CLOUGH J., *ibid*. at 699.

5 See commentary to Article 14 of the Macolin Convention hereafter.

6 See commentary to Article 14 of the Macolin Convention hereafter.

provide relevant national authorities the *possibility to order or similarly obtain certain measures concerning* various types of data – namely – the expeditious preservation of stored computer data, the expedited preservation and disclosure of traffic data, production orders, search and seizure of stored computer data, the real-time collection of traffic data and interception of content data[7]. At the same time, subject to certain exceptions described in further detail below, these provisions seek to provide equivalent and parallel capability as bodies might otherwise have for non-electronic evidence or data, through grant of powers and procedure, for the purpose of investigations connected to offences under the Macolin Convention using digital means or involving data, the access and ability to collect data and other information as needed.

B. Other Applicable Provisions

6. As discussed previously in this commentary, the Macolin Convention's own **Data Protection Principles of 2020**[8] are also to be paid heed to. The prevalence of dealing with data to address manipulation concerns necessitates the adherence to the established principles, including fair and transparent processing, purpose limitation and legal basis, proportionality, integrity and retention, rights of individuals, disclosures and transfers, data security, accountability and effective, independent oversight and redress[9], while at the same time providing adequate facilitation of data flow for effectively countering manipulation.

7. Finally, the measures provided for under Article 20 are required to be in compliance with **each relevant national and international personal data protection law** and standard, as set out in Article 14 of the Macolin Convention, which makes reference to standards defined under Convention

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7 Explanatory Report, para 164.

8 Group of Copenhagen, Macolin Convention Data Protection Principles (draft v. 2), T-MC(2020)55 of June 5, 2020, available at https://rm.coe.int/t-mc-2020-55-wg-data-protection-macolin-convention-data-protection-pri/16809ed7ab (April 30, 2022). Largely – these principles/this standard is to "*serve National Platforms int heir endeavor of establishing a baseline set of data protection requirements which guarantee an appropriate level of protection for individuals while facilitating the free flow of data among them…*" – *ibid*., p. 2.

9 *Ibid*. at pp. 2 to 5.

108[10] of the Council of Europe[11]. Further, the significance of working within the established principles of rights awarded by the General Data Protection Regulation[12] and the Privacy Electronic Communications Directive 2002[13], particularly rights such as that to erasure and data portability, for example, on the collection and processing of sports performance and marketing data – increasingly collected and stored digitally – cannot be understated[14].

III. The Contents of Article 20

A. Explanation of the Article

1. Scope of Article 20

8. It is important to note what the language under Article 20 does ***not*** **include** and apply to, as a caveat and clarification.

9. ***First***, the provisions of this Article (and specifically the reference to expedited preservation of stored computer data and expedited

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[10] Being the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (CETS No. 108 of 1981), as well as consequent amends, and additional protocols to Convention 108 (such as that regarding supervisory authorities and transborder data flows (ETS No. 181 of 2001) - it could be contended that this now extends to Convention 108+ (adopted in 2018, including the amending protocol thereto, being CETS No. 223 for the modernization Convention 108) and its protocols, being the current overarching convention for the protection of individuals with regard to the processing of personal data – available at https://www.coe.int/en/web/data-protection/convention108-and-protocol (April 30, 2022).

[11] Explanatory Report, para 122; see also commentary to Article 14 of the Macolin Convention hereafter; see also the Diagnosis Report (T-MC (2019) 53) which preceded that Macolin Convention Data Protection principles described in *supra* note 8.

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 2016 available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679 (April 30, 2022).

[13] Privacy and Electronic Communications Directive 2002/58/EC or the ePrivacy Directive on data protection and privacy in the digital age, available at https://eur-lex.europa.eu/ LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:HTML (April 30, 2022).

[14] See, for example, "EU: Applying the GDPR to the sport sector", available at https://www.dataguidance.com/opinion/eu-applying-gdpr-sport-sector (April 30, 2022).

preservation and partial disclosure of 'traffic data'[15]) **only refer to the *preservation* and not the *retention* of data**. Therefore, the phrase in no way mandates the collection/retention of all, or even some, data collected by a service provider or other entity in the course of its activities[16]. Thus, there is a presupposition that the data referred to by this statement already exists, is collected and stored, with these preservation measures applying then to computer data that 'has been stored by means of a computer system'.

10. ***Second***, this then further implies that **no real-time collection/retention of future traffic data or real-time access to the content of communications** ('content data') is affected by this provision[17]. **Content data** refers to the content of intercepted communications – the meaning or purport of the communication or what is being conveyed within the communication. Everything transmitted which is not traffic data is considered content data[18]. **Traffic data**, as referred to in the paragraph above, on the other hand, is data that is generated by computers in the chain of communication in order to route a communication from its origin to its destination. It is therefore auxiliary to the communication itself. The categories of traffic data to be included, as envisioned by the Macolin Convention, are the origin of a communication, its destination, route, time (GMT), date, size, duration and type of underlying service[19]. Further details on content and traffic data as well as measures connected to them under Article 21 are looked at in section IV.B below.

11. ***Third***, and finally, Article 20 **does not mandate Parties to ensure that the real-time collection of traffic data or interception of content**

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15 See the consequent paragraph, and refer to sections *infra*, for explanations on 'traffic data'.

16 Explanatory Report, para 165.

17 Explanatory Report, para 165.

18 Explanatory Report to the Cybercrime Convention, para 229, *infra* note 12.

19 The details of the definition present within Article 1(d) of the Cybercrime Convention are present in Explanatory Report to the Cybercrime Convention, paras 28 to 31 – see section III.A.2. on the relevance of this convention to interpret Article 21 of the Macolin Convention. These categories of traffic data are present in the definition of traffic data in the Cybercrime Convention under Article 1(d) which lists exhaustively the categories of traffic data that are treated by a specific regime under that convention. Not all of these categories will always be technically available, capable of being produced by a service provider, or necessary for a particular criminal investigation – see Explanatory Report to the Cybercrime Convention, para 30.

data are applicable measures under their respective national law when undertaking investigations for offences under the Macolin Convention.[20]

2. Basis of Included Definitions

12. A number of definitions of measures provided as examples within Article 20 are phrases 'derived from' and, thus, intended to be interpreted in a manner **consistent with the definitions adopted by the Budapest Convention on Cybercrime** (2001, ETS No. 185, hereafter referred to as the "Cybercrime Convention") of the Council of Europe[21]. While the definitions in the Articles 16 to 21 of the Cybercrime Convention are expressly stated to be useful for interpretation of this Article 20, those Articles rely on further definitions found under Article 1 of the Cybercrime Convention and are referred to as required below.

13. The Cybercrime Convention and its corresponding Explanatory Report were adopted in 2001 for the **purpose of responding to rapidly changing information technology** (and its impact on communication) across sectors[22]. Such instruments normatively aim at not just international co-operation but also questions of substantive and procedural law, as well as matters that are closely connected with the use of information technology[23], with the Cybercrime Convention accordingly aiming to harmonize substantive domestic criminal (elements of offences) and

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20 Explanatory Report, para 165.

21 Explanatory Report, para 166. The Cybercrime Convention is available at https://rm.coe.int/1680081561 (accessed April 30, 2022), and the corresponding Explanatory Report is available at https://rm.coe.int/16800cce5b (accessed April 30, 2022).

22 Explanatory Report to the Cybercrime Convention, para 2; there was also a parallel expansion in the quantum of information or data in computer systems, and possibilities/channels of its exchange/dissemination with parallel emergence of new types of crime, as well as commission of traditional crime using these channels. The nature of the information makes the consequences of such crimes reach geographically farther and necessitate technical and legal measures to function together through binding international instruments, despite domestic laws being confined to one territory – Explanatory Report to the Cybercrime Convention, para 4-6; see discussion on territoriality under the commentary to Article 19 above. Prior documents such as Recommendation No. R. (89) 9 was an approximation of national concepts against certain forms of cybercrime, but not exhaustive in measures. Recommendation No. R (95) 13 on problems on procedural law was also present at the time.

23 Explanatory Report to the Cybercrime Convention, para 9.

procedural law (for investigation and prosecution, and matters of evidence), while setting up efficient means of international cooperation[24].

14. The Explanatory Report, however, specifies that while guidance might be provided by the provisions of the Cybercrime Convention, the examples provided in the Explanatory Report are **merely are "*examples*** *and Article 20 does not impose an obligation to implement all of them.*"[25]

15. Also of note are the Cybercrime Convention **provisions which would complement** those based on which the definitions are drafted. This includes, most importantly, Article 15, which requires that the establishment, implementation and application of the powers and procedures provided in the Cybercrime Convention shall be subject to the conditions and safeguards provided for under the domestic law of each Party, there being an obligation to introduce certain procedural provisions, constitutionally, judicially and legislatively or otherwise, in domestic law for this. These measures should balance the requirements of investigation with human rights and liberties, the specific provisions not being provided due to possibility of variation in standards across jurisdictions, while a certain minimum must be observed by all Parties[26].

16. The principle of **proportionality** shall also be observed to balance the intrusiveness of measures such as interception, production orders or search and seizures with the seriousness of an offence[27]. Finally, in the operation of these provisions, other principles such as those of **independent or judicial supervision** of measures introduced ('sound administration of justice'), evaluated independently, mindfulness of 'public interest' concerns (public health and privacy for example), impact

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24 See scheme of the Cybercrime Convention in paras 18 to 21 of the Explanatory Report to the Cybercrime Convention.

25 Last sentence of Explanatory Report, para 166.

26 Explanatory Report to the Cybercrime Convention, para 145. Specifically, the Explanatory Report to the Cybercrime Convention names obligatory standards under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional Protocols No. 1, 4, 6, 7 and 12 (ETS N. 5(1) , 9, 46, 114, 117 and 177), in respect of European countries that are Parties, the 1969 American Convention on Human Rights and the 1981 African Charter on Human Rights and Peoples' Rights) for countries which are party to these instruments, as well as the more universally ratified 1966 International Covenant on Civil and Political Rights.

27 Explanatory Report to the Cybercrime Convention, para 146 and 147 – for European countries, this principle will be derived from the principles of the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.

on third party rights and interests such as service providers[28] are also to be kept in mind.

B. Measures to Secure Electronic Evidence

17. Article 20 describes the **envisioned sets of measures** to be provided by Parties for the extraction and collection of different types of data – thus, the scheme of the provision divides the measures based on the types of data they collect, not *vice versa*. Each different type of data and the connected measures are systematically looked at below.

18. The **measures below may be grouped** in a manner similar to that explained in the Explanatory Report to the Cybercrime Convention – **4 broad measures** categorised as follows: 1. Expedited preservation measures (of stored computer data and with partial disclosure of traffic data); 2. Production orders; 3. Search and seizure measures; 4. Real-time collection measures (collection of traffic data and interception of content data)[29].

1. Expedited preservation of stored computer data

19. The first set of measures dealt with by Article 20 include measures **enabling the competent authorities to order or similarly obtain the expeditious preservation of specified computer data,** including traffic data, that has been stored by means of a computer system, in particular where there are grounds to believe that the computer data is particularly specifically vulnerable to loss or modification[30]. Preservation (and not retention[31]) refers to a means to keep data, which already exists in a stored

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28 Explanatory Report to the Cybercrime Convention, paras 141, 148; see also Article 21 of the Cybercrime Convention which provides that the power to intercept is limited to the range of serious offences determined by domestic law, many states limiting such powers for privacy concerns – see Explanatory Report, para 142.

29 See scheme of Section 2 on Procedural Law under the Cybercrime Convention and paras 131 to 233 of the Explanatory Report to the Cybercrime Convention.

30 Explanatory Report, para 167.

31 Retention of data means to keeping data, which is currently being generated, in one's possession into the future i.e. the accumulation of data in the present and the keeping or possession of it into a future time period. Data retention is the process of storing data – Explanatory Report to the Cybercrime Convention, para 151 and 152. See the implication of this in paras 152 to 157.

form, secure, safe and protected from anything that would cause its current quality or condition to be modified, deteriorate or be deleted altogether. These measures apply to stored data that already exists[32], has already been collected and retained by data-holders, such as service providers, and not to the real-time collection and retention of future traffic data or to real-time access to the content of communications[33].

20. The definition of what constitutes computer data **relies on the ISO-definition of data**, which, in turn, refers to data "suitable for processing" or data put in such a form that it can be directly processed by a computer system and is introduced as a concept in the Cybercrime Convention (and thereby to be seen as such in the Macolin Convention) to make clear that data in this context is that which is in electronic or other directly processable form. It may be both the target of offences as well as the object of application of any of the measures under the conventions[34]. The meaning of traffic data, a type of computer data, is discussed under section III.B.2 below.

21. A **computer system is defined** as a device consisting of hardware and software developed for automatic (without human intervention) processing of digital data (computer systems executing a computer program or a set of instructions to achieve a desired result, when operating data), including input, output and storage facilities, that might be a standalone or be connected in a network (interconnection between two or more computer systems[35]) with other similar devices[36]. Other networks

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32 For many reasons, computer data relevant for criminal investigations may not exist or no longer be stored. For example, accurate data may not have been collected and retained, or if collected was not maintained. Data protection laws may have affirmatively required the destruction of important data before anyone realised its significance for criminal proceedings. Sometimes there may be no business reason for the collection and retention of data, such as where customers pay a flat rate for services or the services are free – Explanatory Report to the Cybercrime Convention, para 150.

33 Explanatory Report to the Cybercrime Convention, para 146.

34 See Article 1(b) of the Cybercrime Convention and the Explanatory Report to the Cybercrime Convention, para 25.

35 Systems may be earthbound or wireless or both and limited to a smaller geographical area or a large area – the internet being a global network consisting of many interconnected networks all using the same protocols.

36 See Article 1(d) of the Cybercrime Convention and the Explanatory Report to the Cybercrime Convention, para 23.

may or may not connect to the internet but may be able to communicate computer data among computer systems[37].

22. Where a Party addresses an order to a person to preserve specified stored computer data in the person's possession or control, the Party **shall adopt such legislative and other measures as may be necessary** to oblige that person to preserve and maintain the integrity of that computer data for a period of time as long as necessary, which, according to the Cybercrime Convention, cannot exceed ninety days[38], to enable competent authorities to seek its disclosure, and may provide for such an order to be subsequently renewed[39].

23. Finally, this procedure can be **combined with measures to oblige the custodian or other person** who is to preserve the computer data to keep confidential the undertaking of such procedures for the period of time provided for by its domestic law[40].

2. Expedited preservation and partial disclosure of traffic data

24. Expedited preservation and partial disclosure of traffic data can be understood as all **measures adopted to ensure that expeditious preservation of traffic data is available** regardless of whether one or more service providers were involved in the transmission of that communication, as well as measures to ensure the expeditious disclosure to the Party's competent authority, or a person designated by that authority, of a sufficient amount of traffic data to enable the Party to identify the service providers and the path through which the communication was transmitted[41].

25. Traffic data is **needed to trace the source of a communication** as a starting point for collecting further evidence or as part of the evidence of an offence in an investigation. It might last only ephemerally, which makes it necessary to order its expeditious preservation. Consequently, its rapid disclosure may be necessary to discern the communication's route in order to collect further evidence before it is deleted or to identify a suspect, making the ordinary procedure for the collection and disclosure of

37 Explanatory Report to the Cybercrime Convention, para 24.
38 Explanatory Report to the Cybercrime Convention, para 156.
39 Explanatory Report, para 167.
40 Explanatory Report, para 167.
41 Explanatory Report, para 168.

computer data sometimes insufficient. Finally, the collection of such data is considered less intrusive since it does not reveal the content of the communication which is usually regarded as more sensitive[42].

26. The definitions within the Cybercrime Convention leave national legislatures the ability to introduce **differentiation in the legal protection of traffic data in accordance with its sensitivity**, with other provisions requiring that the parties introduce safeguards for the protection of connected rights and liberties[43].

3. Production order

27. Production order can be understood as all **measures permitting competent authorities to order a person in their territory to submit specified computer data in that person's possession or control**, which is stored in a computer system or a computer-data storage medium, as well as to order a service provider offering its services in the territory of the Party to submit subscriber information (information contained as computer data or in any other form held by a service provider relating to the subscribers of its services *other than* traffic or content data[44]) relating to such services in that service provider's possession or control[45].

28. In the interest of Parties having, within their domestic law, **less intrusive measures than applying coercive measures to third parties** for obtaining information in criminal investigations, a production order **provides flexibility** and allows third party custodians of data to voluntarily provide data in their possession, by providing them a legal basis for doing so and relieving them of contractual/non-contractual liability for doing

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42 Explanatory Report to the Cybercrime Convention, para 29.

43 Explanatory Report to the Cybercrime Convention, para 31.

44 I.e. existing data, not that which has not yet come into existence – Explanatory Report to the Cybercrime Convention, para 170. Further, under Article 18.3 of the Cybercrime Convention, subscriber information would also be that by which one can establish a. types of communication service used, technical provisions taken and period of service; b. subscriber identity, postal or geographical address, phone or other number, billing or payment information, available on the basis of a service agreement/arrangement; and c other available information on the site of the installation of communication equipment, available on the basis of a service agreement/arrangement. See also para 177 of the Explanatory Report to the Cybercrime Convention.

45 Explanatory Report, para 169 and Article 18. 1 of the Cybercrime Convention.

so[46]. Such measures are applicable only to the extent that the provider maintains such data[47].

29. **'Possession or control'**, as used in the Cybercrime Convention and also thereby the Macolin Convention (including for subscriber information), refers to physical possession of the data concerned in the ordering Party's territory, and situations in which the data to be produced is outside of the person's physical possession but the person can nonetheless freely control production of the data from within the ordering Party's territory - a mere technical ability to access remotely stored data (e.g. the ability of a user to access through a network link remotely stored data not within his or her legitimate control) does not necessarily constitute "control". In domestic law, the concept of 'possession' might include physical and constructive possession with sufficient breadth to meet this 'possession or control' requirement[48].

4. Search and seizure of stored computer data

30. Search and seizure of stored computer data can be understood as all **measures permitting competent authorities to search or similarly access a computer system or part of it and computer data stored therein**, as well as a computer-data storage medium in which computer data may be stored in its territory[49]. The corresponding provisions in the Cybercrime Convention aim at modernising and harmonising domestic laws on search and seizure of stored computer data for the purposes of obtaining evidence with respect to specific criminal investigations or proceedings, as though most domestic jurisdictions include search and seizure powers, they would not include powers to deal with computer data or other intangibles[50].

31. In new technological environments, compared to traditional search of a physical space, many of the characteristics of a traditional search remain, such as gathering data during the period of the search and in respect of data that exists at that time which will afford evidence of a specific offence, using similar legal authority to undertake a search, and the same

46 Explanatory Report to the Cybercrime Convention, para 170 and 171.
47 Explanatory Report to the Cybercrime Convention, para 172.
48 Explanatory Report to the Cybercrime Convention, para 173.
49 Explanatory Report, para 170.
50 Explanatory Report to the Cybercrime Convention, para 184.

degree of belief required for obtaining legal authorisation[51]. Yet, as data is intangible, which means that it may be read with computer equipment, may be stored in another place from where it is accessed and cannot be seized as a paper record, either the physical medium must be seized or a copy in tangible form taken – thus additional procedural provisions are necessary in order to ensure that computer data can be obtained in a manner that is equally effective or authorized[52].

32. This term may **also include more measures** guaranteeing that where the authorities search or similarly access a specific computer system or part of it, and have grounds to believe that the data sought is stored in another computer system or part of it in their territory, and such data is lawfully accessible from or available to the initial system, the authorities will be able to expeditiously extend the search or similar access to the other system[53].

33. Moreover, this term may involve all measures adopted to empower the competent authorities to seize or similarly secure computer data (accessed through the measures described above), including the power to: a. seize or similarly secure a computer system or part of it or a computer-data storage medium; b. make and retain a copy of the computer data; c. maintain the integrity of the relevant stored computer data; d. render inaccessible or remove the computer data from the accessed computer system[54].

34. Last, the term may also encompass all measures necessary to empower the competent authorities to order any person who has knowledge about the functioning of the computer system or measures applied to protect the computer data therein to provide, as is reasonable, the necessary information to enable the undertaking of the measures referred to above[55].

5. Real-time collection of traffic data

35. Real-time collection or interception of data – here, collection of traffic data and below (in section III.B.6.) the interception of content data

[51] Explanatory Report to the Cybercrime Convention, para 186.
[52] Explanatory Report to the Cybercrime Convention, para 187 to 189.
[53] Explanatory Report, para 171.
[54] Explanatory Report, para 172.
[55] Explanatory Report, para 173.

– **refers to evidence contained in 'currently generated communications'** – i.e. those collected at the time of communication[56]. The flow of intangible data is not interrupted and collected physically, it instead reaches its intended recipient and a recording or copy thereof is made for evidence by a competent authority or service provider, with such communications transmitted by means of a computer system, which could include transmission of the communication through telecommunication networks before it is received by another computer system[57]. A legal authority to permit the collection is sought in respect of a future event[58].

36. Many countries make the **distinction between traffic data and content data based on the amount of intrusiveness and nature of communication content**, imposing greater limitations on the latter due to this. It is also to assist in recognising this distinction that the Macolin Convention, while operationally acknowledging that the data is collected or recorded in both situations, refers normatively in the titles of articles to the collection of traffic data as 'real-time collection' and the collection of content data as 'real-time interception'[59]. As some states do not make the distinction, the legal prerequisites to authorize the undertaking of the measures remain the same, being referred to as 'collect or record' in the text of the Article[60]. The increasing seriousness with which content data is dealt with is also reflected in the measures being taken only if the offences' seriousness so merits it[61].

37. As interception of content data is a **very intrusive measure on private life, stringent safeguards are required** to ensure an appropriate balance between the interests of justice and the fundamental rights of the individual. In the area of interception, neither the Macolin Convention nor the Cybercrime Comvention set out specific safeguards other than limiting

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56 Explanatory Report to the Cybercrime Convention, para 208.

57 Explanatory Report to the Cybercrime Convention, para 205 and 206 – such systems could also be publicly or privately owned, and the Cybercrime Convention (and thus Macolin Convention) is not envisioned to make a distinction between the use of systems and communication services offered to the public or to closed user groups or private parties– para 207.

58 Being a future transmission of data – Explanatory Report to the Cybercrime Convention, para 208.

59 Explanatory Report to the Cybercrime Convention, para 210.

60 Corresponding to Article 20 and 21 of the Cybercrime Convention – see Explanatory Report to the Cybercrime Convention, para 211.

61 Explanatory Report to the Cybercrime Convention, para 212-214.

authorisation of interception of content data to investigations into serious criminal offences as defined in domestic law. Nevertheless, the following important conditions and safeguards in this area, applied in domestic laws, are: judicial or other independent supervision; specificity as to the communications or persons to be intercepted; necessity, subsidiarity and proportionality (e.g. legal predicates justifying the taking of the measure; other less intrusive measures not effective); limitation on the duration of interception; and the right of redress[62].

38. Historical traffic data may no longer be available or it may not be relevant as the intruder has changed the route of communication. Therefore, the real-time collection of traffic data is an **important investigative measure**[63]. Traditionally, traffic data on communications has been a useful investigative tool to determine the source or destination (e.g., telephone numbers) and related data (e.g., time, date and duration) of various types of illegal communications (e.g., criminal threats and harassment, criminal conspiracy, fraudulent misrepresentations) and of communications affording evidence of past or future crimes (e.g., drug trafficking, murder, economic crimes, etc.)[64].

39. Real time collection of traffic data may be understood as all measures **authorising the competent authorities to**: a. **collect or record through the application of technical means** on the territory of that Party, and b. **compel a service provider**, within its existing technical capability: i. **to collect or record** through the application of technical means on the territory of that Party; or ii. **to co-operate** and assist the competent authorities in the collection or recording of traffic data, in real-time, associated with specified communications in its territory transmitted by means of a computer system[65].

40. Where a party to the Macolin Convention, due to the established principles of its domestic legal system, cannot adopt the measures referred to above, the measures it may have adopted to ensure the real-time collection or recording of traffic data associated with specified

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62 Explanatory Report to the Cybercrime Convention, para 215; see also para 227, where traffic data's ability to create a stronger intrusion on privacy is noted where data about the source or destination of a communication (e.g. visited websites) may also be available.

63 Explanatory Report to the Cybercrime Convention, para 216.

64 Explanatory Report to the Cybercrime Convention, para 217 – see also explanation in para 218.

65 Explanatory Report, para 174.

communications transmitted in its territory, through the application of technical means on that territory, are also included within this term[66].

41. It may also include measures permitting Parties to oblige a service provider to keep confidential the execution of any power provided for in Article 20 and any information relating to it. This not only ensures the confidentiality of the investigation, but it also relieves the service provider of any contractual or other legal obligations to notify subscribers that data about them is being collected[67].

6. (Real Time) Interception of content data

42. The collection of content data, such as that connected to telecommunications, has **ordinarily been useful to gauge first whether or not the communication is of illegal nature** (examples include whether the content of the data collected constitutes a criminal threat or harassment, a criminal conspiracy or fraudulent misrepresentations) and, second, to **gather evidence** of crimes already committed or to be committed (examples include drug trafficking, murder and other crimes)[68]. The benefit of computer evidence is the ability to transfer large amounts of data (text, images and sound) and thus an indication of potential to commit crimes involving illegal content. Such crimes could include the transmission or communication of data as a component element of their commission (examples include gain of illicit access to a system or distributing viruses). Intercepting in real-time the content of such messages is required in order to know their illegal nature, the harm caused and prevent it from happening, as opposed to only investigating past, completed crimes, the damage already having occurred[69].

43. Measures for interception of content data may be understood as **all measures empowering the competent authorities**, in relation to a range of serious offences to be determined by domestic law, to: a. **collect or record** through the application of technical means on the territory of that Party, and b. **compel a service provider**, within its existing technical capability: i. **to collect or record** through the application of technical means on the territory of that Party, or ii. **to co-operate** and assist the

66 Explanatory Report, para 175.
67 Explanatory Report to the Cybercrime Convention, para 226.
68 Explanatory Report to the Cybercrime Convention, para 228.
69 *Id*.

competent authorities in the collection or recording of content data, in real-time, of specified communications in its territory transmitted by means of a computer system[70].

44. In addition, this term may include, where a Party, due to the established principles of its domestic legal system, cannot adopt the measures referred to above, other measures adopted to ensure the real-time collection or recording of content data on specified communications in its territory through the application of technical means on that territory[71].

45. Finally, this term may also involve measures permitting a Party to oblige a service provider to keep confidential the fact of the execution of any power provided for in this article and any information relating to it[72].

46. Given the consequences noted above, such measures are **arguably equally as important to be intercepted as traffic data** – the Cybercrime Convention awards similar treatment through the language in Article 20 and 21 therein to both on the collection and recording, obligations to cooperate and assist, to maintain confidentiality of both traffic and content data[73], which would also thus be the case under Article 21 of the Macolin Convention.

47. Yet, **conditions and safeguards applicable to real-time interception of content data may be more stringent** than those applicable to the real-time collection of traffic data, or to the search and seizure or similar accessing or securing of stored data[74]. In many jurisdictions, a distinction is made (and greater limitation imposed on interception of content data) between the interception of content data and collection of traffic data in terms of both the legal prerequisites required to authorise such investigative measures and the offences in respect of which these measures can be employed due to the heightened privacy interests in respect of content data due to the nature of the communication content or message.

70 Explanatory Report, para 177.
71 Explanatory Report, para 178.
72 Explanatory Report, para 179.
73 Explanatory Report to the Cybercrime Convention, para 230.
74 Explanatory Report to the Cybercrime Convention, para 231.

Article 21

by

Surbhi KUWELKER

Article 21 – Protection Measures

Each Party shall consider adoption of such legal measures as may be necessary to provide effective protection for:

a. persons who provide, in good faith and on reasonable grounds, information concerning offences referred to in Articles 15 to 17 of this Convention or otherwise co-operate with the investigating or prosecuting authorities;

b. witnesses who give testimony concerning these offences;

c. when necessary, members of the family of persons referred to in sub-paragraphs a and b.

I. Purpose and Prior Instruments

1. As noted previously in this commentary, the Explanatory Report states that the Macolin Convention seeks to promote "*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*"[1]. For this, it "*involves all stakeholders in the fight against manipulation of sports competitions*"[2]. As has also been noted both in a manipulation of sport context[3], and other literature, only a small percentage of corruption related incidents are reported, if at all[4].

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1 Explanatory Report, para 17.

2 Explanatory Report, para 17.

3 See DIACONU M., KUHN A., KUWELKER S., "The Concept of Manipulation Under the Macolin Convention", 19(2) *Causa Sport* 2021, 145.

4 See for example the UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. iii where the number of such incidents reported is noted as 10% of all occurring incidents.

A. Purpose behind and need for Article 21

2. The **reasons for the lack of reporting and need for protection** include the impression of reporting to authorities being futile as no action is taken, the seriousness of the offences being undermined and improper or unavailable information on reporting mechanisms. Significantly, there is fear of retaliation against persons reporting. Particular to **sport**, there is anecdotal evidence of compromised identities and consequent retaliation against witnesses or whistle-blowers when they do come forward[5]. Further, in a sporting context, rights extended to employees may often not extend to persons not under employment contracts or having extra-contractual relationships with concerned bodies[6]. It has also been noted that sporting contexts, being particularly isolated, magnify and silence those who witness and report acts of corruption, in specific[7]. Such crime tends to benefit those who are involved in it, financially or otherwise[8]. Further, the significant pressure from criminal organisations and the involvement of "*threats, coercion or blackmail towards competition stakeholders or their support personnel*" have been cited as compounding reasons for the inclusion of Article 21[9]. As such wrongdoings can be accompanied and sustained by strong forms of organisational silence (or 'omerta'), whistle-blowers can play an invaluable role in their detection, investigation and eventual sanction in sport in particular[10].

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5 Notably, the instance of Phaedra AlMajid who came forward as a whistleblowers in connection with Qatar's World Cup bid, resulting in retracted statement and then fears for her and her family's safety – see "Qatar World Cup whistleblower retracts ger claims of FIFA bribes", *The Guardian*, July 10, 2011 available at https://www.theguardian.com/football/2011/jul/10/qatar-world-cup-whistleblower (April 30, 2022), and "Qatar World Cup bid whistleblower fears for her family's safety", Ten Guardian, November 20, 2014 available at https://www.theguardian.com/football/2014/nov/20/qatar-world-cup-bid-whistleblower (April 30, 2022).

6 See generally noting on non-extension to actors not in employment relations in sports litigation in cases such as *Conroy* v. *Scottish Football Association Limited*, UKEATS/0024/13/JW in the United Kingdom.

7 See DIACONU M., KUHN A., KUWELKER S. (2022), *supra* note 3.

8 UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 2.

9 Explanatory Report, para 181.

10 "Sports Integrity Guidelines – Action 3 Kazan Action Plan", Council of Europe available at https://rm.coe.int/sports-integrity-guidelines-action3-kazan-action-plan-en/16809f321d (April 30, 2022), p. 34.

3. Other than addressing the risk of compromised safety of their person and those around them, **benefits of providing effective protection** to such persons greatly enhances their willingness to testify[11]. Going further, if such persons are then involved in prosecution, there is a need for protection of witnesses in proceedings, in particular to prevent intimidation aimed at discrediting or in any way damaging evidence against accused persons[12]. Providing such protection is also seen and evidenced as a deterrent to crime as it removes the ability to silence those who might report or act as witnesses[13]. Finally, the percentage of detected wrongdoing through reporting by such persons or whistleblowing remains a steady percentage of all such detected corruption crimes worldwide, making their contribution significant[14].

B. Prior Instruments

4. The Macolin Convention was built on **prior instruments** that preceded it in time and it complements more recent and contemporaneous instruments.

5. These include, notably, in Europe, the Council of Europe **Recommendation No. R(97)13** of the Committee of Ministers to member States **concerning intimidation of witnesses and the rights of the defence** ("Recommendation No. R(97)13")[15], the Council of Europe **Recommendation CM/Rec(2014)7** ("Recommendation CM/Rec (2014)7") on the **protection of whistleblowers**, and its explanatory memorandum. More subject specific provisions are also present within the Council of Europe Civil Law Convention on Corruption and the Criminal Law Convention on Corruption[16].

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11 Explanatory Report, para 182.

12 Explanatory Report, para 186.

13 UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 2.

14 See reports from PricewaterhouseCoopers titled "Global Economic Crime Survey 2010", 2011 available at http://www.pwc.co.uk/ forensic-services/publications (April 29, 2022) p. 25 and KPMG, titled "Who is the Typical Fraudster?", 2011 as cited in UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 5.

15 Explanatory Report, para 183.

16 ETS. No. 173 and 174 of the Council of Europe, (both of 1999 entered into force in 2003 and 2022 respectively).

6. The Macolin Convention is also in large part akin to the **EU Directive** on the **protection of persons who report breaches of Union law** ("EU Directive")[17]. This directive, which has seen a strong push for implementation, has also resulted in ratifying parties to the Macolin Convention introducing provisions for protecting whistleblowers (see below in section B.2.1).

7. There are also other relevant international instruments such as the widely ratified, legally binding **United Nations Convention against Corruption** ("UNCAC")[18] and similar provisions within regional instruments on corruption, as well as studies conducted in other parts of the world[19].

8. The above instruments are used herein to extract best practices and as aids of interpretation to construe the language within the Macolin Convention in a manner where it best serves the purpose outlined above.

II. The Contents of Article 21

A. Explanation of the Article

1. Categories of Persons to be protected under Article 21

9. Article 21 of the Macolin Convention envisions the provision of protection to **three distinct categories** of persons as drafted across its three sub-categories, as discussed below[20]. Language used herein is similar to

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17 Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019.

18 UNCAC, of October, 2003, the United Nations Office of Drugs and Crime, Vienna – the framework provided to prevent, apprehend and combat corruption also contains comprehensive provisions across the instrument dealing with protective measures for various categories of reporting persons; see also the UNODC Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 2.

19 See, for example, the Organization of American States (OAS) Inter-American Convention against Corruption, 1996, the African Union Convention on Combating and Preventing Corruption, 2003 and Protocol against Corruption of the Southern Africa Development Community, 2001 and series of OECD instruments, including its *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, available at from http://www.oecd.org/daf/anti-bribery/48972967.pdf (April 30, 2022).

20 Note, similar categories can be found in UNCAC.

that in prior instruments[21], while there exist other instruments with more comprehensive language[22].

10. Normatively, however, the concept of who might be granted protection should strive to be as wide as possible to bring under its ambit every kind of person who could potentially need protection, due to having revealed information, across various stages of procedure before, during and after the investigation and prosecution of an offence.

11. As will be described in further detail below various definitions and terminology are utilized for persons that require protection across instruments and jurisdictions, and various levels of protection are granted to each of these persons as well. While the Macolin Convention refers to specific persons, it does not use certain terms such as '**reporting' person** or **whistle-blower**[23], which are used across various instruments and jurisdictions[24], yet not consistently seen across legislation.

12. In addition, certain of these instruments might address only certain categories of persons based on specific circumstances –

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21 That in Recommendation No. R(97)13 in Article 21.a in specific; see also Explanatory Report, para 183.

22 Of note is the UNCAC.

23 The National Whistleblower Centre in the United States of America states that a ordinarily, a "whistleblower is someone who reports waste, fraud, abuse, corruption, or dangers to public health and safety to someone who is in the position to rectify the wrongdoing. A whistleblower typically works inside of the organization where the wrongdoing is taking place; however, being an agency or company "insider" is not essential to serving as a whistleblower. What matters is that the individual discloses information about wrongdoing that otherwise would not be known." Further, while, whistleblowers cannot rely usually rely on a simplified definition to guarantee themselves protection but instead, they must adhere to the definitions and procedures in the laws under which they are seeking formal whistleblower status. – "What is a Whistleblower", available at https://www.whistleblowers.org/what-is-a-whistleblower/ (April 30, 2022); see also BROWN A. J., LEWIS D., MOBERLY R., VANDEKERCKHOVE W., (eds.) International handbook on whistle-blowing research (Edward Elgar Publishing, Cheltenham, 2014).

24 We see under Swiss law, for instance that the term used in a limited context is 'denunciator' – see "Denunciators or Heroes? How Swiss Companies Deal With Whistle-blowers", *Ethics and Compliance Switzerland* (January 13, 2022) available at https://www.ethics-compliance.ch/2022/01/13/nzz-denunciators-or-heroes-how-swiss-companies-deal-with-whistle-blowers/ (November 1, 2023).

workspace/employees[25], sector specific definitions (public or private)[26], only within criminal law[27].

13. However, as argued below in section 1.1.1, it is recommended that this category of persons be defined widely to include any persons who might be forthcoming with information that would aid investigation and prosecution of manipulation offences.

1.1. "Persons who ... provide ... information…"

14. The above language in Article 21.a captures within it **two types** of persons, where the use of the term 'or' indicates that such person could fall within **either** category. The first category is all persons who **provide information** about an incident relating to an offence. This part of the provision is conditional on the following two elements:

(1) That such information be provided in connection with an offence under the Macolin Convention (particularly under Articles 15 to 17); and

(2) That such information be provided in good faith.

1.1.1 Persons included

15. It might be pertinent to note that in the introductory paragraphs about the section, the Explanatory Report uses the term **'holding' information**[28] and not 'providing' information, as stated in this part of the Article. When read along with the even more specific categories of persons in the second and third sub-parts of the Article, one may say that the section is perhaps intended to capture a wider set of persons than simply those who

[25] Article 9 of the Council of Europe Civil Law Convention on Corruption on the Protection of Employees which states that "Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

[26] The EU Directive, for example, advocates protection for individuals 'working' in either the public or private sector reporting breaches of EU law by bodies that employ them – see para 1.

[27] Article 22 of the Council of Europe Criminal Law Convention on Corruption on the Protection of collaborators of justice and witnesses which states that "*Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: (a) Those who report the criminal offences established in accordance with articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities; (b) Witnesses who give testimony concerning these offences.*"

[28] Explanatory Report, para 180.

'provide' or come forth with such information – anyone holding such information (whether or not providing it), anyone cooperating (whether or not themselves accused or convicted), as well as witnesses (being the remaining category of persons in the Article) also warrant protection. Thus, through this reading, the scope provides the widest possible interpretation to who Parties are encouraged to protect in domestic legislation.

16. This assumes significance in light of the Explanatory Report's statement that **these categories are intended to be merely illustrative and not exhaustive**[29]. Accordingly, further categories of persons who could benefit from the protection provided through this Article are encouraged to be awarded such protection by the Macolin Convention. **Residual persons** include those who witness or have knowledge relevant to offences under the Macolin Convention but are not involved personally or do not wish to report them (Article 21.a) and/or those who need not be witnesses providing testimony for any reason (Article 21.b). These could include persons who witness to the actual act or those who "*spot the methods that were used to bypass systems and procedures or to redirect funds or benefits away from the intended purpose or recipients, or they may see the harm caused.*"[30]

17. As seen in other instruments, notably in the UNCAC[31], independent of definitions, **'any' person** that holds, discloses, reports or in any way cooperates, irrespective of good intent and reasonableness, should warrant protection on aiding relevant procedure connected to an offence, to capture all residual persons[32]. The UNCAC in addition has, across the instrument, multiple provisions which encourage reporting by different actors that might operate within corruption affected ecosystems.

1.1.2 Conditions within Article 21.a

18. This wide interpretation seen above in section 1.1.1 is subject to the two **conditions**. It is important to note that, read strictly, the conditions would only apply to those holding or providing such information and thus not to those (persons cooperating with investigations) who would be

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29 Explanatory Report, para 187.

30 UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 2.

31 Article 32, UNCAC.

32 Article 33, UNCAC; see also UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 7.

protected by virtue of the categorization in the latter part of Article 21.a (as discussed below) or even Article 21.b and Article 21.c.

19. The **first condition** mentioned is that the information that is held or provided must be **related to offences under the Macolin Convention**, as codified in domestic law, and not other offences. A strict reading would imply that this would exclude from its realm any person having or providing such information which is connected to domestic offences which are not offences under the Macolin Convention[33]. Thus, hypothetically, the wording of the Macolin Convention would imply no requirement for Parties to protect persons providing information about a bribery or fraud related offence, even if it were to help convict a case involving what might be defined otherwise as manipulation under Article 3 of the Macolin Convention.

20. **The second condition** is the requirement of **good faith** and **reasonableness** during the provision of such information. This condition of '*good faith and on reasonable grounds*'[34] requires that the person concerned must have reasonable grounds to believe that the information in their possession shows (relevant) malpractice and that the belief should be reasonable for someone in their position based on the information available to them. Therefore, even if mistaken about the purpose of the information, they would still be entitled to protection for making such a report[35].

21. The logical **corollary** to this, though not expressly stated within the Macolin Convention but seen in other instruments, would be that persons who fail to follow good faith and reasonable belief requirements,

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[33] As noted in other parts of this commentary, as well as the UNODC's Legal Approaches to the Tackling of Manipulation of Sports Competitions: A Resource Guide, many national law provisions do not establish specific manipulation offences, but attempt to prosecute was might constitute such offences or elements thereof under laws governing other crimes such as bribery, fraud, public and private corruption, organized crime, illegal betting and betting fraud, money laundering, participation, attempt and conspiracy, abuse of function/office/authority, influence peddling, and trading in influence, unexplained revenue/wealth/tax fraud or treason, or a combination thereof, *inter alia* – see p. 7 and 8.

[34] This language in Article 21.1 echoes also the language in the UNCAC's Article 33 – discussed below, in section II.A.3.

[35] See UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 24-25; note, the term 'good faith' was left out of the Recommendation for the Protection of Whistleblowers "*in order to preclude either the motive of the whistleblower in making the report or disclosure or of his or her good faith in so doing as being relevant to the question of whether or not the whistleblower is to be protected*" – (Explanatory Memorandum to the Recommendation, para 85).

for example, by not providing information they know to be true, providing false information or manipulating set procedure, will not be protected[36].

22. While the requirement of good faith has been maintained in the Macolin Convention, it has been considered important to not mix it up with **motive** to provide information, to prevent the situation wherein individuals take it upon themselves to become fact finders rather than reporting the facts as they understand them[37]. This risk could be minimized by providing that the good faith requirement means *bona fide* intent with respect to the information through emphasis on quality of information[38].

23. To be noted is the **structure** of the language, whereby the use of the phrase "in good faith and on reasonable grounds" between provide and information, as opposed to stating "*persons who, in good faith and on reasonable grounds, provide information… or otherwise cooperate*", implies that this second requirement is applicable only to the initial portion of the section. It may also logically be construed that those volunteering information in criminal proceedings in which they are themselves a part (discussed in section II.A.1.2 below) will likely do so for personal benefit and thus *de facto* not in good faith. Finally, the word 'otherwise', by which the second part of Article 21.a commences, would also imply that it is disconnected from everything drafted prior, making this condition applicable only to the first part of Article 21.a.

24. Yet, this interpretation could be said to be inconsistent with what is provided for in the Explanatory Report, as seen below.

1.2. "Persons who … otherwise cooperate with the investigating or prosecuting authorities..."

25. While a distinction between the first and the second part of Article 21.a has been made above, it must be noted that the Explanatory Report to

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36 Article 23(2) of the EU Directive states that those who knowingly did not follow the reporting procedures laid down in the EU Directive or those who knew that the reported or publicly disclosed information was wrong would not be entitled to protection.

37 UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 25; this is also why certain nations have removed this requirement from certain national legislation such as the United Kingdom under its Enterprise and Regulatory Reform Act, which changed the provisions of the Public Interest Disclosure Act, 1998 and Employment Rights Act, 1996.

38 Laws such as Bosnia and Herzegovina's Whistleblower Protection in the Institutions of Bosnia and Herzegovina, 2013 and Zambia's Public Interest Disclosure Act, 2020 (also discussed in section II.B.2 below).

the Macolin Convention implies that the **entirety** of Article 21.a, based on the language in Recommendation No. R(97)13, applies to (**only**[39]) those "*who faced criminal charges or had been convicted of offences referred to in Articles 15 to 17 of this convention and who agreed to co-operate with criminal justice authorities, **in particular** by giving information about offences in which they had taken part so that the offences could be investigated and prosecutions brought*" (emphasis supplied)[40], making, *de facto*, such persons also those to whom the good faith and with reasonableness requirement applies, independent of the structure of the provision as discussed in section 1.1.2 above. Certain legislations also refer to such persons as 'collaborating participants'[41].

26. It is prudent to include, however, all such persons who are themselves involved at **any stage** of proceedings, **whether or not they speak in good faith**, so as to not delimit such protections in the larger public interest of having forthcoming information. The wording of the second part of Article 21.a, however, implies that a grant of protection must be contingent on information or cooperation being provided to authorities at certain stages, i.e. to persons that hold, report, or otherwise cooperate **during investigation and prosecution**. Yet, an offence might be committed and thus information might be forthcoming across various stages outside of these or these stages might also include or exclude different elements in the respective sporting and national justice systems.

27. Further, while the Explanatory Report specifies only 'court' proceedings[42], presumably in connection is prosecution phases, this can be interpreted to also include proceedings before sporting bodies, in sports arbitration on appeal as well as other non-judicial fora. In a similar vein, investigation is stated to be that conducted by either the police or a judicial authority[43] but can be interpreted to include other bodies which might be

39 Emphasis supplied.

40 Explanatory Report, para 184; this was based on language present in Recommendation No. R (97)13 at the time of drafting.

41 See the reference to legislation in Switzerland in their Criminal Procedure Code, after 2011, where such persons were not protected before, while other persons or witnesses reporting or informing authorities were. In France, the protection of such 'collaborators of justice' was studied to be limited to certain serious offences; also relevant is the Council of Europe's Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice (adopted on April 20, 2005) – see IOC-UNODC (2017), p. 7.

42 Explanatory Report, para 180, last sentence.

43 Explanatory Report, para 180.

involved in investigation of manipulation offences, including sporting bodies and private entities such as betting monitoring entities and regulators.

28. Finally, on the subject of **whom such information might be reported to**, the Explanatory Report also makes mention of the provision of such information to 'criminal justice authorities'[44], with the Article's wording suggesting investigating or prosecuting authorities. As seen in definitions adopted across other instruments, the use of the phrase 'competent authorities'[45] encapsulates more to whom such information might be reported and thus, any competent authority to whom such information is reported and whether or not at investigating or prosecuting stages, it should warrant protection of such person.

1.3 "Witnesses who give testimony concerning these offences"

29. Expressly, Article 21.b brings within its realm **witnesses** who give testimony. This has been said to mean persons who might possess information relevant to criminal proceedings concerning offences referred to in the Macolin Convention, intending to include also both whistle blowers and informers[46].

30. Akin to the Macolin Convention's differentiation between all other reporting persons ('any' persons, as seen in section II.A.1.3 above) and witnesses who provide evidence in court proceedings, grouping the latter together with other persons who might be present in investigative or court proceedings which include **experts, victims and others** (such as their relatives or those close to them) so far as they are witnesses who give testimony concerning corruption offences, recognizes the potential for retaliation and intimidation of such persons in specific[47]. Accordingly, the concept of a witness should include any person that provides testimony rather than simply those who have personally witnessed an offence.

31. The protection required for witnesses during proceedings within sport has been emphasized repeatedly in sport dispute resolution, which applies federation regulations noting the particular factors necessitating such protection, how it is best administered and the consequent

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44 Note – The Explanatory Report specifies only 'criminal justice' authorities. It is suggested that such authorities include all investigating, and other prosecuting authorities at all levels of sporting justice.

45 See language of Article 33 of the UNCAC.

46 Explanatory Report, para 185.

47 Article 32.1, UNCAC.

admissibility of such **anonymized witness evidence**, guaranteeing the rights obligations of the other party. These guidelines, largely laid down by the Court of Arbitration for Sport ("CAS"), provide a template to follow for national legislation specific to sport and indeed manipulation; this is further discussed below in section II.D.

1.4 "When necessary, members of the family of persons referred to in sub-paragraphs a and b"

32. Under Article 21.c, protection is suggested for **family members** of all those persons covered in provisions described in the section 1 above. As noted above in section II.A.1.4, in certain instruments, the requirement for protection is not only extended to relatives but also **persons 'close' to the reporting person**[48] – contemplating that there might be threats extended to persons beyond family that are known or have connections to the reporting person. Thus, family might also be best construed broadly to serve the purpose of the provision.

33. Notably, while the provision states that it remains illustrative and not exhaustive, it does not include other connected persons to reporting persons such as teammates in a team sport[49], who often require protection. Second, inclusion of the caveat "*When necessary*", particularly in the absence of such a caveat for the two prior parts of Article 21, further delimits the situations and leaves them open to subjective determination on a case-by-case basis, rather than requiring provision of protection across the board to all suggested persons.

2. Considerations and measures in the grant of protection

34. Second, Article 21 uses the expression '**effective protection**' which means that the protection is to be provided keeping the intent of the provision in mind, i.e. the need to adapt the level of protection and the type of measures based on an assessment of the level of risk and threats to collaborators with the judicial authorities, witnesses, informers and, when

48 Article 32.1, UNCAC.

49 See the impact within team sports as described, for example, here – HENRIKSSON K., "How whistleblowing in sports supports fair, safe and legal play", *WhistleB* (August 5, 2019) available at https://whistleb.com/blog-news/how-whistleblowing-in-sports-supports-fair-safe-and-legal-play/ (April 30, 2022).

necessary, family members of such persons[50]. As stated in other instruments, such protection should be directed against any unjustified behavior toward persons covered by such provisions that may result from them coming forward[51].

35. The **envisaged protections**, while not listed, could include a variety of measures. Prior instruments have indicated, for example, procedure for physical protection[52] of such persons to the extent necessary and feasible (relocation/limits on disclosure/change of identity/ employment or bodyguards) or provision of evidentiary rules to permit witnesses and experts to give testimony in a manner ensuring their safety[53]. The **practical measures** that are envisioned include, as stated in the Explanatory Report, installing preventive technical equipment, establishing an alert procedure, recording incoming and outgoing telephone calls or providing a confidential telephone number, a protected car registration number or a mobile phone for emergency calls[54].

36. Having effective **reporting mechanisms**, including reporting interfaces, communicating with the reporting person, assessing reports, impartial and documented investigating, finding and sanctioning wrongdoing, closing cases and learning from them, maintaining confidentiality by assessing retaliation and other risks and imbibing best practices through coordination and sharing learning, is also effective in enhancing safe reporting, as suggested by recent reports[55].

37. Finally, it is important to note that the protection measures provided for by this section should only be granted with the **consent** of the persons concerned or due to receive them[56]. This assumes more significance in light of there being an absence of specification of what there needs to be protection against within the language. For example, the express mention that such protection should be against 'any unjustified

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50 Explanatory Report, para 187.

51 See language in Article 33, UNCAC where 'unjustified behaviour' is to be the trigger for when protection is to commence for protected persons under the instrument.

52 Article 32.2.a, UNCAC – under Article 32.3, states would consider entering into agreements with other states for relocations of persons referred to in Article 32.1.

53 Article 32.2.b, UNCAC; see also Explanatory Report, para 187.

54 Explanatory Report, para 187.

55 See UNODC, UNODC, Reporting Mechanisms in Sport – A Practical Guide for Development and Implementation, 2019 available at https://www.unodc.org/documents/corruption/Publications/2019/19-09580_Reporting_Mechanisms_in_Sport_ebook.pdf (April 30, 2022), p. 38.

56 Explanatory Report, para 189.

treatment', as seen in other instruments[57], assists in streamlining the measures needed for specific circumstances. The sections below look at measures implemented by various countries and by sporting bodies as well in sports jurisprudence specifically for this purpose.

B. National Legislation

1. Country Legislation

38. There remains a varied approach across nations on the requirement to protect different categories of persons. The lack of uniformity across jurisdictions offers a challenge due to different legal conception of the involved elements[58]. Specific legislation addressing the required protection has been passed in many countries, and certain specific legislative examples of which have been looked at in the section below[59].

(1) Certain countries have match-fixing specific legislation that extends protection to witnesses or reporting persons, while other might have general provisions that also apply to the sporting context.

(2) Even within these, legislation might be limited to either the public or private sector, to employees or may vary depending on who might be offered such protection, whether witnesses only, all reporting persons or other specified persons.

(3) Protections granted to each category of protected persons may also vary across jurisdictions.

39. Section II.B.2. below looks at certain examples of types of legislation that can be found at the domestic level across the above categories of countries, including some which are signatories to the Macolin Convention.

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57 Article 33 of the UNCAC.

58 UNODC-IOC, Study on Criminal Law Provisions for the Prosecution of Competition Manipulation, 2017 available at https://www.unodc.org/documents/corruption/Publications/2017/UNODC-IOC-Study.pdf p. 41.

59 UNODC, Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p. 2.

2. Country Specific Examples

2.1 Provisions specific to manipulation offences

40. To begin with, certain countries have legislation that contains provisions applicable **specific to manipulation offences**.

41. **Malta**'s Prevention of Corruption (players) Act, 1976, provides that persons giving evidence in connection with manipulation offences[60] who have made a true and faithful statement on such matters to the best of their knowledge shall, due to this, be exempted from all punishment for their participation in that very offence[61]. The article establishing manipulation offences also creates duties for any official, player or organizer to report any information that he/she might have in relation to any such match-fixing offence[62]. Malta also adopted the 2019 EU Directive on Whistleblowing in 2021[63].

42. In **Poland**, the national law applicable to sport provides that no sanction shall be applied if the perpetrator of manipulation related offences[64] immediately notifies the competent law enforcement body and reveals all of the important circumstances of the crime before that law enforcement body otherwise discovers them[65].

43. In **Turkey**, the law applicable to sports offences, in specific, provides that no punishment shall be imposed on the person who exposes the concerned crime (referring to the match-fixing and incentive bonus

60 Under Article 3, para 1 of the Malta Prevention of Corruption (Players) Act, 1976.

61 See Article 9 of the Malta Prevention of Corruption (Players) Act, 1976.

62 Article 3, para 4 of the Malta Prevention of Corruption (Players) Act, 1976.

63 Protection of the Whistleblower (Amendment) Act 2021 to amend and expand the protection of the current legislation – the Whistleblower Act (Cap 527) of 2013 has been published in Malta to transpose the EU Directive 209/1937 available at https://parlament.mt/media/114506/bill-249-protection-of-the-whistlebower-amendment-bill.pdf (April 30, 2022).

64 Under Articles 46, para 2, para 3 or para 4, in connection with Article 48 para 2 or para 3 of the Act of 25 June 2010 on Sport (Journal of Laws of 15 July 2010, No 127, item 857) as translated to English.

65 Article 49, second paragraph of the Act of 25 June 2010 on Sport as translated to English. A draft legislation in Poland pursuant to the EU Directive is also currently pending being passed – information available at https://legislacja.gov.pl/projekt/12352401/katalog/12822857#12822857 (April 30, 2022).

related offences[66]) by reporting it before the relevant sporting event takes place[67].

2.2 General Criminal Law Provisions

44. **General provisions** protecting whistle-blowers or reporting persons and witness protection are otherwise present across countries' domestic legislation.

45. Among the countries which have **ratified** the Macolin Convention, **Switzerland**, home to most sports governing bodies and where the Macolin Convention was adopted, has no specific law extending protection to whistleblowers in criminal proceedings, though since the enactment of the Swiss Criminal Procedure Code in 2011 protection was extended to persons termed 'collaborating participants', i.e. perpetrators of the crime who later agree to cooperate with the authorities[68].

46. In 2021, **Portugal**, party to the Macolin Convention, adopted whistleblowing legislation pursuant to the 2019 EU Directive on Whistleblowing, albeit with limited applicability, alongside Croatia, Cyprus, Latvia, Lithuania, Denmark, France and Sweden, allowing for all of those countries to grant effective whistleblower protection in the public and private sectors[69]. Such legislations provide protection for whistleblowers, in the private or public sector, in a workspace and thus, to a certain extent, in relation to manipulation related offences.

47. Among Asian nations, **Malaysia**, for example, has overarching legislation protecting any person who makes a disclosure of any improper conduct to an enforcement agency, both in terms of confidentiality but also lack of prosecution. The legislation focuses only on the nature of the

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66 Under Article 11's provisions of Law No. 6222 on the Prevention of Violence and Disorder in Sports (enacted on 14.04.2011 and published in the Official Gazette on 14.04.2011, numbered 27905 as amended by Law no 6259) ("6222 Sayili Sporda Siddet and Duzensizligin Onlenmesine Iliskin Kanun" as translated and quoted in IOC-UNODC (2017) available at https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6222.pdf and https://www.resmigazete.gov.tr/eskiler/2011/12/20111215-7.html (April 30, 2022).

67 Article 11, para 8 of Law 6222/2011 on the Prevention of Violence and Disorder in Sports.

68 IOC-UNODC (2017), p. 41, as was the case in Switzerland until the enactment of its new Criminal Procedure Code in 2011.

69 See information available at https://www.whistleblowingmonitor.eu/country/portugal (November 1, 2022).

concern or complaint that has been reported, without focusing on the source of the information[70].

48. In Africa, certain nations have legislation, while others encourage best practices. **Zambia**'s Public Interest Disclosure Act[71] protects whistle-blowers in both the public and private spheres but has limitation on the extent of protection – disclosure is required to be made in good faith and by a person that is an employee, "who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law"[72]. On the other hand, the government of **South Africa** provides both protection under specific legislation[73] as well as comprehensive online support for reporting and informative documentation concerning corruption related whistleblowing[74].

49. The debate on whistleblowing and protection in certain jurisdictions such as the **United States** is magnified in certain sectors such as collegiate sports[75], with laws dating back to the False Claims Act[76] now supplemented by various federal and state laws and programs, protecting (and rewarding) reporting persons[77].

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70 See Part III, sections 6, 7, 8, 9 and 10 of the Whistleblower Protection Act 2010, Act 711 of 2010, amended 2016 available as translated by the International Labour Organization here – http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89541/102900/F1886669227/MYS89541%202016.pdf (April 30, 2022).

71 Public Interest Disclosure (Protection of Whistleblowers) Act 4 of 2010 which preceded the Anti-Corruption Commission Act 3 of 2012 – available at https://www.parliament.gov.zm/sites/default/files/documents/acts/Public%20Interest%20Disclosure%20%28Protection%20of%20Whistleblowers%29%20Act%202010.PDF (April 30, 2022).

72 Article 22 of the Public Interest Disclosure (Protection of Whistleblowers) Act 4 of 2010.

73 Protected Disclosures Act, no. 26 of 2000 – see L. Camerer, "Protecting whistle blowers in South Africa: The Protected Disclosures Act, no. 26 of 2000", Occasional Paper No. 47 – 2001, Institute for Security Studies available at https://media.africaportal.org/documents/ paper47.pdf (April 30, 2022).

74 See "Whistle Blowing", https://www.gov.za/anti-corruption/whistle-blowing (April 30, 2022).

75 See EPSTEIN A., "The NCAA and Whistleblowers: 30-40 years of wrongdoing and College Sport and Possible Solutions", 28(1) *Southern Law Journal* 2018, 65.

76 31 U.S.C. §§ 3729-33 (2017)

77 Federal Whistleblower Protections, National Whistleblower Centre, available at https://www.whistleblowers.org/?option=com_content&task=view&id=816&Itemid=%2012 9 (April 30, 2022) providing comprehensive outline of relevant federal laws related to whistleblower protections.

C. Sports Body Best Practices

50. Sports bodies and federations, including international sporting governing bodies but also more local sports bodies, as discussed below, have also sought to provide special protection for reporting persons. Sports bodies/federations are encouraged to seek an efficient protection for reporting persons, whether or not they participated in potential manipulation schemes, as these persons who decide to report wrongdoing are usually in very vulnerable positions, especially when athletes are in a precarious financial position, have short-term contracts or do not have employment contracts, have short-term careers, have low ethical empowerment and are members of sports organizations where there is focus on individual performance and group loyalty[78]. As seen below, the actions taken by sports bodies range from safe mechanisms for reporting, to provisions for protection of reporting persons, to recommending sanctioning of non-reporting to encourage persons with knowledge of offences to come forward.

1. *Sport Specific Regulations and Best Practices*

51. In certain sports, looking at football as an example[79], regulations and policies exist at each level of governance.

1.1. International Sports Governing Bodies

52. At the **international** level, **Federation Internationale de Football Associations** ("FIFA") has instituted an online platform for protected and, anonymous reporting for whistleblower protections for incidents including match manipulation; as well as practical tools such as integrity specific mobile applications to facilitate this process. These practical tools complement the respective applicable regulations where there remains both a duty to report any offences on various actors[80] and, specifically, an obligation to report manipulation related offences

78 UNODC, Reporting Mechanisms in Sport - A Practical Guide for Development and Implementation (2019), p. 32.

79 Other notable sports with comprehensive policies and regulations include cricket and athletics.

80 Rule 19 under Chapter 3 of the FIFA Disciplinary Code, 2019.

immediately and voluntarily[81], with a reporting breach drawing an independent sanction of a ban of at least two years from all football related activity and a fine of a minimum of CHF 15,000.

53. Under the FIFA Statutes of 2021, independently, FIFA is committed to respecting all internationally recognized human rights[82], which in turn implies an obligation to observe rights including those of protection for witnesses under international instruments.

54. Finally, a notable trend among international sporting organizations is the inclusion of safeguarding policies and dedicated safeguarding personnel within the organizations. By way of example, the **International Cricket Council**'s Anti-Corruption Code, 2021, has concrete reporting obligations which are complemented by the 2019 Safeguarding Regulations, wherein 'Prohibited Conduct' includes causing any harm of the kind one would anticipate would come to a reporting person or whistleblower[83], and safe reporting, privacy and confidentiality are guaranteed during proceedings[84]. Additionally, the term 'Protected Persons' is defined widely and extended to all actors in the sport[85].

1.2. Regional Sports Governing Bodies

55. Finally, there are **regional** bodies which also include such protections within their regulations pursuant to the need for doing so being established either through incidents or jurisprudence. The **Union of European Football Associations** ("UEFA") implemented article 33bis and 33ter within UEFA Disciplinary Regulations' 2011 edition following observations made by the Court of Arbitration of Sport's panel in a well noted case concerning competition manipulation in football (*FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski* v. *UEFA* ("Pobeda")[86]. UEFA

81 Rule 18.3 under Chapter 3 of the FIFA Disciplinary Code, 2019.
82 Under Article 3 of the FIFA Statutes, 2021 – see information available on the FIFA website – http://fifa.com/bkms (April 30, 2022).
83 See Article 3 of the ICC Safeguarding Regulations, 2019.
84 See, for example, para 8.20 of the ICC Safeguarding Regulations, 2019.
85 See Appendix 1 of the ICC Safeguarding Regulations, 2019.
86 CAS 2009/A/1920, award dated April 10, 2010.

adopted the specific requirements that the award postulated on protected witnesses, as discussed in section D below[87].

56. Currently, Article 47 of the **UEFA Disciplinary Regulations' 2020 edition** allows for anonymous witnesses to testify in disciplinary proceedings where there could be danger to their life or put that person, their family or close friends in physical danger[88]. In such cases, the relevant head of the concerned UEFA disciplinary body may order that the witness is not to be identified in the presence of the parties and ethics and disciplinary inspector, that the witness shall not appear at the hearing or that all or some of the information that could be used to identify the witness be included only in a separate, confidential case file[89]. Certain other measures, such as face masking, distorting the voice, questioning outside the courtroom or in writing, might also be introduced[90], with disciplinary measures imposable on those who reveal an anonymous witness' identity[91].

57. Finally, as required in jurisprudence (discussed below) to ensure witness safety and similar to FIFA provisions mentioned above, UEFA regulations require that anonymous witnesses are identified behind closed doors in the absence of the parties and the ethics and disciplinary inspector, by the person heading the relevant disciplinary body. This identification is recorded in minutes containing the witness's personal details, which are not communicated to the parties and the ethics and disciplinary inspector. The parties and inspector receive a brief note which: a. confirms that the anonymous witness has been formally identified; and b. contains no details that could be used to identify the anonymous witness[92].

1.3. National Sports Governing Bodies

58. Even more locally, at the **national** level, certain national sporting governing bodies have dedicated provisions for witness protection - the **Football Association** ("FA") in the United Kingdom, for instance, had

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87 See BARAK E., KOOLARD D., "Match-fixing. The aftermath of *Pobeda* – what have the past four years brought us?", *CAS Bulletin* 1/2014, Court of Arbitration for Sport, 5, p. 8.

88 Article 47.1 of the UEFA Disciplinary Regulations, 2020 edn., p. 29.

89 Article 47.1.a, 47.1.b and 47.1.c respectively of the UEFA Disciplinary Regulations, 2020 edition, p. 29.

90 Article 47.2 of the UEFA Disciplinary Regulations, 2020 edition, p. 29.

91 Article 47.3 of the UEFA Disciplinary Regulations, 2020 edition, p. 29.

92 See Article 48 of the UEFA Disciplinary Regulations, 2020 edition, p. 30.

specific whistleblowing policies as well as dedicated reporting mechanisms (though specific to offences connected to protecting children)[93]; now, presumably, the FA Handbook contains a set of general 'Safeguarding Adults Against Risk Regulations'[94] which shall ostensibly provide protection to whistleblowers and other persons at risk in connection with offences committed.

2. Universally Applicable Recommendations

59. Finally, within sport, based on the historical evidence of lack of willingness for individuals to come forth when personally, or even peripherally, involved in an offence due to the fear of penalty or, in team sports, fear of indicting a teammate, disciplinary codes incentivize reporting by offering protection to continue competing or reduced consequences based on how 'substantive' the reporting could be. To further address this, the International Olympic Committee's ("IOC") **Olympic Movement Code on the Prevention of Manipulation** has a requirement to report by making the failure to report an offence[95]. As mentioned before, the provisions of this code, described as relevant to reporting and witnesses in the paragraph below, assume importance given the number of international federations that have adopted the code as is or the code's language verbatim into their own policies for tackling manipulation related offences[96].

60. Failure to report to the concerned sports body or to a relevant disclosure/reporting mechanism or authority, at the first available opportunity, full details of any approaches or invitations received by a person (as defined in the code) to engage in conduct or incidents that could amount to a violation of the code[97] or failure to report any incident, fact or matter that comes to their attention (or of which they ought to have been

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93 FA Handbook 2015-16, p. 194 contained a dedicated Whistleblowing Policy.

94 FA Handbook 2021-22, p. 372.

95 Article 2.5 of the IOC Prevention of Manipulation Code 2016, part of the IOC Code of Ethics and other texts, p. 77.

96 See KUWELKER S., DIACONU M., KUHN A., "Competition manipulation in international sport federations' regulations: a legal synopsis", 22(4) *International Sports Law Journal* 2022, 288 – 313, under the section "Existence of Specific Regulations for the Offence of Manipulation" (see Fig. 1 therein specifically) note that seven of the forty-three studied international sporting governing bodies adopt the IOC's Olympic Movement Code on the Prevention of Manipulation verbatim.

97 Article 2.5.1 of the IOC Prevention of Manipulation Code 2016, *ibid*.

reasonably aware), including approaches or invitations that have been received by other person to engage in conduct that could amount to a violation of the code[98], are offences for which the sanctions may range from a warning to a life ban[99]. As part of the Disciplinary Procedure related provisions, the code requires that "*anonymous reporting must be facilitated*."[100] Finally, any substantive assistance provided by persons resulting in discovery or establishment of offences could reduce the sanctions applied under the code[101].

61. This is also seen in the doping context, where the obligation to report is further enforced by making the act of discouraging reporting or any acts of retaliation against reporting, providing evidence or information to concerned bodies under the World Anti-Doping Code, including regulatory or disciplinary bodies, hearing panels or law enforcement, anti-doping rule violations[102].

62. The Macolin Convention, while including sporadic reporting requirements across the convention[103], stops short of recommending sanctioning the lack of reporting to encourage whistleblowing in a streamlined and protected way.

D. Witness Protection in Sport Jurisprudence

63. The importance of **protection of whistleblowers** in sport was emphasized before the CAS early on in cases such as *AEK Athens & Slavia Prague*. v *UEFA*[104], where the panel noted that the preservation of the notion of integrity of sport and authenticity of results in the public's perception are of prime importance due to the social significance of sport (particularly football and in Europe)[105].

64. A number of **CAS panels** deciding on manipulation related offences (but also generally) have had to deal with questions on **admissibility of evidence provided by protected witnesses** or witnesses where anonymity was requested to be maintained in the interest of witness

98 Article 2.5.2 of the IOC Prevention of Manipulation Code 2016, *ibid*.
99 Article 5.1 of the IOC Prevention of Manipulation Code 2016, p. 81.
100 Article 3.5 of the IOC Prevention of Manipulation Code 2016, p. 80.
101 Article 5.3 of the IOC Prevention of Manipulation Code 2016, p. 82.
102 Article 2.11 of the World Anti-Doping Code 2021, p. 25.
103 See for example, Article 7.1.c, 7.2.b, 10.3 and 16.3.
104 CAS 98/200, award dated August 20, 1999.
105 *Ibid*., para 25-27.

protection – this jurisprudence thus supports the protection of persons reporting incidents or whistleblowing while the investigation and prosecution proceed in manipulation offences.

65. In *Pobeda*, the principles relating to anonymous witnesses were explained, namely that the usage of such evidence affected "*the right to be heard which is guaranteed by article 6 of the [ECHR] and article 29 of the Swiss Constitution…*"[106] but that such right was not breached when supported by other evidence provided, citing decisions of the Swiss Federal Tribunal relying on cases involving the European Convention of Human Rights ("ECHR"), which allowed for parties to rely on anonymous statements and prevent the other party from cross-examining them if their personal safety was at stake[107]. Independently, CAS panels have also noted that not all encroachments on the right to be heard and/or a fair trial violated procedural public policy, with the Swiss Code of Civil Procedure[108], for example, providing that a court is entitled to take "all appropriate measures" if the evidentiary proceedings endanger the protected interests of one of the parties or of the witness.

66. Such reliance on these protected witnesses remains contingent on the observance of the **strict conditions** of the ability to cross-examine, including with the use of audio-visual protection systems, and the guarantee of a detailed check of the identity, reliability and reputation of the anonymous witnesses by the court/panel[109], with panels laying down specific further modalities[110] for this admissibility to balance the need to protect/maintain anonymity with that of rights of the parties to be heard and to a fair trial[111]. Finally, panels have held that while not bound by the

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[106] *Pobeda*, para 72 – the specific part of the Swiss Constitution is Article 29.2, applicable as the UEFA, under whose regulations the case arose on appeal is located in Switzerland.

[107] See, in specific the cited decision in ATF 133 I 33 (decision dated November 2, 2006, 6S.59/2006), para 4, as also cited in *Pobeda*.

[108] Article 156 of the Swiss Code of Civil Procedure, cited in *Union Cyclisme International and World Anti-Doping Agency* v. *Alberto Contador Velasco & RFEF*, CAS 2011/A/2384 & 2386, award of February 6, 2012 ("Contador").

[109] *Pobeda*, para 72; see also RIGOZZI A., QUINN B., "Evidentiary Issues Before CAS" available at https://lk-k.com/wp-content/uploads/publications-rigozzi-quinn-bernasconi-intl-sports-cas-2014-ev.-issues-bf.-cas-pp.-1-55.pdf (April 30, 2022), p. 47.

[110] Witness needing to provide convincing motivation of his or her right to remain anonymous, the court having the possibility to see the witness, and concrete risk of retaliation against the witness by the party against whom he or she is testifying

[111] BARAK E., KOOLARD D., "Match-fixing. The aftermath of *Pobeda* – what have the past four years brought us?", *supra* note 87, p. 22-23.

ECHR, they needed to take into account the framework of procedural public policy, with panels concluding on whether or not modalities are met on a case-by-case basis[112].

67. On the **personal safety considerations** of witnesses connected to disciplinary offences, the predominant view has been that abstract danger in relation to the personality rights as well as the personal safety of the protected witness is insufficient, instead there must be a concrete or at least a likely danger in relation to the protected interests of the person concerned[113]. Consequently, CAS panels have held that while there is no requirement to consider interests of witnesses under provisions of Article 6 of the ECHR, their interests may be protected under other provisions such as Article 8, which means that states must organize criminal proceedings in a way that these interests are not unjustifiably endangered and thus balanced against the right to a fair trial[114].

[112] In a manipulation context, see *Football Club* '*Metalist*' *et al*. v. *UEFA*, CAS 2010/A/2267-2281, award of November 29, 2013 where the panel required that the number of witnesses, arguments in support of which their testimony was offered and arguments on their testimony's relevance and materiality to the case were all to be provided to justify the admissibility of testimony of new witnesses based on Article 56 of the CAS Procedural Code, such witness evidence only being possible to provide anonymously in 'exceptional' circumstances (paras 599-604); otherwise (in doping), see *Contador*, *supra* note 108 where the CAS panel held that interests of witnesses were not in fact found worthy of protection to justify curtailment of the procedural rights of the respondents in that case to know their identity (para 184).

[113] *Contador*, *supra* note 108, para 180; BARAK E., KOOLARD D., "Match-fixing. The aftermath of *Pobeda* – what have the past four years brought us?", *supra* note 87, p. 23 and RIGOZZI A., QUINN B., "Evidentiary Issues before the CAS", *supra* note 109, p. 49. More recently, this threshold has been seen to be met in cases of sexual abuse such as *Keramuddin Karim* v. *FIFA*, CAS 2019/A/6388, award of July 14, 2020.

[114] *Ibid.*, para 125.

Articles 22 to 25 - Introduction

by

Surbhi KUWELKER

I. Purpose of Chapter VI

1. As stated in the Explanatory Report to the Macolin Convention, effectively countering the phenomenon of manipulation necessitates not only the development of preventive measures and appropriate legislation to cover offences, but also **setting up effective sanctions** within a country's applicable legislative framework that serve this purpose[1].

2. Prior decisions issued in a manipulation context at the level of state judicial bodies as well as sporting bodies have noted **the need for sanctioning manipulation offences**, and sometimes particularly harshly (with a deterrent purpose) due to the seriousness of the offence, combined with the threat to integrity, public perception and commercial value of sport and the ability/resources of bodies to properly detect, investigate, collect evidence and prosecute such clandestine offences[2].

3. The articles within this Chapter VI are divided to address sanctions and measures for different types of perpetrators (Article 22 for 'natural' persons; and Article 23 for 'legal persons') as well as the various categories of sanctions or measures (Article 22 addresses 'criminal' sanctions inclusively; Article 23 addresses sanctions in general for legal persons; Article 24 addresses 'administrative' sanctions; and Article 25 addresses seizure and confiscation).

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1 Explanatory Report, para 190.

2 The need for effective and dissuasive sanctions as stated in the Article is further discussed under section II.2 below.

II. General Contents of Chapter VI

1. Legislative or Other Measures

4. In Articles 22, 23 and 24 the Macolin Convention mentions the phrase 'legislative or other measures'. The section below addresses the implication of usage of this phrase.

1.1. Sanctions under law

5. A basic tenet of criminal law is the **principle of *nullum crimen, nulla poena sine lege scripta et certa***[3]. In essence, this prescribes that no sanction can be imposed unless there is an express provision of law that describes, with the requisite clarity and specificity, not only what the constitutes the offence but also what an applicable sanction for each offence is[4].

6. This principle is considered to be fundamental in legislating on criminal sanctions, and thus, **no sanction for a criminal offence in domestic law may be imposed without a clear provision** in a ratifying party's domestic legislation, whereby such Party has chosen to criminalize manipulation[5] or use a certain criminal law legislation to sanction offences which would fall in the scope of the definitions of offences under Macolin Convention's Articles 15 to 18.

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3 See, for example, TIMMERMAN M., "Legality in Europe: on the principle "nullum crimen, nulla poena sine lege" in EU law and under the ECHR", Doctoral Dissertation, European University Institute, Department of Law, 2018. See also, DIACONU M., KUWELKAR S., KUHN A., "The court of arbitration for sport jurisprudence on match-fixing: a legal update", 21 *International Sports Law Journal* 2021, 27 under the section 8 on 'Sanctions'.

4 *Ibid*.

5 See the list of such nations as mentioned in the UNODC and IOC's publication, "Legal Approaches to tackling the Manipulation of Sports Competitions: A Resource Guide", Vienna, 2021, where 45 jurisdictions were identified to have criminalized offences which could be considered manipulation (p. 6), with such offences being sanctioned under laws pertaining to a variety of offences (including that of manipulation independently as well, by a few – see p. 7 and 8); this is also a notable increase from prior published reports where fewer jurisdictions (32 in the year 2015) were noted to have legislation addressing such offences – see UNODC-IOC, *Criminal Law Provisions for the Prosecution of Competition Manipulation* (2017, "UNODC-IOC (2017)"), p. 23 onwards and Annexure 1.

1.2. Duality of nature of sanctions

7. The Explanatory Report to the Macolin Convention seems to adopt a broader interpretation, envisioning that there **might be sanctions imposed under provisions of a non-criminal nature**. As such, this **'duality' of types of sanctions has been noted prior**, i.e. that while sanctioning manipulation or sports offences generally, the first level of sanction ordinarily involves disciplinary sporting sanctions, applied by the relevant sports bodies according to their internal punitive system (termed "sport justice")[6]. Thereafter, at the second level there might also be state sanctions, applied by public authorities (termed "state justice"). The Explanatory Report further specifies that based on both common legal principles and the domestic law of ratifying Parties, the liability for manipulation of sports competitions **can be criminal, civil or administrative in nature**[7], each termed to be a 'sanction'.

8. In addition, such liability could also include disciplinary 'sanctions' imposed by sports organisations. For instance, the fixing of a football match within the Swiss national league could potentially be sanctioned by the Swiss national football federation[8], under civil law provisions[9] as well as, arguably, under Swiss criminal law[10]. Ordinarily, and as seen in this example, both civil and criminal sanctions are enforced by a state's judicial framework, while sanctions in administrative proceedings are applied by non-judicial bodies[11].

9. Within the world of sporting justice at the highest level, the Court of Arbitration for Sport ("CAS") has clarified that "*disciplinary sanctions imposed by associations are subject to civil law and must clearly be distinguished from criminal penalties*"[12]. Thus, as held by CAS in practice[13] but also theoretically, **sporting and criminal sanctions may be**

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6 See UNODC-IOC (2017) at p. 1; see also VALLONI L., PACHMANN T., "Sports Justice in Switzerland", *European Sports Law and Policy Bulletin* 1 (2013), p. 600 onwards.

7 Explanatory Report, para 191.

8 Under Article 13bis of the Disciplinary Regulations of the Swiss Football Association, as of July 2020.

9 Under Article 41ss of the Swiss Code of Obligations, as of July 2016.

10 Under Article 25a of the Sports Promotion Act, as of January 2019.

11 See further discussion under the commentary to Article 24 within this Chapter.

12 See *Johannes Eder* v. *Ski Austria*, CAS 2006/A/1102, award dated 13 November 2006 at para 52.

13 See also, *AEK Athens and Slavia Praha* v. *UEFA*, CAS 98/2000, award dated 20 August 1999.

complementary. The legal nature of "sport sanctions" – which may include, *inter alia*, warnings, bans, relegations, fines and other penalties[14], has been clarified by the Swiss Federal Tribunal ("SFT") as statutory, which is **a form of contractual sanction**[15].

10. Keeping the above in mind, it is important to note that Article 22 tackles only 'criminal' sanctions for natural persons, as specified in its title as well as through the recommendation for deprivation of liberty as a penalty; Article 23 addresses 'sanctions for legal persons', without specification of the nature of such sanctions in its title, and provides an inclusive list of these sanctions in the text; Article 24 addresses 'administrative sanctions' in general; and Article 25 speaks of seizure and confiscation as additional complementary measures.

1.3. Double jeopardy

11. Finally, but not in the least, is the need for observance of **the *ne bis in idem* principle, which prescribes that the same offence must not be sanctioned twice**[16]. The application of this principle here is complicated due to the aforementioned distinction in the nature of sporting and criminal sanctions, allowing for parallel decisions to be made across both sporting fora or types of state fora. **National courts** have made note, in the United Kingdom, for example, that there is a possibility of further sanctions in the sporting sphere and state issued sanctions should therefore be adjusted accordingly[17].

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[14] See VAN KLEEF, R., "Reviewing disciplinary sanctions in sports", 4(1) *Cambridge Journal of International Comparative Law*, 2015, 3.

[15] In its notable award of *Gundel* v. *Federation Equestre Internationale*, SFT 119 II 271, decision dated 15 March 1993, at para c. 3c); see also decision of the SFT in S*wiss Ice Hockey Federation* v. *Dube*, SFT 120 II 369 decision dated 6 December 1994 at para c. 2; the SFT's decisions gaining significance in light of the presence of numerous international sporting federations headquartered in Switzerland, with appeals lying to the CAS, also located in Switzerland; see also UNODC-IOC (2017), p. 14.

[16] See generally OLIVER P., BONBOIS T., "Ne bis in idem en droit européen: Un principe à plusieurs variantes (Double Jeopardy in European Law: a principle with several variants)", 9 *Journal de Droit Européen* 9, 2012, 266.

[17] The CAS Panels in *Mohammad Asif* v. *International Cricket Council* ("ICC"), CAS 2011/A/2062 award of April 17, 2013 and *Salman Butt* v. *ICC*, CAS 2011/A/2064 award dated of April 17, noted that the English Courts before whom their respective cases were also proceeding, had already considered as a potential mitigating factor the presence of parallel proceedings in which a guilty finding was likely. This was appealed

12. Within sporting justice, **CAS panels are regularly confronted with cases in which administrative, disciplinary, penal and/or civil sanctions have been pronounced for the same case of manipulation of sports competitions**[18]. This can be observed at different levels (national and international, courts and sports bodies, administrative or disciplinary)[19], arguably warranting further consideration in future sporting or non-sporting jurisprudence.

13. Further, CAS panels usually consistently conclude that **there is no violation of *ne bis in idem* by distinguishing between the nature of sanctions**[20]. Yet, it remains worrisome to note that the same person may be subject to several sanctions for the same act on the sole basis of the difference in the legal nature of each of them. The result of such an interpretation of the *ne bis in idem* principle is all the more questionable when it leads to various types sanctions that have similar semantics (for example, all called a "fine") and the same effect from the perspective of the natural person affected, even if the legal nature of such sanctions is indeed different[21].

14. Sometimes, but however only if the legal nature of both sanctions is the same, this issue may be **addressed by considering the double penalty disproportionate**[22]. While considered necessary for setting an example, particularly in susceptible sports, a financial penalty in addition to a life-time ban, for example, has been considered excessive on occasion,

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to the England and Wales Court of Appeal, in *R* v. *Amir & Butt*, Case No. EWCA Crim 2914, 3 November 2011.

18 See CAS awards in Public Joint-Stock Company "Football Club Metalist" v. UEFA and PAOK FC, CAS 2013/A/3297, award of November 29, 2013, Klubi Sportiv Skënderbeu v. UEFA, award of November 21, 2016, Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi Tic A.S., Trab- zonspor Futbol Isletmeciligi Tic A.S. and Tranzonspor Kulubu Dernegi v. Turkish Football Federation, UEFA, Fenerbahçe Futbol A.S. and Fenerbahçe Spor Kulubu, CAS 2015/A/4343, award of March 27, 2017, Sivasspor Kulübü v. UEFA CAS 2014/A/3625, award of November 3, 2014 and most recently in Lao Toyota Football Club v. Asian Football Confederation, CAS 2018/A/5500, award of June 12, 2018 ("Lao Toyota") where the different levels of applicability of the principle and exceptions were discussed.

19 In awards such as those in Asif and Butt, this may be noted even though the principle if not explicitly cited there.

20 The CAS award in *Lao Toyota* is a notable exception of this principle; see DIACONU M., KUWELKAR S., KUHN A. (2021) at p. 44.

21 *Ibid*.

22 See also the issues concerning proportionality of sanctions discussed under section II.B.2 below.

as the ban would, in any case, have an additional financial effect on a player by affecting his/her future earnings[23].

2. Effective and Dissuasive

15. While jurisprudence among national courts specifically on constitution and sanctioning of manipulation offences remains little and varied across jurisdictions, within the sporting justice world, guidance may be taken on **what constitutes 'effective' sanctions** in the context of manipulation through existing decisions, such as public awards of the CAS. Research has concluded that, when made keeping in mind legal constraints, the disciplinary power of sports institutions' internal bodies can constitute a fast, efficient and coercive tool against the manipulation of sports competitions[24]. Thereafter, on appeal therefrom, a CAS panel would usually consult any existing criteria, under the applicable regulations[25], and then determine if the sanction imposed by the respective governing body is adequate, legal, in line with public policy and appropriate to the level of guilt and the gravity of the violation[26]. In connection with this, the Macolin Convention also stresses proportionality of sanctions, in addition to effectiveness, which is discussed in Section II.B.2 below.

16. An element which indicates whether a sanction has been effective is its deterrent factor, should that be an objective – **the Macolin Convention indeed highlights that sanctions must be deterrent** in

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[23] See for example, Daniel Köllerer v. Association of Tennis Professionals ("ATP"), Women's Tennis Association, International Tennis Federation and Grand Slam Committee, CAS 2011/A/2490, award of March 23, 2012 ("Köllerer") at paras 70 – 73 and David Savic v. Professional Tennis Integrity Officers, CAS 2011/A/2621 award of September 5, 2012 at paras 8.33(vii), 8.34, 8.36– 8.38 and 9.3. See also section on Proportionality (section II.1.3 below) as well as sections on monetary sanctions (fines) under Articles 22 and 23.

[24] ICCS-Sorbonne Report, "Protecting the Integrity of Sport Competition – The Last Bet for Modern Sport", (2014) at p.94.

[25] Seen expressly stated in Union Europeene des Football Association ("UEFA") Regulations which are applied frequently given the volume of cases arising out of UEFA competition before the CAS (see DIACONU M., KUWELKAR S., KUHN A. (2021)) and referred to by the CAS from initial awards – see for example, *FK Pobeda*, *Aleksandar Zabrcanec and Nikolce Zdraveski* v. *UEFA*, CAS 2009/A/1920 award of April 15, 2010 ("Pobeda") at para 21 and 67–70 or *N and V* v. *UEFA*, CAS 2010/A/2266 award of May 5, 2011 ("N and V"), at para 81.

[26] See *N and V* at para 41.

certain articles in this chapter. Proponents of deterrent theories of sanctioning posit that the objective of sanctioning (reduction of crime) can be achieved through sanctions that are swift, severe and certain; thus, deterring people from recommitting crimes or, by observing sanctions of others, preventing future crime[27].

17. **Specific to sport, deterrence as an objective has been noted in sporting justice** with regard to manipulation. Noting the seriousness of manipulation and the need to protect integrity of sport, deterrence is used to heighten sanctions, issue life bans or provide exemplary punishments in sports more susceptible to fixing, such as tennis, as long as provided for within the applicable law[28]. It may be noted that many sports federations' regulations now provide sanctions which aim at not only deterrence but also the rehabilitation of natural persons who might be found responsible for such offences including education and community service[29]. Yet, in most cases, these are to be used in concurrence with other more deterrent sanctions.

18. **Should a combination of effective and deterrent sanctions be desired, it is desirable that they be issued in accordance with the law, as seen above in section II.A.1.1, so as to not compromise the principle of *legal certainty***, held necessary in a sporting context as well due to potentially harsh sanctions upheld by CAS, for example, where research has deemed this to need more in-depth consideration. To elaborate further, most CAS awards refer to prior awards on various aspects, including awards related to match-fixing, and panels are unlikely to depart significantly from this practice[30]. Thus, even if not obligated to follow precedent, they tend to do so in the interest of legal certainty[31], which also

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27 See "Deterrence, Crime, and the Criminal Justice System: Myths and Realities", *Max Planck Law* available at https://law.mpg.de/event/deterrence-crime-and-the-criminal-justice-system-myths-and-realities/ (September 2, 2023); see also Ellis A., "A Deterrence Theory of Punishment", 53: 212 *The Philosophical Quaterly* 2003, 337.

28 See *Kollerer*, para 66; this award and other decisions were also cited in *Savic,* paras 8.33–8.34 and 9.2.

29 Discussed further below in section II.C.1.4.

30 Seen across awards – for example *Canadian Olympic Committee and Beckie Scott* v. *IOC*, CAS 2002/O/373, award of December 18, 2003 at para 14. KOFFMAN-KOHLER G, "Arbitral precedent: dream, necessity or excuse", 2007 *Arbitration International* 23, 357 at p. 366.

31 BLACKSHAW I, "The role of the court of arbitration for sport (CAS) in countering the manipulation of sport", In: BREUER M., FORREST D. (eds) *The Palgrave handbook on*

then aids in ensuring proportionality, also emphasized by Article 22, as discussed below.

19. It has been noted that the **independent interpretation of the same regulations** by each panel, or indeed a sporting forum, a state forum or different state judicial bodies across jurisdictions, **could compromise consistency in many elements of a decision, including sanctioning**[32]. Finally, the tendency to borrow from decisions on offences decided on more frequently or on which there exists more jurisprudence or nuanced legislation, such as, within sport disciplinary offences, doping, could lend to further concerns over consistency across issued sanctions, before manipulation cases develop domestic law jurisprudence of their own, as seen in a sporting context among CAS awards now[33].

3. Proportionate

20. The question of proportionality has been considered in a manipulation related sporting justice context prior and remains intricately connected to what is considered 'effective' as a sanction. In a sporting context, it may be observed that the **CAS has held in manipulation related awards that sanctions issued by lower sporting bodies must be 'proportionate', i.e. such sanction must be reasonably required in search of a justifiable aim**[34]. Considerations of proportionality in maintaining or revising awards and for different parties in the same proceedings have also been observed[35]. Proportionality may result in the adjustment across types of sanctions – for example, the non-issuance of a fine where there is already a deprivation of personal liberty through a ban, based on gravity of the offence and degree of guilt[36].

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the economics of manipulation in sport (Palgrave Macmillan: Cham, 2018), p. 223 at p.155.

32 DIACONU M., KUWELKAR S., KUHN A. (2021) at p. 44.

33 See discussion in DIACONU M., KUWELKAR S., KUHN A. (2021) at p. 44 where it is also noted that CAS panels have held as well that strict degree of certainty as in criminal procedure is unrequired given the hybrid nature of proceedings as seen in *Skënderbeu* v. *Albanian Football Association*, CAS 2017/A/5272, award of April 13, 2018 – an appeal against this decision was rejected by the SFT in July 2020 (4A_462/2019).

34 *Public Joint-Stock Company "Football Club Metalist"* v. *UEFA* and *PAOK FC*, award of November 29, 2013*,* CAS 2013/A/3297, paras 8.25–8.26.

35 See *N and V*, paras 43 and 81.

36 See, for example, considerations made under the prior Tennis Anti-Corruption Programme in *Köllerer*, paras 70-73.

21. In the context of proportionality, important to note is the presence of certain sanctioning factors both **aggravating and mitigating**, which are present in state legislation, both specific and not specific to manipulation. The Macolin Convention in itself, however, does not provide for such factors expressly as part of its sanctioning provisions or other provisions.

22. In certain jurisdictions, sanctions are **aggravated** if a perpetrator is a person in a **position of responsibility** or heightened visibility in a sports environment, such as a sports director, referee, agent, representative, member of a delegation, management, control body, general assembly, board of a club or other legal entities in sport[37].

23. It is also common to see in jurisdictions, including Bulgaria[38], Greece[39], and Italy[40], that **fixing a competition on which bets are offered** is considered to be an aggravating factor [in the sanctioning of the offence], i.e. providing a more severe sanction for perpetrators who indulge in fixing in the context of a bet, while criminalizing manipulation itself whether or not it may have taken place in the context of a bet. In the same vein, certain jurisdictions heighten punishments for **seriousness of an offence, recidivism, or where involving organized crime**[41].

24. Also of note are public interest related factors such as **the nature of the competition** involved, with fixing on **age group** competitions warranting harsher sanctions[42] but lower sanctions if a minor is the perpetrator[43]. Similarly, fixing in **more important or professional**

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37 See, for example, in Portugal under Article 12 para. 1 of Law no. 50/2007, in Bulgaria under Article 307d of the Bulgarian Criminal Code though limited to where official functions are being discharged and in Turkey under Article 11 para. 4b of Law 6222/2011 on the Prevention of Violence and Disorder in Sports (enacted on 14.04.2011 and published on the Official Gazette dated 14.04.2011 and numbered 27905,183 as amended by Law No. 6259).

38 Section 307d.1 (New, SG No. 60/2011) of the Bulgarian Criminal Code (as amended in July 2011).

39 Section 132 of Greek Law 2725/1999 – Sports Law (as amended by Law 3057/2002).

40 Article 1 para 3 of Italy's Law No. 401 of December 13, 1989: sporting fraud as amended lastly by Law-Decree No. 119 of August 22, 2014 under Article 1.

41 See, for example and *inter alia*, section 307d.2 (New, SG No. 60/2011) of the Bulgarian Criminal Code (as amended in July 2011) which includes all three.

42 Bulgarian law provides for aggravated sanctions for involving players below 18 years of age in fixing offences, by specifying imprisonment from two to eight years and a heightened fine – see Article 307d of the Bulgarian Criminal Code.

43 See Italy's Law No. 401 of December 13, 1989: sporting fraud as amended lastly by Law-Decree No. 119 of August 22, 2014 under Article 1 para 1.

competitions (of a national or international level) warrants heightened punishment in certain jurisdictions[44].

25. **Mitigating** factors may also be present which include cases of lesser significance[45], low profit obtained or low value of the advantage, the importance of the duties of the offender[46], as well as, interestingly, the presence of incentive bonuses promised or given with the sole intention of promoting the success of a team[47].

26. These factors are also considered **within the realm of sporting justice, being usually expressly mentioned within federation regulations** as factors which should not be considered in the determination of the offence, as opposed to purely sanctioning, including participation/attendance in the same event, outcome of event, nature of such outcome, receipt of consideration, effect on an actor's performance and violation of any technical rules[48].

27. Among federation regulations, **factors listed to be considered for the purposes of sanctioning include** age/youth/experience/inexperience, disciplinary record/prior violations, number of breaches, significance of benefit, potential to affect course/result, whether the breach was part of a broader scheme, admission of the violation, cooperation/assistance/ remorse[49], and such factors could also include the nature of the breach(es), the degree of fault, the harm that the breach(es) has/have done to the sport,

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44 See, for example, Art. 218-A on Sport Fraud within the El Salvador Criminal Code (introduced on March 16, 2016).

45 Article 229 para 2 and 230 para 2, of the Polish Criminal Code.

46 Spanish Criminal Code (enacted by Organic Law 1/2015, which amends Organic Law 10/1995) under Article 286 bis para 3.

47 Article 11.5, of Turkish Law No. 6222/2011 on the Prevention of Violence and Disorder in Sports (enacted on 14.04.2011 and published on the Official Gazette dated 14.04.2011 and numbered 27905,183 as amended by Law No. 6259.

48 KUWELKER S., DIACONU M., KUHN A., "Competition manipulation in international sport federations' regulations: a legal synopsis", *International Sports Law Journal* (2022) available at https://doi.org/10.1007/s40318-022-00210-9; see for example Article 2.7 of the International Olympic Committee Code on the Prevention of Competition Manipulation, 2016. Articles 6.1.1 and 6.1.2 of the International Cricket Council's Anti-Corruption Code, 2019 are an example of aggravating and mitigating factors specific only to sanctioning and not to the determination of the offence itself.

49 See Figure 7 in KUWELKER S., DIACONU M., KUHN A. (2022); as well, for example, Article 27.2.2.1 and 27.2.2.2 of the Federation Internationale de Hockey ("FIH") Integrity Code (2018). Article 27.3 therein also states that where "*more than one breach has been committed, the sanction will be based on the most serious breach, and increased as appropriate depending on the specific circumstances."*

the need to deter future breaches, among other specific factors[50]. Certain guidelines on sanctioning require, for example, considerations of "*level of responsibility*" or "equity", factoring in "fraud" (intentional breach), "fault" (whether or not intentional), "involvement" (indirect) and "attempting" (result agnostic) in their sections addressing sanctions[51].

28. In addition, certain federations provide for a strict tabulated range of sanctions based on how a specific manipulation offence is committed[52]. These factors are ordinarily applied in the forum of first instance, even if not present as such in the regulation[53]. The CAS also takes into account such factors should a federation decision be overturned[54].

29. Finally of note, and also external to the realm of state criminal law, is guidance on best practices within the sports regulations, as may be found within the **International Olympic Committee's Sanctioning Guidelines on the Competition Manipulation, 2018** ("IOC Sanctioning Guidelines"), which independently provide factors that must be considered while sports bodies sanction manipulation, including whether the participant is betting on a competition she/he is participating in; the number and size of the bets; and addiction to betting or other specific personal circumstances[55].

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50 See Article 27.1.7 of the same FIH Integrity Code (2018) as specified particularly for determining period of ineligibility.

51 See Item 4 "Level of Responsibility" which describes factors to be considered while issuing sanctions under the World Skate Code of Conduct and Code of Ethics (2019, p. 6).

52 The International Federation for Sport Climbing's Disciplinary and Appeals Rules, 2019 under Article 20.1 and 20.2 provide a specific time period for bans and amount for fines for types of offences (Items 8, 9 and 11). Certain subjective unspecified "exceptional circumstances" might be considered when sanctioning as listed under Article 23.

53 In the ICC Anti-Corruption Unit decision of in proceedings between the ICC and Zimbabwean cricketer Heath Streak, dated March 28, 2021 available at resources.pulse.icc-cricket.com (April 5, 2021) at para. 33 – factors such as admission of breach, remorse, good prior record, lack of substantial damage to commercial value or public interest.

54 In Boniface Mwomelo v. FIFA, CAS 2019/A/6220, mitigating factors included comparatively small amounts, singular attempt at manipulation, a first offence, incitement by a third party, and the fact that a less harsh sentence could achieve the same purpose.

55 IOC Sanctioning Guidelines at p. 13.

Article 22

by

Surbhi KUWELKER

Article 22 – Criminal sanctions against natural persons

Each Party shall take the necessary legislative or other measures to ensure that the offences referred to in Articles 15 to 17 of this Convention, when committed by natural persons, are punishable by effective, proportionate and dissuasive sanctions, including monetary sanctions, taking account of the seriousness of the offences. These sanctions shall include penalties involving deprivation of liberty that may give rise to extradition, as defined by domestic law.

I. The Contents of Article 22

A. Scope of Article

1. Juridically, **a 'person' may be classified into two distinct groups: natural persons and juridical persons**[1]. In itself, any juridical personality could be considered to be a creation, under applicable law, to individualize the concerned subjects with rights and obligations, granting them legitimacy to exercise such rights and fulfil the corresponding obligations[2]. As opposed to a natural person or individual, a legal entity is a juridical construction that possesses the following five elements: the being or subject, its will, the subjective rights, the obligations and the element of such juridical personality[3].

2. This distinction is relevant in light of the **distinction made in the Macolin Convention between Articles 22 and 23, where the former**

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1 See generally, for example, QUINTANA ADRIANO E., "The Natural Person, Legal Entity or Juridical Person and Juridical Personality", 4(1) *Penn State Journal of International Law and International Affairs* 2015, 364 at 366; see the evolution of the doctrine on what constitutes various types of persons at section II.B, page 367 onward.

2 *Ibid*., at 390.

3 *Ibid*., at 389.

addresses offences committed only by natural persons and the latter by legal persons[4]. This follows from the discourse in earlier articles which envision independent offences for non-natural persons irrespective of the natural persons affiliated to them under the Macolin Convention[5]. In a sporting context, such a distinction can be observed in certain sanctions present in federation regulations[6]. Further, specific to manipulation offences, sanctions have been issued *ratione personae* to both categories, i.e. individuals (players, coaches and management, referees, club officials and other persons such as those involved in illegal betting), as well as legal entities (such as clubs and corporations)[7].

3. State criminal sanctions have also been observed as previously issued to natural persons for manipulation related offences[8]. Across national legislation, however, it may be observed that a **strict distinction as mentioned within the Macolin Convention may not be observed**. An example is that of Spanish law, where a (legal) distinction is drawn instead between the directors, administrators, employees and collaborators of a sporting entity on the one hand, and the sportspersons, arbiters or judges. Coaches as well fall within the former category[9].

4. **Commission hereunder refers specifically to offences under Articles 15 to 17**[10]. This would imply that not merely commission of the offence, but, as well, as mentioned under Article 17, parties are encouraged to also establish in their domestic law also offences that **involve aiding**

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4 Please see further, the commentary to Article 23 for distinctions between the language in Article 22 and 23. See also Section IV.C.9 under the commentary to Article 15 for further details in connection with who manipulation legislations target are prospective perpetrators.

5 See commentary to Article 18.

6 Section I.3.B and I.3.C of the same World Sailing Code of Ethics and Code of Conduct (2019, p. 4).

7 See section 6.2 in DIACONU M., KUWELKAR S., KUHN A. (2021) at 40.

8 See, for instance, English criminal Courts' convictions and denial of appeals by the Court of Appeal Criminal Division in 2011 and 2013 by cricketers Mohammed Asif and Salman Butt under the then applicable English Prevention of Corruption Act, 1906 and the Gambling Act, 2005, discussed in *Asif* and *Butt* (mentioned above) as well as the prison sentence of two years and five months received by referee Robert Hoyzer and confirmed by the German Federal Supreme Court of Justice in 2006 for matchfixing in Germany, where he was convicted alongside Croatian gambler Ante Sapina, two of his brothers, a co-referee and a former footballer – BGH, 15 December 2006, 5 StR 181/06, NJW 2007, 782.

9 See Art. 286 bis para. 4 of the Spanish Criminal Code.

10 Please refer to the commentary to Article 15, 16 and 17.

and abetting the commission of any of the criminal offences otherwise laid down in pursuance of the Macolin Convention's requirements, though limited to those 'when committed intentionally'[11]. Accordingly, both natural persons committing the crime but also those aiding and abetting such offences are within the realm of recommended persons to be included in legislation.

B. Types of Sanctions

1. Inclusively defined

5. The sanctions included within the text of the section are **listed in an inclusive manner** and thus, arguably not restricted to the three categories mentioned therein[12]. It must be noted that the actual presence of sanctions across domestic legislation remains extremely disparate[13].

6. It is also important to note that under different countries' legal regimes, there may be more than a single offence[14] that addresses different aspects of manipulation, whether or not a specific law exists to address manipulation[15]. In turn, there might be differently defined sanctions as well.

1.1. Deprivation of liberty

7. The first type of sanction is the kind which **which results in a deprivation of liberty** – this would ordinarily include restriction of personal liberty, such as through imprisonment, as is specified in numerous national legislations but, when seen within a sporting context, might also

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11 See Article 17 of the Macolin Convention. Article 27 of the United National Conventions Against Corruption as well recommends the inclusion of persons that might be accomplices, assistants and instigators.

12 While unspecified in the context of Article 22, the Explanatory Report provides for Article 23

13 See UNODC-IOC (2021), and DIACONU M., KUWELKAR S., KUHN A. (2021) under section 8 'Sanctions'.

14 For example, see the distinction made between the manipulation of a sporting event (for South Africa, in Section 15 of the Prevention and Combating of Corrupt Activities Act, 2004; for Germany, in Article 265d of the Criminal Code; and the manipulation of a bet (for South Africa, in Section 16 of the Prevention and Combating of Corrupt Activities Act, 2004; for Germany, in Article 265c of the Criminal Code).

15 As also mentioned in the discussed under Article 15 above.

involve restriction of movement such as banning from events, restriction on the ability to work and/or hold positions, such as a ban from involvement with or playing of a sport, and/or holding positions within various governments, sporting entities or other bodies.

8. An example of a **party to the Macolin Convention with its domestic criminal law providing for sanctions involving deprivation of liberty would be Switzerland**, which provides for up to three years of imprisonment[16] and up to five years in 'serious' instances of manipulation[17]. In addition, numerous other jurisdictions, both those party and not party[18] to the Macolin Convention, provide for imprisonment as part of their sanctions for manipulation, but there remains vast variation in the quantum of such sanctions. Indeed, the minimum sanctions observed are those that range from one or two months in Argentina and France to two years in Brazil[19], El Salvador[20] and Italy[21], whereas in other countries

16 Article 25(a), sub-article 2, of the Federal Act on the Promotion of Sport and Exercise of 17 June 2011; CC 415.0 (the specific provision being introduced by amendment on January 1, 2019).

17 Article 25(a), sub-article 3, of the Sport Promotion Act; serious offences include those akin to conspiracy (sub-sub article a), and those resulting in large proceeds or profits/commercial acts (sub-sub article b).

18 See, for example, United Kingdom's Gambling Act, 2005 where section 42 provides for imprisonment for a term exceeding two years under para 4.

19 See, for example, Brazil's Law no 10.671 May 15, 2003 as amended by Law No. 13.155 of August 4, 2015) under Article 41.C

20 Article 218A entitled "Sporting fraud" in El Salvador's Criminal Code under para 1 and para 4.

21 Sanctions are mentioned across all paras of Article 1 of Italy's Law 401 (as amended by Law-Decree no 119 of August 22, 2014) which criminalizes various types of fraud in sporting competitions.

a maximum sanction (for non-aggravated offenses) ranges from one year in Denmark[22] to 10 years in Australia[23], Greece[24] and Poland[25].

9. Independently, **certain national case law** also demonstrated the use of imprisonment as a sanction, when regulations, though not specific to manipulation, are utilized to sanction manipulation offences, in both countries which have and have not ratified the Macolin Convention. By way of example, in Norway, a country having ratified the Macolin Convention, the Oslo Appeals Court sentenced a football goalkeeper and another player to 14 months' imprisonment for aggravated corruption and fraud[26]. More known is the England and Wales Court of Appeal's decision ordering the imprisonment of an English professional cricketer, Mervyn Westfield, for deliberate underperformance by bowling in a way that allowed easy scoring of runs[27]. Finally, countries such as Finland and Germany have also had multiple cases which have led to imprisonment as sanctions[28].

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22 Denmark's Legislative Decree No. 116 of January 31, 2015 (as amended by Act No. 536 of April 29, 2015) and through the Promotion of Integrity in Sport Act, all forms of match-fixing were made part of the Criminal Code where by section 10b provides for a prison sentence.

23 Though a country with federal laws per territory, Australia's National Policy on Match-Fixing in Sport (of June 10, 2011) under Chapter C 3.4 attempts to harmonize these efforts of which the maximum imprisonment penalties may be found under Article 195 C onward of the Crimes Amendment (Integrity in Sports) Act, 2013 in Victoria, Article 443 onward of the Criminal Code (Cheating at Gambling) Amendment Bill, 2013 in Queensland; Article 193 H onward of the Crimes Amendment (Cheating at Gambling) Bill, 2012 in New South Wales; and Article 144 G onward of the Criminal Law Consolidation Act, 1935 in South Australia.

24 Under Article 132 of Law 2725/1999 (amended by Law 3057/2002 and replaced in 2012 by Article 13 of Law 4049/2012) as located in the Official Gazette 35A, where aggravating circumstances under para 4 of Article 12 in Law 4049/2012 push the sanction up to a maximum of 10 years.

25 In para 1 of the Articles 46 of the Act of June 25, 2010 on Sport (Journal of Laws of July 15, 2010, No. 127, item 857).

26 Under part II, Chapter 30 of the Norwegian Penal Code the containing general criminal provisions relating to fraud and corruption.

27 See Criminal Division, *Majeed & Westfield* v. *R*, Case No. EWCA Crim 1186, May 31, 2012, where he was held guilty of conspiracy to give corrupt payments violating to section 1.1 of the Criminal Law Act, 1977, and conspiracy to cheat at gambling, violating to section 42 of the Gambling Act, 2005. In connection with English courts and cricket, see also aforementioned decisions in *R* v. *Amir & Butt*, Case No. EWCA Crim 2914, 3 November 2011.

28 See UNODC-IOC (2021) at p. 60-61, for example.

10. Given the seriousness of this sanction however, **national courts have also been seen to treat imprisonment carefully**, particularly in light of procedural propriety, as seen in cases such as the one where the Singapore Court of Appeal freed the convicted person who had been awarded a four-year sentence[29]. Similarly, in a case of attempted bribery, a Swedish court imposed a fine and probation period on the concerned footballer but found the crime not serious enough to impose a custodial sentence[30].

11. In a purely sporting context, **the issuance of bans, including life bans, as sanctions for persons found to have committed manipulation has been noted to be prevalent**, and even problematically so. Life bans (isolated from any other sanctions) may be delicate in the high-performance sporting context, where an athlete's career only lasts for a few years; therefore, it can be argued that a ban of eight years (similar to the maximum ban applicable in doping offences) is efficient and deterrent enough[31]. As noted above, this is then also the maximum range of specified bans under domestic legislation, which are often issued in parallel. In addition, life-time bans have also been considered disproportionate based on the existence of mitigating factors, such as no proof of actual involvement in the fix and the effect on an athlete's career[32].

12. Such **bans are issued by sports federations**[33] **and very often**[34]**, which keeps with the deterrent objective of the Macolin Convention.** Further, they are regularly upheld **(unless found grossly disproportionate)** on appeal to bodies such as the CAS[35], to whom appeals

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29 The conviction was connected to a football player at the South East Asian games under chapter 67 of the Criminal Law (Temporary Provisions) Act – see SELVARAJ R. and ors., "Singapore", 2nd ed., In: *The Sports Law Review* (Gurovits A., London: Law Business Research, 2016) at p. 184.

30 Decision under section 5 of the Swedish Criminal Code, TAIWO T., "Etuhu: former Manchester City and Fulham midfielder banned for match-fixing", *The Sports Integrity Initiative*, April 17, 2020, and BROWN A., "Dickson Etuhu & Alban Jusufi banned for five years for match-fixing", *The Sports Integrity Initiative*, April 16, 2020.

31 See DIACONU M., KUWELKAR S., KUHN A. (2021) at p. 44.

32 *Kevin Sammut* v. *UEFA*, CAS 2013/A/3062 award of May 28, 2014, at paras 179 and 180.

33 See Figure 6 on Types of Sanctions in KUWELKER S., DIACONU M., KUHN A. (2022).

34 See section 3.2.2 on Specific Sanction of Life Bans in KUWELKER S., DIACONU M., KUHN A. (2022).

35 In *Mwomelo*, applying the 2009 FIFA Code of Ethics, FIFA's issued life ban and fine and CHF 10,000 fine were reduced to a 15 year ban and CHF 10,000 fine by CAS (in

would most commonly lie from internal sporting body sanctions. Though not the same as lifetime imprisonment, life bans, especially at the first instance of commission of an offence, are an effective end to an athlete's career, and, while the most severe sanctions outside of sporting justice are awarded based on the gravity of a crime and only in the rarest of rare circumstances (or equivalent jurisdictional test and usually with a possibility to challenge), the regularity of such sanctions in sport necessitates further regulation regarding the margin of discretion, the inclusion of more nuance or a range of sanctions such as in doping, for example[36].

13. Finally, of note is the suggested **quantum of sanction in the IOC Sanctioning Guidelines, 2018,** for the offence of manipulation, which recommend a sanction of "approx. 4 years ban" for a betting related offence and "approx. 2 years ban" for a non-betting related offence[37].

1.2 Extradition

14. As has been noted earlier in the commentary on the Preamble to the Macolin Convention, which explores the objectives behind and context of the Macolin Convention, it was due to the (increasingly) **transnational aspect of the manipulation of sports competitions** and the need to combat criminal and other acts related to this that it was deemed necessary to heighten the focus on international co-operation around manipulation offences[38]. Toward this end, the Explanatory Report states that the Macolin Convention recommends administrative and enforcement measures such as extradition and equally means of prevention, including detection, exchange of information and education[39].

15. Extradition may be defined as the **legal process that permits the transfer of a person suspected or convicted of committing an offence**

July 2020); similarly, in *Sidio Jose Mugadza* v. *FIFA*, CAS 2019/A/9219 award of March 2020, the ban was reduced from 15 to seven years.

36 See discussion under section 3.2.2 on Specific Sanction of Life Bans in KUWELKER S., DIACONU M., KUHN A. (2022).

37 IOC Sanctioning Guidelines, 2018 at p. 13. Under the IOC Sanctioning Guidelines, independent but related offence such as failure to report or cooperate carries zero to two years of ban and obstructing investigations carries one to two years of ban.

38 Explanatory Report, para 21 and 26.

39 Explanatory Report, para 21 and 193.

or a crime from one country's jurisdiction to another[40]. Though listed as a form of sanction against natural persons under Article 22, extradition in itself is not a sanction but a tool to effectively exercise jurisdiction, which could, in turn, have implications on what a sanction might be, as sanctions may differ by jurisdiction.

16. The Explanatory Report clarifies that when focusing on international co-operation in investigating and prosecuting offences, the Macolin Convention **does not prejudice instruments which already exist in the field of mutual assistance in criminal matters** and extradition and which can facilitate investigations and prosecutions, such as the European Convention on Extradition (1957, ETS No. 24, hereafter "Convention 24"), the European Convention on Mutual Assistance in Criminal Matters (1959, ETS No. 30, hereafter "Convention 30") and its Additional Protocol (1978, ETS No. 99)[41]. Accordingly, the provisions of these conventions shall apply first[42].

17. Finally, international cooperation is specified as an objective and implementation tool under various other articles that assist in clarifying the operation of the Macolin Convention alongside the aforementioned conventions. **Article 26 requires international cooperation for extradition and mutual legal assistance**[43]. If a party makes extradition or

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40 See 'Extradition' as defined by the European Union Agency for Criminal Justice Cooperation, available at https://www.eurojust.europa.eu/judicial-cooperation/instruments/extradition (August 28, 2022).

41 Explanatory Report, para 21 and para 202, the latter being specific to Article 26 on international cooperation in judicial matters.

42 Under Article 1 of Convention 24, parties to the convention undertake to surrender to each other, subject to the provisions and conditions laid down therein, all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order. Further, Article 2 specifies that Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months. Accordingly, as seen under Section II.C.1.1 above and II.C.1.3 below, in certain cases of manipulation, contingent on sanctions present in national law, Convention 24 will be possible to apply and in others not.

43 See further, the commentary to para 2 of Article 26, where even if the laws of the party being requested to extradite place the offence in a different category or use a different term, criminality shall be presumed as long as provided that the conduct at the origin of the offence in respect of which a request for mutual assistance or extradition was made,

mutual assistance in criminal matters conditional on the existence of a treaty and receives such a request from another party with which it has not concluded such a treaty, it may, acting in full compliance with its obligations under international law and subject to the conditions provided for by its own domestic law, consider the Macolin Convention to be the legal basis for extradition or mutual legal assistance in criminal matters in respect of the offences referred to in Articles 15 to 17 of this convention[44].

18. Last, under Chapter V, **Article 19 para 3** of the Macolin Convention, **the principle of *aut dedere aut judicare*** is enshrined, so as to ensure that parties which refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the party which requested extradition under the terms of the relevant international instruments[45].

1.3. Monetary Sanctions

19. **Fines are provided for under numerous national legislations**, both where there exists a law specific to tackling competition manipulation[46] as well as where there is no specific law, but where other existing crimes, such as gambling, fraud, bribery and corruption, among others, are used to prosecute manipulation offences[47] as envisioned in the Macolin Convention. Fines are often imposed by national courts[48],

constitutes an offence under the laws of both parties (para 3 of Article 26 and Explanatory Report, para 207).

44 See Explanatory Report, para 208 which talks about Article 26's provision for how the Macolin Convention should operate alongside other international instruments.

45 See details in commentary to Article 19, as well as para 158 of the Explanatory Report.

46 See, for example, Brazil's Law no 10.671 May 15, 2003 (as amended by Law No. 13.155 of August 4, 2015) under Article 41.C, Turkey's Law 6222 on the Prevention of Violence and Disorder in Sports (enacted and published in the Official Gazette April 14, 2011 and numbered 27905, as amended by Law No. 6259) under Article 11, as well as Project Law on Games of Chance proposing amendments to the Federal Law on Sport (RS 415.0) of Switzerland, who have ratified the Macolin Convention, where para 1 and 2 of Article 25a provide for fines as sanctions for manipulation specific offences.

47 Ukraine's Criminal Code was amended to include such a provision specifically which then provides for fines – see Bill no. 2243a of June 2, 2015 which complemented Article 369-3 of the Criminal Code; see also the United Kingdom's Gambling Act, 2005 where section 42 provides for such sanction under para 4.

48 In December 2014, pursuant to Victoria Police Sporting Integrity Intelligence Unit's Operation Outshouts in tennis, a Victoria court convicted the accused player and fined

sometimes in lieu of imprisonment where such a sanction would be considered too harsh[49].

20. While outside the realm of state criminal law, it may be noted that the imposition of fines is also **seen in the sporting context in almost all federation regulations** to sanction manipulation, and such fines are also upheld by the CAS[50]. At certain times, the amounts are fixed according to the advantage received by the offender[51] or are limited by a maximum amount (which can vary according to whether it is imposed on a natural person or a legal entity[52] and/or according to the seriousness of the act committed[53]). However, fines may also be of an unlimited/unspecified amount[54] and may be combined with other sanctions[55]; this, for example, is clearly stated in the IOC Sanctioning Guidelines, 2018 (alongside the bans described in section II.C.1.1 above[56]). Factors like the accused's financial hardships should be considered when fixing the amount, both as a mitigating factor and to serve proportionality[57].

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him AUD 3,500. The player pleaded guilty in Burwood Local Court, New South Wales, and was fined AUD 1,000 in April 2016 – see UNODC-IOC (2021) at p. 54.

49 See decision of Swedish Court of Appeal, discussed above, as also cited in UNODC-IOC (2021) at p. 59.

50 See Figure 6 on Types of Sanctions, in KUWELKER, DIACONU, KUHN (2022), as well as

51 See, for example, Rule 8.3 (p. 9) of the Federation Internationale de Ski's Rules on the Prevention of Manipulation of Competitions on "Financial Sanctions".

52 Under Federation Internationale de Basketball (FIBA) Internal Regulations (Book 1, Nov 2020 edn., p. 41) specifies that the fines possible to be imposed went up to CHF 300,000 for legal entities and CHF 100,000 for natural persons for manipulation offences – see Items 164.c and 165.c.

53 Limits based on seriousness of the offence are present under section 164.14 of the Federation Equestrian Internationale's General Regulations (24th edn., Jan 2020, p. 39) which follow a gradation system of low end (CHF 1000 to CHF 1500), mid-range (CHF 2000 to CHF 3000), top-end (CHF 5,000 to CHF 10,000) to max (CHF 15,000); and FIH (ranging between CHF 500 and CHF 20,000).

54 Under Article 18.1 of the currently applicable FIFA Disciplinary Code, 2019 a minimum fine of CHF 100,000, is prescribed without stating a maximum.

55 Under the same Article 18.1 of the FIFA Disciplinary Code, 2019 the fine is prescribed but the primary sanction remains a ban from football related activities for a minimum of five years (and/or a fine).

56 Along-side the bans prescribed for betting and non-betting offences, the IOC Sanctioning Guidelines, 2018 (p. 13) also provide for fines for each offence.

57 In *Asif*, the CAS panel considered financial hardships (and existing prison sentences) and decided against mitigating the award on this basis as it would amount to gaining advantage for the same factors twice – see paras 70-71.

21. In sport regulations, there are also **administrative fines** (independent of the fine imposed as a penalty) envisioned as payment of procedural costs and compensation to victims[58]. The imposition of fines and the factors taken into account could be relevant to state courts to ensure preservation of proportionality and that there is no violation of the double jeopardy principle – both discussed above.

1.4. Other types of Sanctions observed in manipulation offences

22. While ordinarily criminal law sanctions would involve the types of sanctions mentioned in the sub-sections above, **certain other specific sanctions** may be observed across national legislations, which the Macolin Convention's open definition would not preclude.

23. In certain jurisdictions there is mention of curtailment or **restriction of certain rights**, usually economic rights, such as a limitation on the right to exercise a certain profession/activity, hold certain positions or operate in a specific sector/industry[59].

24. Further, we see the Macolin Convention itself envision other measures, including **seizure and confiscation**[60]. Certain forms of special confiscation have also been observed in existing national legislation[61].

25. In the world of sporting justice and independent of criminal sanctions, **numerous other sanctions can be observed** across federation regulations, including warnings and provisional suspensions pending investigations[62]. Further, the annulment results, deductions of points, return of awards and/or expulsion from the current competition, bans from

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58 See section 3.2.1 on General Sanctions in KUWELKER S., DIACONU M., KUHN A. (2022).

59 Ukraine's Bill no. 2243a, which amended their Code of Administrative Offences (Bulletin of Verkhovna Rada of UkrSSR, 1984, Attachment No. 51), under Article 172-1 which established liability for violating the ban on sports betting, associated with the manipulation of official sports events, that provided, *inter alia*, disqualification to hold certain positions or engage in certain activities for a period of one year. Other countries which provide for similar restrictions, as noted UNODC-IOC (2017) under Annexe 1, including Bulgaria, El Salvador, Portugal, Russian Federation and Spain.

60 Discussed further in the commentary to Article 25 which addresses the ability of parties to use this as a sanction.

61 See Bill no. 2243a of 02.06.2015 of Ukraine which complemented Article 369-3 of the Criminal Code and established liability for unlawful influence on the results of official sports competitions with sanctions including special confiscation.

62 See, for example, Article 4.1 to 4.3 of the World Karate Federation Code on Prevention of Manipulation of Competitions, 2016.

venues or removal from held positions/membership from a body are also widely known sanctions in the regulations of federations[63].

26. Finally, though contrary to the deterrent objective stated in Article 22's language, **rehabilitative sanctions** have been observed in federation regulations – namely, restitution, education and rehabilitation programmes, social work, reprimands (sometimes public ones)[64]. In certain cases, these may be used as a prerequisite to regain liberty to operate or be active in the sport again[65]. While deterrence is stated as a general objective of the Macolin Convention and, specifically, in the provisions on sanctions, state policies on sanctions could differ on the objective of rehabilitation[66].

63 See, for example, the types of sanctions under section I.3.A of the World Sailing Code of Ethics and Code of Conduct (2019, pp. 4 and 5).

64 See, for example, the PMC 5.1.3 of the FINA Prevention of Manipulation of Competition Rules, 2016 which provides for "Education and Rehabilitation" as a sanctions; in the same vein, Article 7.1.f of the FIFA Code of Ethics, 2019 provides "social work" as a potential disciplinary sanction.

65 The aforementioned PMC 5.1.3 of the FINA Prevention of Manipulation of Competition Rules, 2016 makes Education and Rehabilitation" a precondition to eligibility to participate after a period of ineligibility issued.

66 See, for example, WENZEL M., OKIMOTO T. G., FEATHER N. T., PLATOW M. J., "Retributive and Restorative Justice", 32(5) *Law and Human Behaviour* 2008, 375.

Article 23

by

Surbhi KUWELKER

Article 23 – Sanctions against legal persons

1 Each Party shall take the necessary legislative or other measures to ensure that legal persons held liable in accordance with Article 18 are subject to effective, proportionate and dissuasive sanctions, including monetary sanctions and possibly other measures such as:

a a temporary or permanent disqualification from exercising commercial activity;

b placement under judicial supervision;

c a judicial winding-up order.

I. Content of Article 23

1. As seen within the commentary to Article 15, Article 18 and Article 22, the Macolin Convention makes a **distinction between not just offences but also, specifically, the sanctioning of natural and legal persons**. As also mentioned prior in the commentary on Article 18, the express provision for the sanctioning of legal persons gains pertinence in light of the **liability that has been attributed to organizations** such as clubs[1], as well as the increasing involvement of organized crime, companies, and not for profit bodies in manipulation and offences adjacent to it, including corruption, bribery, laundering and illegal betting[2]. The

[1] Numerous 'sporting justice' sanctions have been issued against sporting clubs for offences connected to match-manipulations; see, for example, the administrative sanctions of exclusion from UEFA club tournaments and non-eligibility famously issued to Turkish club Fenerbahce pursuant to proven instances of bribes awarded to lose games across five matches, based on parallel criminal action of Turkish authorities – *Fenerbahçe Spor Kulübü* v. *Union European de Football Association* ("UEFA"), CAS 2013/A/3256, award of April 11, 2014 ("Fenerbahçe") at para 1-22.

[2] See 'Liability of Legal Persons', United Nations Office on Drugs and Crime ("UNODC"), available at https://www.unodc.org/e4j/en/organized-crime/module-

deterrent effect of sanctioning legal persons has been noted due to the important cost of reputational damage[3].

2. The fairly recent acceptance of liability, particularly criminal liability, for non-natural persons across jurisdictions[4] also necessitates the express provision in an international convention such as this to encourage parties to introduce such liability and sanctions for it in the specific context of manipulation[5]. An earlier example of this, prior to the Macolin Convention, includes **conventions** such as the **Council of Europe's Criminal Law Convention on Corruption, 1999** ("CoE Criminal Law Convention")[6], among others[7], where criminal, or non-criminal sanctions, including monetary sanctions, were prescribed, while simple civil tort liability allowing victims to sue for personal damages was considered inappropriate[8].

3. Accordingly, the Explanatory Report to the Macolin Convention for Article 23 provides that legal persons should also be subject to effective, proportionate and dissuasive sanctions, which include monetary

4/key-issues/liability-le gal-persons.html (August 30, 2022, "UNODC Liability of Legal Persons"). The Council of Europe also details the reasons for complementing natural person's liability with that for criminal persons, in the Council of Europe's document titled Liability for Legal Persons for Corruption Offences (May 2020) available at https://rm.coe.int/liability-of-legal-persons/ 16809ef7a0 (August 22, 2022, "CoE Liability for Legal Persons Document"), as also described in the commentary to Article 18 in section I thereto.

3 UNODC Liability of Legal Persons, *supra* note 2.

4 See commentary to Article 18, where examples provided in Section I evidence that most such liability, where present was introduced only in or after the 1990s in Europe, for example. The commentary to Article 18 also discussed why attributing liability to legal personalities is more difficulty given that the basis of criminal law is the two elements of *actus reus* and *mens rea*, where establishing the latter for a legal person remains difficult.

5 Criminal liability of legal persons is accepted by the vast majority of the Council of Europe member states, including by a number of countries where the principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be the dominant perspective, with more than two-third of state parties to the United Nations Convention on Corruption having established some form of criminal liability for corruption – CoE Liability for Legal Persons Document, *surpra* note 2 at p. 29.

6 With liability established under Article 18 thereof.

7 See also the EU's Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1999 under Article 3, and the United Nation's Convention Against Corruption, 2005 ("UNCAC") under Article 26, among others.

8 See CoE Liability for Legal Persons Document at p. 51, which cites GRECO Report of 2007, paras 223 and 235 which recommended this in the context of Ukraine's legislation.

sanctions, as well as, where appropriate, other measures, such as temporary or permanent disqualification from exercising commercial activity, placement under judicial supervision or a judicial winding-up order[9].

4. **It is important to note, however, that this Article provides flexibility as to the nature of the sanctions** applied to legal persons in order to take into account the diversity of sanctions available under domestic law[10]. In particular, it **does not entail any obligation to apply sanctions of a criminal nature[11], as seen under Article 22.**

II. The Contents of Article 23

A. Scope of Section

1. Commission by Legal Persons

5. As described in further detail under Article 18, the determination of the **manner of commission of such an offence by a legal person, or of who bears liability for the commission of an offence, may be made in a few ways,** varying by jurisdiction, with common law and Roman/civil law traditions differing, but also based on the jurisdictional basis being claimed in relation to corruption offences themselves[12].

6. In **common law jurisdictions** such as the United States, for example, the **'strict' liability approach is adopted** based on the concept of '*respondeat superior*'. A legal entity is hence liable for the acts of employees, officers, directors and agents in a company, with no requisite mental element to be established[13]. Yet, in **civil law countries, vicarious**

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9 Explanatory Report, para 194.

10 There are countries under whose domestic law the entire range of sanctions may be found for legal persons in a corruption context which could potentially then be utilized also for manipulation offences such as the United States – detailed explanations available in U.S. Department of Justice/U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2012, available at https://www.justice.gov/criminal-fraud/file/1292051/download, accessed September 1, 2022 ("US Resource Guide"), at p. 86 onward.

11 Explanatory Report, para 195.

12 See section 4.1 of the CoE Liability for Legal Persons Document, at p. 19.

13 See *Wilson* v. *United States*, 989 F.2d 953, 958 (8th Cir. 1993) and *In re Hellenic, Inc*., 252 F.3d 391, 395-6 (5th Cir. 2001).

liability[14] **as well as the slightly different 'strict' liability/lack of supervision approach**, which is used in Portugal[15], may be noted. There may also be imputed/deemed liability, as seen in countries such as Finland[16]. In the two prior European Conventions which have addressed such liability for legal persons[17], there has been imputed liability (attribution through actions of an employee) combined with the objective attribution based on failure to fulfil a duty.

7. Finally, there may also be **administrative liability**, which is further discussed in the context of Article 24 of the Macolin Convention. Particularly for legal persons however, where criminal liability and thus sanctions might be difficult to attribute[18], and the increasing presence of criminal sanctions across (particularly European) countries, administrative sanctions, despite their drawbacks[19], benefit from feasibility of implementation and compliance[20].

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14 See Article 4 of the Foreign Bribery Prevention Act of the Republic of Korea, for example.

15 Corporate criminal liability is independent from individual liability under Article 11(7) of the Portuguese Penal Code, whereunder terms and for which crimes companies may be held criminally liable are laid down. Article 11(2)(a) for example, provides for strict liability when managers have committed criminal conduct in pursuit of the company's interests on its behalf, as well as in some cases if they act against its instructions – Article 500(1) and (2). Under Article 11(2)(b), companies may be liable for lack of supervision.

16 Following amendments to their penal code in 1995 and 2001, a natural person, whether or not formally a part of management of the legal person, must have been either an accomplice or allowed, authorised or directed the offence, for the legal person to be liable.

17 Discussed above in Section I and footnote 5; this is termed as the imputation model, based on responsibility for management or akin to 'master-servant' liability in torts or through objective attribution on not having expressed a certain degree of care expected or based on international conventions – see section 3.1 of the CoE Liability for Legal Persons Document, at p. 11; though non-enforceable, similar attribution is also found in "Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector", for example – see CoE Liability for Legal Persons Document, at p. 15.

18 See section I under commentary to Article 18 as well as section I above.

19 See further in the commentary to Article 24 – this includes their more limited deterrent effect, the tendency to follow, and not precede criminal action, thoroughness of the criminal process, longer limitation periods and probability for international cooperation.

20 For instance, with the requirement of international instruments such as Article 26 of the UNCOC as well as now with the Macolin Convention.

8. **Countries which have introduced criminal liability for legal persons in a sporting or manipulation context** include Lithuania[21], Portugal[22], and Switzerland, where the law provides that criminal liability applies to corporations – thus, should manipulation include corruption, it may be prosecuted[23].

9. Finally, in a **sporting justice context**, particularly in the context of football, it is common to see clubs being attributed liability for actions of their players, fans and management, including in manipulation cases[24]. Certain widely followed regulations and policies in sport also envision the attribution of liability to legal persons for acts committed by natural persons[25].

B. Nature of Sanctions

10. Article 23 of the Macolin Convention requires that the sanctions introduced for the offences under the convention committed by legal persons also be **effective, proportionate and dissuasive**, akin to the wording under Article 22[26]. This language, in the context of legal persons (as for natural persons), is borrowed from prior European Union instruments[27].

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21 Under Article 182 of the Lithuanian Criminal Code, which such liability when it unlawfully affects the fair progress or outcome of a professional sports competition.

22 Article 2, 3 and 5 and 12 of Portuguese Law No. 50/2007 of August 31, 2007, revoking Decree Law No. 390/91 of October 10, 1991 – the legislation foresees the criminal liability of legal persons, including sports legal persons.

23 Under Article 102 of the Swiss Criminal Code, amended in 2003 to include such liability, read with Article 322.8 and 322.9 of the same code.

24 See *infra* note 45, discussing penalties issued to UEFA Clubs in connection with manipulation.

25 See, for example, Article 1.4 of the IOC's Olympic Movement Code of the Prevention of Manipulation, 2016, replicated as policies by many federations, where legal persons could be groups of persons (such as an athlete body), managers, agents, sports organizations, clubs and so forth.

26 Please refer to Section II on the General Contents of Chapter VI.

27 EU Directive 2018/1673 on Combating Money Laundering by Criminal Law under Article 8, which states that "ensure that a legal person is "*punishable by effective, proportionate and dissuasive sanction, which shall include criminal or non-criminal fines*."

11. Given this, it is also important that the same offence under criminal law **not be sanctioned twice**[28]. This element gains significance in the context of sanctioning a legal person owing to the actions attributed to that legal person[29] but decided and acted on by natural persons that hold positions of responsibility within such a body, for example, when the sanction issued to the legal person also affects the natural person who is independently sanctioned (in this case, pursuant to provisions legislated on in furtherance of Article 22). Yet, as seen in other international instruments which sanction legal persons, such liability is best introduced **without prejudice to that of the natural persons** connected to that entity or offence[30].

12. Being sanctioned more than once for the same offence also compromises the **principle of proportionality** in sanctions[31], which has to be balanced with the need for making sanctions effective and dissuasive (or deterrent)[32]. In the context of legal entities, national courts have also been seen to include this within decision making, particularly in a corruption context; for example, in the United Kingdom, a sanction ultimately imposed was significantly less than what the courts would otherwise have imposed because the company concerned was a modestly-resourced small-medium enterprise for which a higher fine, although warranted, would have forced insolvency, contrary to the public interest[33].

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28 Under the *ne bis in idem* principle – see commentary to Article 22 under section II.1.1.3 on 'Double Jeopardy'.

29 Discussed below in section II.A.1.2.

30 See, for example Article 10 para 3 of the UNCOC; see also the commentary to Article 18 under Section I and IV.

31 See section II.B.2 in the commentary to Article 22 where the concept of proportionality as seen in the sporting justice context has been discussed, particularly in the light of parallel sanctions.

32 Please refer to the Section II on the General Contents of Chapter VI.

33 See OECD, "Implementing the OECD Bribery Convention, Phase 4 Report: United Kingdom" available at https://www.oecd.org/corruption/anti-bribery/uk-phase-4-report-eng.pdf (September 2, 2023), at para. 162.

C. Types of Sanctions

1. Inclusively defined

13. As stated above and implicit in the title of Article 23 (which only states 'Sanctions', as compared to 'Criminal Sanctions' in Article 22), the Explanatory Report to Article 23 states that the Macolin Convention **offers some flexibility as to the nature of the sanctions** applied to legal persons, in order to take into account the diversity of sanctions available under domestic law[34]. In particular, it **does not entail any obligation to apply sanctions of a criminal nature**[35], though in section I above and in the commentary to Article 18, why these are most appropriate and increasingly prevalent is discussed.

1.1. Monetary Sanctions

14. Monetary sanctions are **most frequently used** against legal entities and could be categorized as criminal, non-criminal, or hybrid in nature[36]. The **EU Directive on combating Money Laundering by Criminal Law ("EU Directive 2018/1673")** envisions, in its own illustrative list, "*criminal and non-criminal fines*" categorically[37]. Further, the CoE Criminal Law Convention compels its parties to implement monetary sanctions[38]. Fines may form part of **concurrent liability** of civil/tort damages (such as where provided for other offences, such as bribery) alongside criminal/administrative sanctions[39].

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34 There are countries under whose domestic law the entire range of sanctions may be found for legal persons in a corruption context which could potentially then be utilized also for manipulation offences such as the United States – detailed explanations available in U.S. Department of Justice/U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 2012 at p. 86 onward, available at https://www.justice. gov/criminal-fraud/file/1292051/download, accessed September 1, 2022 ("US Resource Guide").

35 Explanatory Report, para 195.

36 See UNODC Liability of Legal Persons, *supra* note 2.

37 Article 8 of the EU Directive 2018/1673.

38 See Article 19 para 2 as well as Explanatory Report to the CoE Criminal Law Convention, para 91.

39 See, for example, the Article 6 of the Polish Law on Liability of Legal Persons.

15. **Proportionality in the issuance of fines** necessitates not capping fines at a low level to ensure effectiveness[40], with propensity for economic advantage being among the factors used in detecting corruption offences; exceptions could include such fines being combined with other sanctions[41]. Financial and other social factors can be used to assess an appropriate level of fine, as seen in Polish[42] and Swiss[43] law.

16. Finally, in a sporting context, and specific to manipulation, **fines or other fees have been issued to legal entities such as clubs, both at the international[44] and national level[45]**. In fact, decisions by bodies such as the FIFA Disciplinary Committee and Appeals Committee have relied on the jurisprudence of the Swiss Federal Tribunal concerning strict liability of a club, without the need to identify a perpetrator as long as the offence was committed under the umbrella of the club[46].

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40 CoE Liability for Legal Persons Document, at p. 52. The maximum fine of Euros 10 million in Germany has been considered too low for corruption offences, with discussions to raise it to 10% of a company's turnover. Germany has issued fines as high as Euros 201 million (administrative fine) – see "Record US fine ends Siemens bribery scandal", *The Guardian* (16 December 2008) available at www.guardian.co.uk (accessed October 3, 2022).

41 Section 17 of the German Act on Regulatory Offences (as amended in 2009).

42 Article 10 of the Polish Law on Liability of Legal Persons, act of October 28, 2002 on Liability of Collective Entities for Acts Prohibited under Penalty ("Polish Law on Liability of Legal Persons"). Factors include size of the revenue (prescribing caps under Article 7), weight of irregularities in electing or supervising, size of advantages, financial situation of the entity and social consequences of the fine, including on the entity's functioning.

43 Swiss Criminal Code SR 311.0 of January 1, 2013. Factors include seriousness of the offence, of organizational inadequacies and of the loss or damage caused, based on economic ability to pay the fine.

44 See, for example, FIFA Appeals Committee decision upholding the decision of the FIFA Dispute Resolution Committee on the case of Club Zoo FC, Kenya ("Decision FDD-8729") of September 16, 2021.

45 See, for example, Sheikh Jamal Dhanmondi Club fined by the Bangladesh Football federation USD 27000 for taking part in a fixed game against Rahmatganj MFS in 2011 – "Soccer- Bangladesh fine top club for alleged match-fixing", *Reuters*, (July 16, 2011) available at https://www.reuters.com/article/soccer-asia-bangladesh-idUKB195841201 10716 (October 1, 2022); similarly, Cyprus FA fined AEZ Zakakiou and Karmiotissa FC Euros 50,000 each on notification from UEFA of suspicious betting on 75 matches – see Brown A., "Cyprus FA fines two clubs for involvement in match-fixing", available at https://www.sportsintegrityini tiative.com/cyprus-fa-fines-two-clubs-invol vement-match-fixing/ (October 1, 2022).

46 See Decision FDD-8729 above, on Club Zoo FC, para 10 and 11, quoting the Swiss Federal Tribunal in SFT 4A_462/2019.

1.2. Non-monetary Sanctions

17. In creating a division between monetary and non-monetary sanctions, the language in the inclusive list of sanctions is that found in prior European Union instruments and national legislation, where **examples of such non-monetary sanctions include** (a) exclusion from entitlement to public benefits, aid and financing[47]; (b) temporary or permanent exclusion from access to grants, concessions, public funding[48], and tender procedures[49], (c) confiscation[50] and (d) restitution[51]; in addition to those mentioned in the Macolin Convention, as discussed below.

18. Under the Macolin Convention, the first non-monetary sanction is the temporary or permanent **disqualification from exercising commercial activity**, which has been seen in national legislations[52] for the offence of corruption, as well as in other situations where manipulation is considered reason to impose strict liability despite no negligence or fault of the club, making it ineligible to compete despite qualification[53], as such sanctions were considered 'non-disciplinary' in nature[54]. Proportionality is also accounted for in certain legislations, depending on the consequences of such bans, for example, bankruptcy or layoffs[55].

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47 See Article 90.I of the Portuguese Criminal Code for example.

48 See Section 22 of Act No. 418/2011 on Criminal Liability of Legal Persons and the Proceedings against Them, 2011; see Article 9.1 of the Polish Law on Liability of Legal Persons.

49 See Article 9.1.4 of the Polish Law on Liability of Legal Persons; see also recommendation 6 in VERMEULEN G., DE BONDT W., RYCKMAN C., "Liability of Legal Persons for Offences in the EU", Vol. 44 IRCP-series, European Commission DG Justice, (Maklu: Antwerp, 2012), at p. 139; also, annulment of procurement decisions already taken is also recommended, for example, in the European Union Remedies Directive, Council Directive on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC of December 12, 1989).

50 See commentary to Article 25 below which deals with the sanctions of seizure and confiscation.

51 Appendix to Council of Europe Recommendation No. R(88)18, as well as the prior mentioned EU Directive 2018/1673, also in Article 8.

52 See Article 9.1 and Article 9.5.2 of the Polish Law on Liability of Legal Persons.

53 See, for example, the CAS award in *Eskişehirspor Kulübü* ("Eskişehirspor") v. *UEFA*, award dated September 2, 2014, at paras 128 to 13; see also *Sivasspor Kulübü* ("Sivasspor") v. *UEFA*, award of November 3, 2014.

54 *Ibid*., at paras 137 to 141.

55 Article 9.5.3 of the Polish Law on Liability of Legal Persons.

19. Yet, and arguably *disciplinary* sanctions, have been issued against non-natural persons such as state Olympic committees, a recent example being the Russian Federation, including by other states, such as the United Kingdom[56] setting precedent for such potential action to be issued in other disciplinary offences. Such action also saw assets of enterprises that owned clubs in sport frozen, though the respective regulations only applied to UK entities at the time[57].

20. The second sanction under the Macolin Convention is the **placement** of a legal person **under judicial supervision**, ordinarily entailing the provision of periodic updates on the legal person's activity to a court-appointed representative to ensure the sanctioned person is in full compliance with the applied laws and standards[58]. In the domain of national criminal law, such sanctions are available in a corruption context in Portugal, for example, subject to certain conditions, with the monitoring representative ordinarily having no judicial or management powers[59]. Such arrangements may also be included in judicial process as barter for lower sentences with similar conditions[60]. Where a legal person volunteers information or demonstrates cooperative behaviour, self-monitoring may also be a possibility[61].

21. In a sports context, specifically manipulation, **judicial supervision** has been used in India, when rampant spot-fixing, **poor**

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[56] Both for state sponsored doping by the World Anti-Doping Agency and other bodies, as well as in 2022 for the invasion of Ukraine – see for example, GRAY P. et al, "Ukraine: Sanctions in Sport" (March 16, 2022) available at https://www.dlapiper.com/en/abudhabi/insights/publications/2022/03/ukraine-sanctions-in-sport/ (October 3, 2022); see also PEREZ C., "Ahead of the Game? Sporting Sanctions against Russia following the invasion of Ukraine", *EJIL: Talk!* (March 9, 2022) available at https://www.ejiltalk.org/ahead-of-the-game-sporting-sanctions-against-russia-following-the-invasion-of-ukraine/ (October 3, 2022).

[57] *Id*. – see the Russia (Sanctions) (EU Exit) Regulations 2019 implemented pursuant to the Sanctions and Anti-Money Laundering Act 2018 which were expanded in 2022 after the invasion of Ukraine.

[58] See Annex 9.1 of the CoE Document on the Liability of Legal Persons at p. 57.

[59] When a fine is less than 600 day-fines under Article 90(E) of the Portuguese Criminal Code, with reporting by a court appointed representative every six months or whenever thought necessary. Absence of compliance would lead to revocation of supervision and sanction imposition.

[60] In the United States, it may form a part of plea bargaining – see US Resource Guide, *supra* note 35, at p. 71.

[61] See example of the United Kingdom's agreement with the company Rolls-Royce under section 6.3 of the CoE Document on the Liability of Legal Persons at p. 57.

governance and conflicts of interest were found in cricket in connection with the Indian Premier League. The Lodha Committee[62] (and previously Justice Mudgal Committee[63]) were appointed by the Indian courts to provide recommendations to the Board of Control for Cricket. One of the recommendations of the Lodha Committee was continued external supervision and oversight of the board[64], while also recommending legalization of betting and criminalization of manipulation respectively.

22. The third and final sanction listed under the Macolin Convention **is a judicial winding up order**, which is a mandatory liquidation or closure of an entity on instruction from a judicial authority to close down an entity's activity and liquidate its assets[65]. This could be considered analogous to a life-time ban for a natural person, as it prevents the person from carrying out activities in the sports world.

23. Certain jurisdictions like Germany choose to forgo resorting to this type of sanction due to the severe social, human and economic consequences[66], while others choose to maintain it[67], as it is arguably deterrent and effective, keeping with the objective of the Macolin Convention. Typically, the threshold of imposition remains high, with factors to consider before imposition including, for example, the crime being the predominant purpose of the entity and regularity of commission[68]. Even so, it could be partial or temporary[69], with protection

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62 Formed under order of January 22, 2015 in Civil Appeal No. 4235 of 2014 of the Supreme Court of India resulting in the Report on Cricket Reforms presented to the court on January 4, 2016.

63 The Mudgal Committee headed by retired High Court Justice Mr. Mudgal, with fellow lawyers – see "Supreme Court asks Mudgal Committee to complete probe within two months", *Indian Express*, September 1, 2014 available at https://indianexpress.com/article/sports/cricket/supreme-court-asks-mudgal-committee-to-complete-probe-within-two-months/ (October 3, 2022).

64 It recommended establishment of an ombudsman, ethics officer and electoral officer; further court orders necessitated continued external administration – see order of December 30, 2017, for example.

65 See, for example, "What is a winding up order and can it be challenged?", available at https://www.ukliquidators.org.uk/company-liquidation/compulsory-liquidation/what-is-a-winding-up-order-and-can-it-be-challenged#:~:text=A%20winding%20up%20order%20is,attempts%20to%20recover%20their%20money (October 3, 2022).

66 See section 6.2.9 of the CoE Document on Liability of Legal Persons, at p. 58.

67 See Article 53 of the Criminal Code of Lithuania.

68 See Article 90.F of the Portuguese Criminal Code.

69 As also stated in international instruments such as the EU Directive 2018/1673 on Combating Money Laundering by Criminal Law in Article 8.

to potential natural persons in terms of jobs and pay, for instance[70]. In the sport world, the required dissolution of clubs[71] and cessation of function or closure of certain entities[72] may be considered as disciplinary sanctions, albeit not in a manipulation context.

[70] Article 90.L of the same Portuguese Criminal Code provides for temporary closure (three months to five years), unless a certain threshold based on warranted sanction (based on quantum of fine assessed) is exceeded.

[71] See generally DERUNGS V., Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport, Stampfli Verlag:Bern, 2022.

[72] WADA Labs may be handed restrictions in their functions including partial testing restrictions (see "WADA extends analytical testing restriction imposed on Bucharest Laboratory", *World Anti-Doping Agency*, November 17, 2021 available at https://www.wada-ama.org/en/news/wada-extends-analytical-testing-restriction-imposed-bucharest-laboratory (September 2, 2023)) or complete suspension (see "WADA suspends accreditation of New Delhi Laboratory", *World Anti-Doping Agency*, August 22, 2019 available at https://www.wada-ama.org/en/news/wada-suspends-accreditation-new-delhi-laboratory (September 2, 2023)).

Article 24

by

Surbhi KUWELKER

Article 24 – Administrative Sanctions

[1] Each Party shall adopt, where appropriate, such legislative or other measures in respect of acts which are punishable under its domestic law as may be necessary to punish infringements established in accordance with this Convention by effective, proportionate and dissuasive sanctions and measures following proceedings brought by the administrative authorities, where the decision may give rise to proceedings before a court having jurisdiction.

[2] Each Party shall ensure that administrative measures are applied. This may be done by the betting regulatory authority or the other responsible authority or authorities, in accordance with its domestic law.

I. Purpose of Article 24

1. As noted in the commentary to various articles above including Article 7 para 4, Article 18 para 2 and in the context of Articles 22 and Article 23, the **Macolin Convention envisions, under domestic law, the presence of administrative sanctions in addition to criminal sanctions (and civil sanctions) for both natural and legal persons**. Administrative sanctions are distinguished from their criminal counterparts[1] owing to the nature of the proceedings, the imposition of sanctions only after a finding of guilt, the deterrent and punitive purpose of the sanctions, the severe nature of the sanction, and whether the sanction expresses a moral

[1] OBERG J., "The definition of Criminal Sanctions in the EU", 3(3) *European Criminal Law Review* (2014) 273, at p. 298; the Macolin Convention under prior articles prescribes criminal sanctions for natural and legal persons (see commentaries to Articles 22 and 23).

condemnation – in the absence of prescription that the behaviour is criminal through formal classification[2].

2. **Administrative sanctions may be useful to supplement criminal sanctions for various reasons.** Where criminal liability and thus sanctions are preferred in international instruments, practically, such liability might be difficult to attribute due to need to high procedural thresholds and need to establish elements such as *mens rea*[3], particularly for legal persons, with the presence of criminal sanctions across (particularly European) countries (yet) not uniformly present, administrative sanctions, benefit from feasibility of implementation and compliance[4]. Further, administrative sanctions have, in themselves, been found to be compliant entirely with requirements in international instruments, to counter offences that could also be used to address manipulation[5].

3. It is to be noted that **administrative sanctions may not be adopted for certain reasons, as compared to criminal sanctions** – their drawbacks include a more limited deterrent effect, the tendency to follow rather than precede criminal action, the relative thoroughness of the criminal process and competence of judicial fora, longer criminal limitation periods and lower potential for mandated international cooperation compared to criminal law[6].

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2 See also OHANA D., "Chapter 46: Regulatory Offences and Administrative Sanctions: Between Criminal and Administrative Law", Oxford Handbook of Criminal Law, (Oxford University press: Oxford), available at https://doi.org/10.1093/oxfordhb/9780199673599.013.0046, at p. 1064-1086.

3 As also noted in Section I under the commentary to Articles 18 and 23; see section 4.3 in Council of Europe's document titled Liability for Legal Persons for Corruption Offences (May 2020) available at https://rm.coe.int/liability-of-legal-persons/16809ef7a0 (August 22, 2022, "CoE Liability for Legal Persons Document"), at p. 29; see also DE MOOR-VAN VUGT A., "Administrative Sanctions in EU Law", 5(1) *Review Of European Administrative Law* (2012) 5, at p. 11-15 and p. 18-24.

4 For instance, with the requirement of international instruments such as Article 26 of the United Nations Convention Against Corruption ("UNCAC") as well as now with the Macolin Convention.

5 See United Nations Office on Drugs and Crime, "The State of implementation of the UN Convention against Corruption" (2017), at p. 90, where Article 26 of the UNCAC is spoken about.

6 CoE Liability for Legal Persons Document, at p. 30-31; provisions within international instruments such as the UNCAC in Chapter IV and Macolin Convention's Chapter VII.

II. The Contents of Article 24

A. Scope of Section

4. As discussed under the commentary to Article 22, no sanction may be issued unless there is an **express provision of law** that describes, with requisite clarity and specificity, not only what the constitutes the offence but also what an applicable sanction for each offence is[7].

5. Article 24 in paragraph 1 specifies that administrative sanctions must follow **"*proceedings brought by the administrative authorities*"**, where the decision may give rise or be further challenged in proceedings before a competent court or one with jurisdiction[8]. Article 24 also specifies that **such sanctions may be issued by authorities**, including the parties themselves, a party's "*betting regulatory authority*" and any "*other responsible authority or authorities*", ostensibly all authorities established under law[9].

6. As the sanctions envisioned by the Macolin Convention and national legislations may be of **civil, criminal or administrative** nature[10], it is also important that the same offence under criminal law **must not be sanctioned twice**[11]. Ordinarily, should both sanctions address different wrongs, they can be applied concurrently, as is the case in Germany[12], while in Spain, while, on the other hand, criminal and administrative sanctions function as different levels of sanctions, meaning the criminal

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7 Pursuant to the principle of *nullum crimen, nulla poena sine lege scripta et certa* as discussed in the introductory section to this Chapter VI above.

8 Explanatory Report, para 196.

9 See Explanatory Report, para 196; an example of an instance of a betting regulator issuing sanctions is the United Kingdom's Gambling Commission which maintains a Regulatory Action register, available at https://www.gamblingcommission.gov.uk/public-register/regula tory-actions/full (October 4, 2022).

10 See introduction to Chapter VI under section II.1.1.2 above on the 'Duality of Sanctions'; see also Explanatory Report, para 158, as well as CoE Liability for Legal Persons Document, at p. 23; finally, various international conventions also envision sanctions of all three kinds for legal persons – see Article 26, para 2 of the United Nations Convention on Organized Crime ("UNCOC").

11 Under the *ne bis in idem* principle – see commentary to Article 22 under section II.A.1.3 on 'Double Jeopardy'.

12 Criminal liability deals with natural persons, whereas administrative liability deals with legal persons under the Administrative Offences Act, see *infra* note 13.

penalty takes precedence over the administrative sanction[13]. Particularly in a manipulation context, the Swiss Federation Tribunal has held that double jeopardy requires that the legal values protected be identical but does not exclude that the same proceedings could carry civil, administrative or disciplinary consequences besides the criminal ones[14].

7. Finally, Article 24 of the Macolin Convention requires that the administrative sanctions applied also be **effective, proportionate and dissuasive**, akin to the wording under Article 22 and 23[15]. This language is borrowed from prior European Union instruments[16] and has been discussed in detail under the introduction to this Chapter VI above.

B. Types of Sanctions

8. While the Macolin Convention itself does not mention a list, illustrative or exhaustive, of the types of sanctions which it envisions under this section, it does mention that it looks to include "*measures in respect of acts which are punishable under its domestic law as may be necessary to punish infringements established in accordance with this Convention*"[17]. Thus, **it points state parties toward utilizing administrative sanctions that pre-exist in national legislation to sanction offences under the Macolin Convention**.

9. Following from this, **observing sanctions of an administrative nature pre-existing in national legislation**, which may be applied as such, assumes significance. In France, for instance, corruption laws include such liability in certain contexts[18]. Specific to national sporting law, the

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13 VERMEULEN G., DE BONDT W., RYCKMAN C., "Liability of Legal Persons for Offences in the EU", Vol. 44 IRCP-series, European Commission DG Justice, (Maklu: Antwerp, 2012), at p. 37.

14 4A_386/201022 of January 3, 2011, at para 9.3.2; this was also quoted in 4A_324/2014, at para 6.2.3.

15 Please refer to the commentary under Article 22.

16 EU Directive 2018/1673 on Combating Money Laundering by Criminal Law under Article 8, which states that "ensure that a legal person is "*punishable by effective, proportionate and dissuasive sanction, which shall include criminal or non-criminal fines*."

17 Article 24, para 1.

18 Where no proper compliance program can be identified by the French Anticorruption Agency under the Law No. 2016-1691 entitled "Transparency, the fight against Corruption and the Modernization of the Economy".

Code du Sport also includes specific administrative sanctions[19], though limited to certain non-manipulation offences[20]. Further, similar liability is seen in a corruption context, which could be applied to manipulation, in Brazil[21], Germany[22] and Italy[23].

10. In others jurisdictions, certain in-between concepts such as those of "administrative-criminal liability" have been created[24]. Thus, it may be noted that **there is no consistent presence of administrative liability, and consequently sanctions, across national legislation.** Around a third of European Union member states do not apply administrative liability of legal persons for offences in their national law systems[25].

11. Across the legislations mentioned above, the sanctions that are administrative in nature vary and include fines[26]. The Explanatory Report to Article 24 of the Macolin Convention further **provides certain examples** of what may be considered purely administrative measures. Such measures are stated to potentially include **licence withdrawal** for a sanctioned operator or **website access being blocked**[27]. Administrative

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19 Articles L232-21-1 to L 232-23-3-12, modified by Ordinance No. 2021-488 of April 21, 2021 to Articles 59 and 61 as available at https://www.legifrance.gouv.fr/codes/id/LEGIARTI000043414713/2021-05-31 (September 2, 2023).

20 In a doping context specifically, where These sanctions include warning, temporary or definitive suspension from sporting activities, or concurrent sanctions with monetary fine not exceeding Euros 45000 for natural persons and Euros 150,000 for legal persons – *id.*

21 See Articles 2 and 3 of the Law No. 12,846/13 (of August, 2013) called the Clean Companies Act, imposed administrative and civil liability on legal entities for corrupt or fraudulent conduct pursuant to provisions in the constitution which provide for exception to the rule of criminal liability for legal entities, including for economic and financial crimes.

22 Shall there be legal proceedings against a natural person, such administrative liability can also be imposed on a legal person in the course of the same criminal proceedings through a fine – under the Administrative Offences Act; see CoE Liability for Legal Persons Document, at p. 28.

23 Under Legislative Decree No. 231 of June 8, 2001 provides for 'administrative liability' for legal persons in the context of offences committed in its interest by natural persons acting as its representatives.

24 As discussed in the context of Bulgaria, where the law does not recognize the existence of corporate criminal liability but this form of liability for legal persons – See VERMEULEN G. *et al., supra* note 13, at p. 26.

25 CoE Liability for Legal Persons Document, at p. 33.

26 Under the German Administrative Offences Act, as described in the CoE Liability for Legal Persons Document, p. 28.

27 Explanatory Report, para 195.

sanctions in national legislation also currently include financial penalties, exclusion from public tender processes, confiscation of proceeds, and publication of judgments[28].

12. In the world of sporting justice, in a case involving sanctioning through **ineligibility** for football clubs for match manipulation as is often seen, the Swiss Federal Tribunal on appeal from the Court of Arbitration of Sport upheld the regulations applied that governed the dispute before it[29], whereunder the nature of the initial 'minimal' sanctions being administrative (when they involve ineligibility of a club) allowed for their issuance, in addition to more severe disciplinary sanctions, even of the same kind[30].

[28] See for example the penalties under Law 231/2001 of Italy, *supra* note 23, at Articles 9 to 19.

[29] Article 2.06 of the UEFA Champion's League Regulations (2011/2012 edition).

[30] See Swiss Federation Tribunal's decision *Fenerbahçe Spor Kulübü* ("Fenerbahçe") v. *UEFA*, 4A_324/2014 in the appeal against the CAS award in Fenerbahçe, CAS 2013/A/3256, award of April 11, 2014. An initial one-year period of ineligibility while UEFA undertook detailed investigation of transgressions was upheld as permissible and not automatically disallowing a consequent disciplinary measure of ineligibility without a defined maximum period in addition.

Article 25

by

Surbhi KUWELKER

> ***Article 25 – Seizure and Confiscation***
>
> *1 Each Party shall take the necessary legislative or other measures, in accordance with domestic law, to permit seizure and confiscation of:*
>
> *a the goods, documents and other instruments used, or intended to be used, to commit the offences referred to in Articles 15 to 17 of this Convention;*
>
> *b the proceeds of those offences, or property of a value corresponding to those proceeds.*

I. Purpose of Article 25

1. **Seizure and confiscation of assets derived from criminal activity or used by criminal organisations is an efficient means to fight against organised crime**[1]. Seizure and confiscation, the definitions of which are discussed below under Section B, aim to put a natural or legal person affected by an offence back in the situation that they would have been had no manipulation occurred (restitutive in nature). Thus, while in itself not a punitive sanction, seizure and confiscation serve the purpose of supplementing other sanctions, which are aimed at punishing (punitive in nature) and deterring (deterrent in nature)[2].

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1 Explanatory Report, para 197; this is reflected in the presence of such provisions across international instruments which seek to regulate this such as the United Nations Convention against Corruption, 2004 ("UNCOC"), the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ("UNITNDPS"), the UN Convention against Transnational Organized Crime, 2000 ("UNTOC") and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141 of 1993) ("Convention 141"). These instruments are used as interpretive tools given the likeness of offences they deal with to manipulation offences.

2 See generally, for example, MAYER J., "Reflections on Some Theories of Punishment", 59:4 *Journal of Criminal Law and Criminology* 1969, 595 and MANN K., "Punitive

2. Seizure/freezing or confiscation/forfeiture are critical in order to successfully conduct criminal and other investigations and to ensure that the property, assets and other items connected to offences are adequately secured throughout such investigations. They can also serve to identify and prevent future offences, which may occur through the use of such items to further the crime, particularly organized financial crime, where assets may easily be moved across jurisdictions. Such remedies prevent disposal or enjoyment of such items and serve to preserve them as evidence[3].

3. Keeping with the above stated purpose of this article, Article 25 requires Parties to allow **goods, documents and materials that are used to commit offences** referred to in Articles 15 to 17 of the Macolin Convention**, as well as the proceeds of those offences or property of equal value, to be seized and confiscated**[4].

II. The Contents of Article 25

A. Scope of Article

4. As discussed in the commentaries to Article 22, Article 23 and Article 24, even **seizure and confiscation require to be provided for pursuant to express provisions in a party's domestic law** that describes with requisite clarity and specificity what an applicable sanction for each offence is[5]. It is also of importance that the same offence under criminal law, **must not be sanctioned twice**[6]. Article 25 of the Macolin

Civil Sanctions: The Middleground between *Criminal* and Civil Law", 101:8 *Yale Law Journal* 1992, 1975, and particularly under sections I, A. B and C.

3 See chapter on "Principle 4: Have Effective Powers to Freeze, Seize and Confiscate Assets", *Fighting Tax Crime – The Ten Global Principles* (edn. 2) available at https://www.oecd-ilibrary.org/sites/49967781-en/index.html?itemId=/content/component/49967781-en (October 5, 2022) at paras 70-71; see also "Confiscation and freezing of Assets", *European Commission*, available at https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/confiscation-and-freezing-assets_en (October 5, 2022).

4 See language of Article 25.

5 Pursuant to the principle of *nullum crimen, nulla poena sine lege scripta et certa* – see section II.1.1.1 of introduction to Chapter VI above. See also the provisions in other international instruments which prescribe this specifically in the context of confiscation, for instance – Article 5.9 of the UNITNDPS, *supra* note 1.

6 Under the *ne bis in idem* principle – see commentary to Article 22 under section II.1.1.3 on 'Double Jeopardy'.

Convention, however, **does not specify that seizure/confiscation sanctions should be effective, proportionate and dissuasive/deterrent**, as it does in the wording for other sanctions under Article 22, 23 and 24[7].

5. As mentioned in section I above, such measures serve the purpose of supplementing other punitive and dissuasive sanctions recommended to counter manipulation across other provisions of Chapter VI of the Macolin Convention, while not having such a nature themselves. Given this, as well as why they are instituted, as discussed under Section I above, the concerns about being sanctioned twice, for example, are also therefore limited in the context of application of seizure and confiscation provisions together with other sanctions.

B. Nature of Action

1. Seizure and Freezing of Assets

6. The term '**seizure**', as defined in various international instruments[8] which are relied on within the Explanatory Report, means **temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property** on the basis of an order issued by a court or other competent authority[9].

7. The related act of '**freezing'** involves **temporarily suspending rights** over the asset and, for example, may apply to bank accounts which are fungible, while seizure is an action to temporarily restrain an asset or put it into the custody of the government and may apply to physical assets such as a vehicle[10].

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7 Refer to the commentary under Article 22, this language, as mentioned previously in this Chapter, having been on Combating Money Laundering by Criminal Law under Article 8, states that "ensure that a legal person is "*punishable by effective, proportionate and dissuasive sanction, which shall include criminal or non-criminal fines*" from prior European Union instruments such as EU Directive 2019/1673.

8 The Explanatory Report to the Macolin Convention under para 198 refers to the UNTOC, whereunder Article 2.f provides the same definition for the terms of seizure and freeezing of assets; Article 2.f of the UNCAC also provides the same definition.

9 See Explanatory Report, para 198.

10 See the chapter on "Principle 4: Have Effective Powers to Freeze, Seize and Confiscate Assets", *supra* note 3, para 68.

8. **The implementation of measures such as these are aided by instruments aimed at international cooperation** in criminal law matters, specifically in Europe[11]. Domestic legislation on the subject can be seen across countries such as Switzerland[12] and the United Kingdom, including as applied by courts, where specific to a sporting (though not manipulation) context, such action has been noted as taken toward Russian entities, though it is not without its own drawbacks[13].

2. Confiscation and Forfeiture

9. The Explanatory Report to the Macolin Convention again refers to the definition of the term '**confiscation'** as seen in international instruments[14], under which confiscation is defined to **include, where applicable, the term 'forfeiture' and means the permanent deprivation of property by order of a court or other competent authority**[15]. Confiscation or asset forfeiture is usually applied after the final outcome of a case, as it is a final measure that stops criminals from accessing assets obtained from a crime[16]. It may be used independently or to ensure that other fines are paid, for example[17].

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11 See the EU regulations 2018/1805 of the European Parliament and of the Council of November 14, 2018 on the Mutual Recognition of Freezing Orders and Confiscation Orders, as well as the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union – DIR 2014/42/EU of April 3, 2014.

12 Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons, 2015. Look at freezing under criminal code as a procedural measure, can confiscate.

13 See OLDFIELD J, "The challenges of asset freezing sanctions as an anti-corruption tool", *Transparency International and European Union Anti-Corruption Helpdesk*, available at https://knowledgehub.transparency.org/assets/uploads/kproducts/Sanctions-Asset-Freezes-Anticorruption_2022_final.pdf (October 6, 2022).

14 The Explanatory Report cites UNITNDPS, which, defines confiscation under Article 1.f, whos application is described under Article 5; yet is the definition and use of confiscation in the UNTOC, which under Article 2.g uses the same definition for confiscation, which is more relevant to manipulation related offences, particulary in the context of organized crime.

15 Explanatory Report, para 199; such forfeiture could be civil (contrary to law) or criminal, issued as a punishment – see CoE Liability for Legal Persons Document, at p. 53.

16 See "Principle 4: Have Effective Powers to Freeze, Seize and Confiscate Assets" above, *supra* note 3, para 69.

17 *Ibid*., para 71.

10. The Explanatory Report also specifies that the implementation of the provision relating to confiscation **may include specific protective measures** in respect of persons who are not offenders of, or accessories to, the offence and whose assets were used to commit the offence without their knowledge[18].

11. Such sanctions involving confiscation and forfeiture are seen within **national legislation** in countries such as Germany[19] and Poland[20] for non-sporting specific offences under which manipulation could be brought. The general provisions in criminal law in national legislation for other crimes such a bribery, for example, under which manipulation could be prosecuted also provide for sanctions such as confiscation[21].

12. In a **sporting context**, given the utlization of provisions connected to fraud, for instance in the prosecution of manipulation, there is recommended the application of corresponding sanction, especially in transnational crime which best suit such offences, including confiscation[22]. National laws such as those in Bulgaria[23] and Ukraine[24], for example, also provide for forfeiture or confiscation as a sport specific remedy. In Bulgaria, it is possible to order the 'seizure' of up to one-half of the culprit's property, and do so in favour of the state (i.e. confiscation, under

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18 Explanatory Report, para 201.

19 See §29a and § 30 para. 5 of the German Act on Regulatory Offences [Gesetz über Ordnungswidrigkeiten], as amended in 2009 which apply to natural and legal persons.

20 Article 8 of the Poland's Act on the Liability of Collective Entities for Acts Prohibited under Penalty, of October 28, 2002.

21 See, for example Article 357 para 1 of the Republic of South Korea's Criminal Act of 2005 where confiscation or where impossible, then equivalent price of pecuniary advantage is to be collected from the convicted person.

22 See, for example SERBY T, "Follow the Money: Confiscation of Unexplained Wealth Laws and Sports Fixing Crisis" 13(1) *Sweet and Maxwell International Sports Law Review* (2018) 1, at p. 2-8.

23 See Article 307.e(2) and Article 307.f of the Bulgarian Criminal Code (SG No. 60 of 2011) as also cited in KEA European Affairs, "Match-fixing in Sport: A mapping of criminal law provisions in EU27", 2012 available at https://ec.europa.eu/assets/eac/sport/library/studies/study-sports-fraud-final-version_en.pdf (September 20, 2023), p. 68; see also "Countering Organized Crime in Bulgaria: Study on the Legal Framework", Centre for the Study of Democracy (Sofia: 2012) available at https://www.files.ethz.ch/isn/152563/-2.pdf (September 20, 2023), p. 31.

24 Law No. 2243a which complemented Article 369.3 of the Ukrainian Criminal Code, and was adopted in 2015.

the Macolin Convention's interpretation); as well as, where expropriated, confiscate in this manner, an equivalent awarded amount[25].

C. Particulars of Seized/Confiscated Items

13. The Macolin Convention lists two kinds of items that the above sanctions may be applied to. The first category consists of any **'goods, documents and other instruments',** either used, or intended to be used, to commit the offences referred to in Articles 15 to 17 of this Convention[26]. In some jursidictions, it is also possible to require the forfeiture of "substitute assets" found within a state's jurisdiction in transantional offences[27].

14. The Macolin Convention further prescribes that **proceeds of an offence or property equivalent in value** may also be seized or confiscated[28]. The Explanatory Report to the Macolin Convention states that the term "proceeds" is defined and applied in the manner used originally in the Council of Europe's Convention 141[29]. Consequently, it is also clarified that this definition of **"proceeds" should be as broad as possible** and may include, where appropriate, objects of offences[30].

15. In Convention 141, proceeds are defined as any economic advantage from criminal offences, which could also include property, defined as property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property[31]. This language may be noted to have been imported into the Macolin Convention from such other conventions.

16. Similarly, '**instruments'** as used in the initial paragraph is defined in Convention 141 as any property used or intended to be used, in any

25 *Supra* note 23.
26 See Article 25 para 1.a.
27 CoE Liability for Legal Persons Document, at p. 53.
28 See Article 25 para 1.b.
29 Explanatory Report, para 200. See definition of proceeds under Convention 141, in Article 1 para b. This definition is also similar to that seen in the UNTOC and UNCAC.
30 Explanatory Note, para 200; as also seen under the Explanatory Note (para 140 which discusses Article 16 of the Macolin Convention), Convention 141, for example applies to the proceeds of any criminal activity, including corruption, subject to certain restrictions in reservations made by parties to the convention.
31 See Article 1 para b of Convention 141.

manner, wholly or in part, to commit a criminal offence or criminal offences[32].

17. Certain **national law** are also seen providing a description of what property may be seized or confiscated[33]. The wording of the definition within the Macolin Convention does not rule out the inclusion of property and assets that may have been transferred to third parties and includes any economic advantage derived from or obtained, directly or indirectly, from criminal offences[34]. Finally, it is evident from the languauge of the Macolin Convention, in the context of proceeds that property *equivalent* in value may also be seized of confiscated, which reverts to the principle of proportionality discussed above[35].

[32] See Article 1 para c of Convention 141 – this convention however utilizes the term 'instrumentalities' and not 'instruments' as done in Article 1 para b as well as the Macolin Convention in Article 25, para 1.a.

[33] See Law No. 7258 on the Turkish Provision of Betting and Luck Games in Football and Other Sporting Competitions (1959) under which Article 5 para d speaks about the types of items possible to confiscate. To elaborate on?

[34] Explanatory Report, para 200.

[35] See section II above, which also cites Article 5.1.a of the UNITNDPS.

Articles 26 to 28 - Introduction

by

Surbhi KUWELKER

1. As also seen before in the commentary to the Macolin Convention's Preamble[1], to Chapter II and to Chapter V[2] – the Explanatory Report emphasizes the **cross-border nature of criminal networks**, in registering suspicious bets with sports betting operators established in different jurisdictions, and in manipulation of international sports competitions or national competitions in several countries at the same time[3].

2. The Macolin Convention does not contain a specific definition of a manipulation offence that occurs across borders, despite jurisdiction specific provisions such Articles 19 to 22 and Article 33[4] showing that it is envisioned that this might occur. Yet, other instruments which define transnational crime provide useful reference such as the United Nations Convention against Transnational Organized Crime ("UNTOC"), which defines **offences of a transnational nature** as those which are committed (a) in more than one country; (b) in one country but a substantial part of their preparation, planning, direction or control takes place in another; (c) in one country but involves an organized criminal group that engages in criminal activities in more than one country; and/or (d) in one country but have substantial effects in another[5].

3. The **transnational nature of manipulation** and corruption related crimes and offences, in particular, has been widely noted[6]. This is also

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1 See section II.B.1 within the Chapter containing the commentary to the Preamble.

2 See commentary to respective Chapters above, specifically articles 19 and 20 in Chapter V.

3 Explanatory Report, para 205.

4 Discussed below as part of the commentary to Chapter IX on Final Provisions where the functioning of the Macolin Convention amidst existing state obligations to other concluded and ratified instruments is addressed.

5 Article 3, UNTOC.

6 Explanatory Report, para 159; see also, for example, UNODC, Legal Approaches to tackling the Manipulation of Sports Competitions: A Resource Guide, p. 2; see also, for

particularly the case as offences are increasingly 'artificial', i.e. in non-territorially demarcated space or cyberspace and use computer systems[7]. To this extent, the relevance of instruments which provide guidance on what law shall address crimes taking place across jurisdictions such as the Macolin Convention and that contain provisions to address consequent jurisdictional issues that arise may be highlighted; a response to such offences, particularly when committed digitally, through strengthened international cooperation, based on the principles of shared responsibility and in accordance with international law assumes significance[8].

4. The Macolin Convention **must thus function together with other international conventions** which have attempted to harmonize and facilitate cooperation across European nations in their respective criminal law, among others. In this light, it is important to reemphasize other supplementary provisions (and principles) in the Macolin Convention as well[9].

example, EUROPOL's Operation Veto – see "The involvement of organized crime groups in sport: Situation Report', EUROPOL, https://www.europol.europa.eu/sites/default/files/documents/the_involvement_of_organised_crime_groups_in_sports_corruption.pdf (November 21, 2022) and EUROPOL, "Update – Results from the Largest Football Match-Fixing Investigation in Europe", https://www.europol.europa.eu/media-press/newsroom/ news/update-results-largest-football-match-fixing-investigation-in-europe (June 15, 2022), along with the Explanatory Report, para 27 and 159.

7 See generally RYNGAERT C., "Territorial Jurisdiction over Cross-frontier Offences: revisiting a Classic Problem of International Criminal Law", 9(1) *International Criminal Law* Review 2009, 187; RYNGAERT C., "The Territoriality Principle", *Jurisdiction in International Law* (Oxford Public International Law, Oxford University Press: Oxford, 2015), in section 3.4 on Territorial Jurisdiction over Cross-border Offences; see also RYNGAERT C., "The Concept of Jurisdiction in International Law" available at https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf (April 30, 2022); by way of example, numerous virus attacks, fraud and other violations committed through the internet target matches and function through persons and platforms in other countries – Explanatory Report to the Cybercrime Convention, para 239.

8 UNODC, Legal Approaches to tackling the Manipulation of Sports Competitions: A Resource Guide (2021), p. 49 citing UN General Assembly Resolution 74/177 entitled "Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity".

9 See commentary to Article 19 in Chapter V, above and Article 33 in Chapter IX, below.

Article 26

by

Surbhi KUWELKER

Article 26 – Measures with a view to international co-operation in criminal matters

[1] The Parties shall co-operate with each other, in accordance with the provisions of this Convention and in accordance with the relevant applicable international and regional instruments and arrangements agreed on the basis of uniform or reciprocal legislation and with their domestic law, to the widest extent possible for the purposes of investigations, prosecutions and judicial proceedings concerning the offences referred to in Articles 15 to 17 of this Convention, including seizure and confiscation.

[2] The Parties shall co-operate to the widest extent possible, in accordance with the relevant applicable international, regional and bilateral treaties on extradition and mutual assistance in criminal matters and in accordance with their domestic law, concerning the offences referred to in Articles 15 to 17 of this Convention.

[3] In matters of international co-operation, whenever dual criminality is considered to be a requirement, it shall be deemed to have been fulfilled, irrespective of whether the laws of the requested State place the offence within the same category of offence or use the same term to denominate the offence as the requesting State, if the conduct underlying the offence in respect of which legal mutual assistance or extradition is requested is a criminal offence under the laws of both Parties.

[4] If a Party that makes extradition or mutual legal assistance in criminal matters conditional on the existence of a treaty receives a request for extradition or legal assistance in criminal matters from a Party with which it has no such treaty, it may, acting in full compliance with its obligations under international law and subject to the conditions provided for by its own domestic law, consider this Convention to be the legal basis for extradition or mutual legal assistance in criminal matters in respect of the offences referred to in Articles 15 to 17 of this Convention.

I. Introduction and Purpose of Article 26

1. Under this article, the Macolin Convention **encourages parties to attempt to co-operate across the four different highlighted areas** in each of its paragraphs, discussed in section II below. The Explanatory Report makes mention that during the Macolin Convention's drafting process it was decided **not to reproduce provisions similar to those found in pre-existing instruments across subject areas, and a separate mutual assistance regime was not sought to be created** which would replace other applicable instruments or agreements. It was thus considered more efficient to rely generally on regimes established by the existing treaties on mutual assistance and extradition[1].

2. Consequently, **only provisions with added value compared to existing conventions were included** within Chapter V's provisions and specifically within Article 26[2].

II. The Contents of Article 26

A. Investigations, prosecutions and judicial proceedings

3. Paragraph 1 of Article 26 therefore calls for co-operation between the Parties, in accordance with international law, for the purposes of **investigation, prosecution and judicial proceedings** regarding the offences referred to in Articles 15 to 17 of this convention, including the seizure and confiscation in light of the growing transnational nature of manipulation[3].

4. Specific to **criminal law process**, the European Convention on Mutual Assistance in Criminal Matters (1959, ETS No. 30, "**Convention 30**")[4] and, given the specific emphasis on seizure and confiscation, the Convention on Laundering, Search, Seizure and

1 Explanatory Report, para 203.
2 Explanatory Report, para 203.
3 Explanatory Report, para 205 and 206.
4 Which had further Additional Protocols (1975, ETS No. 86; 1978, ETS No. 98; 1978, ETS No. 99; 2001, ETS No. 182, 2010, CETS No. 209).

Confiscation of the Proceeds of Crime (ETS No. 141, "**Convention 141**")[5] are significant.

5. As regards **judicial co-operation** in criminal matters, the Explanatory Report makes mention that the Council of Europe already has an important pre-existing normative framework, namely the **European Convention on Extradition (1957, ETS No. 24, "Convention 24"), Convention 30,** and the prior mentioned **Convention 141**, which are cross-cutting instruments applicable to a large number of offences[6]. For European Union member states, other instruments adopted within the framework of the European Union such as **the Council Framework Decision of 2002**[7] are also of significance.

6. A number of European nations have ratified the Convention 24, for example, which would, in such instances, apply, should the crime be one for which such country has provisions in its laws enabling prosecution and sanctioning. Among the nations that have ratified the Macolin Convention but also Convention 24, the responses to extradition requests could vary based on the nuances in each such country's legislations[8].

7. Thus, the Explanatory Report states that these can also be implemented to **grant judicial co-operation in criminal matters in the course of proceedings in respect of offences referred to in Articles 15**

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5 The applicable provisions specific to search and seizure, including definitions to the terms are presented in detail in the commentary to Article 25.

6 Article 33 also makes mention of the Council of Europe's e Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS No. 198) as particularly relevant in para 2.d.

7 On the European arrest warrant and the surrender procedures between member States of June 13, 2022.

8 See, for example, Section 3 of the Swiss Federal Act of January 22, 1892 on Extradition to Foreign States which contains a list of extraditable offences. Further, Article 7 of the Swiss Criminal Code deals with extradition of Swiss nationals abroad, and ostensibly provides for trial for persons guilty of manipulation or related offences in another country. Should a situation arise where a Swiss national is not found guilty domestically, extradition could be refused under Article 9 of Convention 24 under which Switzerland has made reservations. On the other hand, countries such as Italy and Norway reserve extradition based on the fulfilment on certain conditions, such as the criteria laid down under Article 25 of Convention 24, or the order to detain being expressly provided for in the criminal law of the requesting party as being a necessary consequence of an offence – see https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=024&codeNature=2&codePays=SWI (September 24, 2023).

to 17 of the Macolin Convention[9]. The use of extradition as a method of implementation of effective process and sanctions, including in tandem with the provisions under other criminal law conventions, has been discussed prior in the context of Article 19[10], 22[11] as well as hereafter in the context of Article 33[12], which addresses this convention's relationship with that of other pre-existing conventions and states categorically that the Macolin Convention does not affect the rights and obligations of parties under international multilateral conventions concerning specific subjects[13].

8. Finally, the Explanatory Report also makes note of how cooperation may operate by stating that the parties to the Macolin Convention **can also provide for cooperation under arrangements agreed on the basis of uniform or reciprocal legislation**[14]. While not explained further in the Explanatory Report, the reference to legislation could be thought to mean national legislation, with uniform indicating that the law is the same across both countries, and reciprocal indicating that the same applicable law or grant of rights applies to a foreign national in the say way as to a citizen. An arrangement, in turn, is further to such national legislation – i.e. bilateral or multilateral treaties and instruments to cooperate over integrity matters[15].

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9 Explanatory Report, para 202.

10 In the context of principle of *aut dedere aut judicare* within the Macolin Convention, so as to be able to ensure that parties which refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the party which requested extradition under the terms of the relevant international instruments – see also Explanatory Report, para 158.

11 As discussed in II.C.1.2 in the commentary to Article 22, extradition is legal process that permits the transfer of a person suspected or convicted of committing an offence or a crime from one country's jurisdiction to another as defined in Convention 24.

12 See commentary on Article 33 within Chapter VIII, below.

13 Under para 1 of Article 33 it goes on to say that the Macolin Convention does not alter the rights and obligations arising from other agreements previously concluded in respect of the fight against doping and consistent with the subject and purpose of the convention.

14 Explanatory Report, para 204.

15 See for example the principle in Article 16 of the Italian Civil Code, which allows for foreigners and foreign legal persons to enjoy the same rights as citizens subject to reciprocity and provisions contained in special laws. Reciprocity need not be examined in certain instances, i.e. individuals are treated on par with citizens automatically, such as if a citizen of a fellow European Union state (natural or legal) and of the European Economic Area countries (Iceland, Lichtenstein, Norway) under Legislative Decree No. 285 of July 25, 1998. Where not exempted from examination of such reciprocity, agreements would need to exist to establish such reciprocity.

9. By way of example, the explanatory notes relating to Convention 24[16] make mention of certain specific situations that the draft looked to emulate such as those in the Nordic countries, where while certain general common rules on extradition are present, the requested state may ultimately decide to extradite or not. The classic extradition principles were to then to be replaced by a uniform law based on mutual desire to combat common crimes and given the existing similarity in penal codes on both the definitions of offences and the scale of penalties[17]. In the context of Convention 24, a multilateral agreement was ultimately preferred[18].

B. Extradition and mutual assistance in criminal matters

10. The second paragraph of Article 26 encourages co-operation, as permissible under a party's domestic law, in **extradition and mutual legal assistance (to fellow parties) in criminal matters to the widest extent possible,** in accordance with the relevant applicable international, regional and bilateral treaties[19]. Interpretation of the scope of this provision may be gauged from the detailed provisions of other instruments such as the UNCAC which have been used to tackle similar offences, including provisions on extradition[20] as well as further provisions on mutual legal assistance in investigations, prosecutions and judicial matters. The UNCAC requires cooperation as possible to the fullest extent under relevant laws, treaties, agreements and arrangements of the requested party, subject to further conditions and exceptions as listed therein[21].

11. Further, as is also seen in such other conventions, the Explanatory Report provides that if a party that makes extradition or mutual assistance in criminal matters **conditional on the existence of a treaty** receives such a request from another Party with which it has not concluded such a treaty, it may, acting in full compliance with its obligations under international

16 Mentioned above in section II.A, and available at https://rm.coe.int/168048bd43 (September 20, 2023).

17 Considerations Generales, Comite Europeans pour les Problems Criminels – Comite Europeen sur le functionnement des Conventions europeens dans le domaine penal (1998) para 13, p. 16 available at https://rm.coe.int/168048bd43 (September 23, 2023).

18 Parties were given the ability to conclude bilateral agreements on limited grounds to supplement the main provisions of the convention – *ibid*., p. 39 in connection with Article 28 on bilateral agreements.

19 Article 26, para 2 and Explanatory Report, para 206.

20 Article 44 of the UNCAC, as described in section II.A above.

21 See Article 46 on Mutual Legal Assistance, UNCAC, p. 33-39.

law and subject to the conditions provided for by its own domestic law, **consider the Macolin Convention to be the legal basis for extradition or mutual legal assistance** in criminal matters in respect of the offences referred to in Articles 15 to 17 of this convention[22].

12. It is to be noted that under Article 33, as is common to other instruments[23], parties may also conclude bilateral or multilateral treaties with one another on the matters dealt with in the Macolin Convention to supplement or strengthen its provisions or facilitate the application of its principles[24].

C. Dual criminality

13. The concept of dual criminality stipulates that the alleged crime for which extradition, discussed in section II.B. above as well as under other parts of this commentary[25], is being sought must be criminal in *both* the demanding and the requested countries[26].

14. Article 26 accordingly creates a **legal fiction** by stipulating that, as regards international co-operation, **where dual criminality is considered to be a requirement, it shall be *presumed* to be fulfilled (emphasis supplied)**[27]**.** This shall be the case even if the laws of the party to whom the request is made have placed such offence within a different category or use different terminology for the offence than the party requesting extradition[28], *subject to the condition* that the conduct at the origin of the offence, in respect of which a request for mutual assistance or extradition was made, constitutes an offence under the laws of both parties to the Macolin Convention (emphasis supplied)[29].

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22 Explanatory Report, para 208.

23 See Article 44, para 30, UNCAC, p. 39.

24 See para 3 and 4 of Article 33.

25 See commentary to Article 19 above and Article 33 hereafter.

26 See, for example, "Extradition", Encyclopedia Britannica, available at https://www.britannica.com/topic/extradition#ref283335 (November 19, 2022).

27 See Article 26, para 3 and Explanatory Report, para 207.

28 As discussed above in the commentary on Article 15 to 17, and Articles 22 to 26, as seen in national legislations, the offence of manipulation may be prosecuted under and then sanctioned under laws specific to sports and manipulation, or general laws relating to other crime such as fraud, bribery, corruption or betting specific offences, even among countries party to the Macolin Convention.

29 Explanatory Report, para 207.

15. Article 26 adopts the language and objective seen across numerous international treaties, which attempt to adopt a less restrictive application of the principle by stating that **fulfilment of the principle shall occur even if the offence is categorized or defined differently in both jurisdictions**[30].

[30] See BERNHOLZ S. A., BERNHOLZ M. J., HERMAN G. N., "Problems of Double Criminality – International Extradition in CCE (Continuing Criminal Enterprise) and RICO (Racketeer Influenced and Corrupt Organization Act) Cases", 21(1) *Trial* 1985, 58.

Article 27

by

Surbhi KUWELKER

Article 27 – Other international co-operation measures in respect of prevention

[1] Each Party shall endeavour to integrate, where appropriate, the prevention of and the fight against the manipulation of sports competitions into assistance programmes for the benefit of third States.

I. Introduction and Purpose of Article 27

1. The significance of prevention of manipulation through education, awareness and other measures has been long recognized across international instruments[1]. As seen before in the commentary on Chapter II of this Convention, measures for fighting manipulation, including prevention, education and awareness of competition manipulation, are increasingly implemented across domestic sports federations[2]. The Macolin Convention **actively encourages ratifying parties to encourage domestic sports bodies to adopt the slew of such measures**, as laid down across Articles 4 to 11 of the convention[3].

2. As well, **the transnational aspect of the manipulation** of sports competitions, as discussed in the commentary to the Preamble[4] and other

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1 In addition to the provisions discussed in this commentary, the United Nations Convention Against Corruption's Resolution 8/4, on safeguarding sport from corruption, adopted by the Conference at its eighth session (Abu Dhabi, December 2019) emphasized

2 See commentary on Chapter II, above.

3 See Chapter II, Macolin Convention.

4 See section II.B.1 of the Preamble where the Explanatory Report's explanation on how the link between manipulation and transnational organised crime also thus poses a direct threat to public order and the rule of law discussed, an example being EUROPOL's Operation Veto – see "The involvement of organized crime groups in sport: Situation Report", EUROPOL, https://www.europol.europa.eu/sites/default/files/documents/

articles, has led to it being deemed vital to step up international co-operation for this purpose. This is specifically relevant in light of the heightened expertise and ability to prevent and prosecute manipulation related offences available in certain jurisdictions in comparison to others[5].

3. Further, under the commentary on Articles 19 and 26 above, the **merits of international cooperation** in the fight against manipulation have been laid down, including the operation of the Macolin Convention together with other international conventions which have attempted to harmonize and facilitate cooperation in criminal law across European nations, among others[6].

4. Article 27 advocates for parties to include such co-operation in prevention and fighting manipulation in their joint endeavours on assistance programs **with third states as well**[7].

II. The Contents of Article 27

5. Under this article, the Macolin Convention encourages parties to attempt to integrate, where appropriate, the prevention of and the fight against manipulation of sports competitions **in development of assistance programmes for the benefit of third countries**[8].

6. While not elaborated on further within the Explanatory Report, it may be noted that prior documents which preceded the Macolin Convention during the drafting process provide indication of the intent behind Article 27. The discussion provided in **Opinion 287 of the**

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the_involvement_of_organised_crime_groups_in_sports_corruption.pdf (November 21, 2022) and EUROPOL, "Update – Results from the Largest Football Match-Fixing Investigation in Europe", https://www.europol.europa.eu/media-press/newsroom/news/update-results-largest-football-match-fixing-investigation-in-europe (June 15, 2022), along with the Explanatory Report, para 27 and 159.

5 See United Nations Office on Drugs and Crime and International Olympic Committee, "Legal Approaches to Tackling the Manipulation of Sports Competitions" (2021), available at https://www.unodc.org/documents/corruption/Publications/2021/Legal_Approaches_to_Tackling_the_Manipulation_of_Sports_Competitions_EN.pdf (November 22, 2022), where the distinction between nations having effective legislation – one among many types of provisions at the national level to tackle manipulation – may be observed.

6 See commentary to Articles 19 and 26, above.

7 See Article 27 and Explanatory Report, para 209.

8 Explanatory Report, para 209.

Parliamentary Assembly[9] states that as parties to the Macolin Convention would be invited to incorporate the prevention of and the fight against the manipulation of sports competitions into assistance programmes for the benefit of third states or countries not party to the Macolin Convention, the Parliamentary Assembly recommended, accordingly, that the Council of Europe draw up targeted co-operation programmes to support those parties that wished to take advantage of the expertise of the Council of Europe's bodies to reform their systems and to facilitate, where necessary, co-ordination of the assistance provided by other parties[10].

7. It can be concluded from this that the **intent behind the provision was to allow for third parties to benefit from the considerably greater expertise that the Parliamentary Assembly envisioned the Council of Europe and its bodies to have** relative to countries who had not ratified the Macolin Convention[11].

[9] See Opinion 287 (2014), Final version, Draft Council of Europe Convention on the Manipulation of Sports Competitions (Text Adopted by Standing Committee on May 23, 2014, Doc. 13508), available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp? fileid=20927&lang=en (November 22, 2022).

[10] See para 1.4 of the Opinion 287 (2014), *supra* note 9.

[11] The intent to borrow, lend and share best practices is also evident from the consequent paragraph in the document which provides for inviting collaboration from outside of Europe from larger nations such as the United States and China whose participation would 'considerably strengthen' in their opinion, the impact of the Macolin Convention – see para 1.5 of the Opinion 287 (2014), *supra* note 9.

Article 28

by

Surbhi KUWELKER

Article 28 – International Cooperation with International Sports Organizations

[1] Each Party, in accordance with its domestic law, shall co-operate with international sports organisations in the fight against the manipulation of sports competitions.

I. Introduction and Purpose of Article 28

1. As seen before in the commentary to Chapter II of this Convention, measures for fighting manipulation, including disciplinary processes but also prevention, education and awareness connected to competition manipulation, are **increasingly implemented across domestic sports federations**. The Macolin Convention **actively encourages ratifying parties to encourage domestic sports bodies to adopt the slew of such measures** as laid down across Articles 4 to 11 of the convention[1].

2. As well, **the transnational aspect of the manipulation** of sports competitions, as discussed in the commentary to the Preamble[2], among other articles, has led to it being deemed vital to step up international co-operation for this purpose. Further, the **merits of international**

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1 See Chapter II, Macolin Convention.

2 See section II.B.1 of the Preamble where the Explanatory Report's explanation on how the link between manipulation and transnational organised crime also thus poses a direct threat to public order and the rule of law discussed, an example being EUROPOL's Operation Veto – see "The involvement of organized crime groups in sport: Situation Report", EUROPOL, https://www.europol.europa.eu/sites/default/files/documents/the_involvement_of_organised_crime_groups_in_sports_corruption.pdf (November 21, 2022) and EUROPOL, "Update – Results from the Largest Football Match-Fixing Investigation in Europe", https://www.europol.europa.eu/media-press/newsroom/news/update-results-largest-football-match-fixing-investigation-in-europe (June 15, 2022), along with the Explanatory Report, para 27 and 159.

cooperation in the fight against manipulation have been noted above, including the operation of the Macolin Convention together with other international conventions which have attempted to harmonize and facilitate cooperation in criminal law across European nations, among others[3].

3. Accordingly, to further this end, Article 28 advocates for parties to **cooperate with international sports organizations in order to fight manipulation together**[4], in contrast and in addition to the measures under Chapter II with domestic sporting bodies.

II. The Contents of Article 28

A. Breadth of Recommended Cooperation

4. While, unlike in Chapter II, Article 28 of the Macolin Convention **does not elaborately list measures to be undertaken** (and, presumably, as party legislation would, at the outset, be inapplicable to supra-national international entities even if sports bodies functioned in or their functions bore a nexus with a party's jurisdiction), the listed measures in Chapter II could be considered an indication of the broad areas over which cooperation could be undertaken.

5. Accordingly, the Explanatory Report provides that these measures could **include prevention, awareness-raising of stakeholders, detection or exchange of information**[5], the Macolin Convention being concerned as much with enforcement as with prevention, including detection, information exchange and education[6]. Further, international sports organisations are specifically recognised in the Explanatory Report as having a role to play as key partners of public authorities in combating manipulation, in particular where disciplinary sanctions and exchanges of information are concerned[7].

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3 See commentary to Articles 19, 26 and 27 above, with introduction to this Chapter VII.
4 See Article 27 and Explanatory Report, para 210.
5 Explanatory Report, para 211; exchange of information is also discussed earlier in the commentary to Article 9, para 1.a and Chapter III, where Article 12 discussed exchange of information between national authorities, sports bodies and betting operators. Article 13 lays down the foundation for the operation of national platforms.
6 Explanatory Report, para 21.
7 *Ibid*.

6. On exchange of information in specific and as previously discussed[8], **parties have an obligation to share 'relevant information' as defined, and to do so spontaneously** where there are reasonable grounds to believe that offences or infringements of the laws have been committed, and to provide, upon request, all necessary information to the national, foreign or international authority requesting it[9].

7. Finally, it is made note of that all such measures introduced are required to be **in accordance with each party's domestic law**[10], which refers to law resulting from the implementation of international treaties/instruments and, where appropriate, the directly applicable provisions of international treaties. Specifically, standards connected to data protection and confidentiality of investigations are to be complied with[11].

B. Cooperation Measures between Nations and International Sports Federations

8. As has been noted before in the context of exchange of information, **legislation in Switzerland assumes significance** due to a majority of international sports governing bodies being located there[12]. **All such bodies, including betting operators, are required to report suspicions** of match manipulation to the inter-cantonal authority (Gespa), which functions as the Swiss national platform[13].

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8 See commentary to Article 12, section II.

9 Explanatory Report, para 112; such information may also include rumours of fixing and thresholds may be defined by stakeholders – see Explanatory Report, para 113.

10 Explanatory Report, para 210.

11 Explanatory Report, para 112 – see commentary to Article 12, section II.

12 Switzerland is one of the European countries and parties to have ratified the Macolin Convention who have implemented legislative obligation on sports bodies to report match manipulation alerts to public authorities even if not specifically asked – see generally VANDERCRUYSSE L., VERMEERSCH A., VANDER BEKEN T., "Macolin and beyond: legal and regulatory initiatives against match manipulation", 22(1) *International Sports Law Journal* 2022, 248 and BOSS P. V., "Tackling match-fixing in Switzerland: The new duties on international sports federations to monitor & report suspected match manipulations", LawInSport (2019) available at https://www.lawinsport.com/item/tackling-match-fixing-in-switzerland-the-new-duties-on-international-sports-federations-to-monitor-report-suspected-match-manipulations?category_id=697 (November 22, 2022).

13 In 2020, for example, FIFA reported to 41 such suspicious events, while the UEFA reported 4 – see "Manipulation of sports competitions – National Platform Annual

9. Across sports bodies, **numerous measures have been introduced** to tackle competition manipulation. The **International Olympic Committee** ("IOC") has a **dedicated unit**, the Olympic Movement Unit on the Prevention of Manipulation ("OM Unit PMC"), which undertakes three broad functions being: regulation and legislation[14], awareness and capacity building[15], and other ancillary measures, such as its intelligence and investigation assistance. The provisions of the OM Unit PMC's issued model rules **closely echo the provisions of the Macolin Convention** and are broadly adopted as a template for rules by international federations[16], providing for potential consistency in the provisions between national legislation and federation regulations, often applied at first instance, to then potentially ease coordinated sanctioning.

10. For **detection and intelligence**, the IOC system, termed the **Integrity Betting Intelligence System** ("IBIS"), is a key example of detection measures being used by numerous federations[17], among certain other private service providers[18], whereby the IOC undertakes to aggregate and analyse generated data handed over by regulators and operators to

Review 2020", Gespa, available at gespa.ch (November 22, 2022), p. 2; see also Article 64(2) of the Swiss Gambling Act (RS 935.51) which necessitates reporting by operators.

14 This has resulted in the issuance of documents such as the Olympic Movement Code on the Prevention of Competition Manipulation, 2016 discussed previously in the commentary to the Preamble, above. The IOC's Code of Ethics also addresses betting related offences at Olympic Games since 2006 – see Rules for the Application during the Olympic Games of Articles 7 to 10 of the IOC Code of Ethics and of the Olympic Movement Code on the Prevention of the Manipulation of Competitions, IOC Code of Ethics and other texts, p. 101.

15 See "Awareness Raising and Capacity Building", IOC, available at https://olympics.com/ioc/prevention-competition-manipulation/awareness-raising-capacity-building (November 19, 2022).

16 See KUWELKER S., DIACONU M., KUHN A., "Competition Manipulation in International Sport Federation Regulations: A Legal Synopsis", 22 *International Sports Law Journal* 2022, 1.

17 See, for example, the Federation Equestre Internationale ("FEI") wherein the IBIS is used for detection of irregular betting and thereby manipulation at the Olympic Games, and for key FEI competitions identified on a yearly basis such as World and European Championships. Alerts of unusual or irregular betting are received through IBIS as well as intelligence through its centralized mechanism system that is used for information exchange.

18 World Aquatics, which governs swimming and para-swimming, is also affiliated to IBIS, for example, but uses Sport Radar's services for betting alerts as well.

international sporting bodies on events sanctioned by them or multisport event organizers that are members of IBIS[19].

11. While some systems turn up little data and vary significantly based on the concerned sport[20], others such as Union Europeenne de Football Associations ("**UEFA**") run **Betting Fraud Detection System** ("BFDS") have seen a high number of alerts and consequently feature as admissible evidence in disciplinary proceedings[21]. The BFDS suspicious match alerts trigger, based on match jurisdiction, comprehensive investigations by the UEFA Anti-Match-Fixing Unit or the relevant national association integrity officer, frequently in conjunction with state authorities, thereby assisting closely in both detection and investigations by state authorities[22]. To this end, it may be noted that UEFA also has observer status in the follow-up committee to the Macolin Convention[23].

12. International sporting federations also liaise with countries through international bodies such as **INTERPOL** to facilitate intelligence sharing and **capacity building** for parties' domestic law enforcement, government agencies, betting operators and regulators and national sports bodies through workshops and issued documentation[24]. The Federation Internationale de Football Association ("**FIFA**") has, in partnership with the United Nations Office on Drugs and Crime, also introduced its Global Integrity Programme aimed at providing all member associations (parties' domestic national football associations) with the knowledge and tools to

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19 Memoranda of Understanding are concluded between regulators and operators with the IBIS – see "IOC's new betting intelligence system, "IBIS", hailed by International federations", *IOC News*, available at https://olympics.com/ioc/news/ioc-s-new-betting-intelligence-system-ibis-hailed-by-international-federations (November 19, 2022).

20 In case of FEI, no such alert has been received since an agreement was signed with IBIS in 2015.

21 See "IOC steps up fight for clean sport with Interpol MoU and new intelligence system", IOC News, available at https://olympics.com/ioc/news/ioc-steps-up-fight-for-clean-sport-with-interpol-mou-and-new-intelligence-system (September 2, 2023).

22 See "Integrity", *UEFA* available at https://www.uefa.com/insideuefa/news/0243-0f8e5ded692c-b45c308f173c-1000--integrity/ (November 19, 2022). UEFA has also assisted EUROPOL with cross jurisdictional investigations similarly – *id*.

23 The activities of, and provisions for the Follow Up Committee are further discussed in Chapter VIII which provides for the formation of a Follow-Up Committee to look over implementation of the Macolin Convention.

24 Such as the IOC-INTERPOL Handbook on Protecting Sport from Competition Manipulation – details available through IOC at https://olympics.com/ioc/prevention-competition-manipula tion/capacity-building-partnership-with-interpol (November 19, 2022).

fight manipulation, specifically through the decentralization of efforts with confederation-based workshops[25].

13. Hand in hand with capacity building is **prevention**, where it is of note that sports bodies such as UEFA also dedicate resources, through bodies such as their Anti Match-fixing Unit, toward **education, awareness and initiatives such as training programs**, which specifically assist member countries' national/domestic sports federations[26]. Finally, bodies such as the IOC also provide monetary support toward prevention and educational activities[27].

[25] "FIFA Launched Global Integrity Programme to strengthen fight against match-fixing", FIFA, available at https://www.fifa.com/legal/football-regulatory/media-releases/fifa-launches-global-integrity-programme-to-strengthen-fight-against-match-fixin (November 22, 2022).

[26] UEFA's App for Players which contains an e-learning module on anti-match fixing, the UEFA Fight the Fix program through the UEFA Academy which aims at stakeholder education and prevention development through leading academics – *id*.

[27] See IOC USD 10 million fund for protection of athletes – available at https://olympics.com/ioc/news/ioc-publishes-unprecedented-olympic-movement-code-for-preventing-competition-manipulation (November 22, 2022).

Article 29

by

Surbhi KUWELKER

Article 29 – Provision of information

[1] Each Party shall forward to the Secretary General of the Council of Europe, in one of the official languages of the Council of Europe, all relevant information concerning legislative and other measures taken by it for the purpose of complying with the terms of this Convention.

I. Introduction and Purpose of Article 29

1. Article 29, Article 30 and Article 31, forming Chapter VIII of the Macolin Convention, seek to put into place **provisions aiming to ensure the effective implementation** of the Macolin Convention by the parties to the Macolin Convention[1].

2. In this vein, the Explanatory Report states that the purpose behind the inclusion of Article 29 in specific is not primarily to check the effectiveness of the Macolin Convention but, **through the offices of the Secretary General, to exchange information and experiences between parties and observers**[2].

3. As has been observed in prior Chapters, the offence of competition manipulation has become increasingly cross-jurisdictional in its reach[3] and regulation or counter/measures and prosecution thereof operate at various levels (sporting bodies, national law and international efforts)[4]. In this

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1 Explanatory Report, para 212.

2 Explanatory Report, para 213.

3 See Explanatory Report, para. 4, CHAPPELET J., VERSCHUUREN P., *Chapter 28: International Sports and Match Fixing,* The Business and Culture of Sports (Gale: 2019) available at https://serval.unil.ch/resource/serval:BIB_A33DEABE8CB9.P001/REF accessed December 14, 2022, at 431 and 432.

4 There has been documentation thereof across various reports, see, for example, Several international studies documented this phenomenon, see, for example, KEA, *Match-fixing in sport: A mapping of criminal law provisions in EU 27* (2012); various UNODC

light, the above purpose of Article 29, as stated in the Explanatory Report, gains even more significance.

II. The Contents of Article 29

A. Relevant information

4. The Macolin Convention, under Article 30[5], provides for the establishment of a **Follow-up Committee** to implement monitoring of the Macolin Convention. It is this Follow-up Committee which **may specify the type of information, frequency and methods of gathering information**[6], which would then be the 'relevant information' that each party shall have to forward to the Secretary General under Article 29.

5. As of the date of writing, the Macolin Committee, comprising of representative of parties to the Macolin Convention and Observers, has been set up to monitor implementation of the Macolin Convention. It first met on November 24 and 25, 2020, and has had 5 meetings in total, with 2 more scheduled for 2023[7]. Thus far, across the documented meetings of the Macolin Committee, there has been no precise specific direction on such information gathering specific to Article 29[8].

reports, including the latest *Global Report on Corruption in Sport*, 2021 as well as their prior reports, as well as academic articles including VAN ROMPUY B., T.M.C. Asser Institute, *The Odds of Match Fixing: Facts & Figures on the Integrity Risk of Certain Sports* Bets, 2015.

5 Discussed hereafter in the commentary to Article 30.

6 Explanatory Report, para 212; see also "Follow-up Committee", available at https://www.coe.int/en/web/sport/follow_up_committee (December 12, 2022).

7 *Id*.

8 See activities of Follow-up Committee meetings as available here https://www.coe.int/en/web/sport/follow_up_committee#{%22109592386%22:[3]} (December 13, 2022).

6. Yet, in its third[9], fourth[10] and fifth[11] meetings, the Follow-up Committee's lists of decisions published by the Council of Europe indicate discussions on issues of sharing of information (though not specific to implementation measures and communication with the Secretary General under this article) and specifically in light of protection needed under applicable data protection regulations. In its third meeting, the Follow-up Committee supported the adoption of the Macolin Data Protection Principles[12], jointly with the Committee of Convention 108, providing further guidance on the implementation at operational level of the data protection principles, in specific case studies touching, for instance, upon the regime of international data transfers or the sharing of information between stakeholders[13].

7. Such information is to be supplied **in one of the official languages** of the Council of Europe. These languages, at the time of writing, are English and French[14].

B. Responsibility for provision of information

8. The information to be conveyed under the Macolin Convention or as directed by the Macolin Committee is to be by the parties and regarding **legislative or other measures** taken by them toward implementation of the Macolin Convention. Legislative measures would, presumably, include codification of manipulation related offences, and particularly as crimes, along with related sanctions within domestic law.

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9 See 'Exchange of Information', under List of Decisions, 3rd meeting, Follow-up Committee on the Manipulation of Sports Competitions (T-MC), T-MC(2021)19, Strasbourg, October 12, 2021 available at https://rm.coe.int/t-mc-2021-19-list-of-decisions-3rd-meeting/1680a44088 (December 13, 2022), p. 1.

10 See Decision 6, under List of Decisions, 4th meeting, Follow-up Committee on the Manipulation of Sports Competitions (T-MC), T-MC(2022)3, Strasbourg, April 7, 2022 available at https://rm.coe.int/t-mc-2022-3-list-of-decisions-4th-meeting-20220408/1680a 6206f (December 13, 2022), p. 1.

11 See Decision 10, under List of Decisions, 5th meeting, Follow-up Committee on the Manipulation of Sports Competitions (T-MC), T-MC(2022)9, Strasbourg, October 20, 2022 available at https://rm.coe.int/t-mc-2021-19-list-of-decisions-3rd-meeting/1680a 44088 (December 13, 2022), p. 1.

12 Adopted by the Group of Copenhagen on June 5, 2020 (Strasbourg), T-MC (2020)55 and discussed in the commentary above under Article 14.

13 *Supra* note 9.

14 As available at https://www.coe.int/en/web/about-us/did-you-know (December 13, 2022).

Article 30

by

Surbhi KUWELKER

Article 30 – Convention Follow-up Committee

1 For the purposes of this Convention, the Convention Follow-up Committee is hereby set up.

2 Each Party may be represented on the Convention Follow-up Committee by one or more delegates, including representatives of public authorities responsible for sport, law enforcement or betting regulation. Each Party shall have one vote.

3 The Parliamentary Assembly of the Council of Europe, as well as other relevant Council of Europe intergovernmental committees, shall each appoint a representative to the Convention Follow-up Committee in order to contribute to a multisectoral and multidisciplinary approach. The Convention Follow-up Committee may, if necessary, invite, by unanimous decision, any State which is not a Party to the Convention, any international organisation or body, to be represented by an observer at its meetings. Representatives appointed under this paragraph shall participate in meetings of the Convention Follow-up Committee without the right to vote.

4 Meetings of the Convention Follow-up Committee shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held as soon as reasonably practicable, and in any case within one year after the date of entry into force of the Convention. It shall subsequently meet whenever a meeting is requested by at least one third of the Parties or by the Secretary General.

5 Subject to the provisions of this Convention, the Convention Follow-up Committee shall draw up and adopt by consensus its own rules of procedure.

6 The Convention Follow-up Committee shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

I. Introduction and Purpose of Article 30

1. As provided for under paragraph 1, a 'Follow-up Committee' was set up to **monitor the implementation of the Macolin** Convention by its parties[1] – after its first meeting, held on November 24 and 25, 2020, its **main tasks** were decided to be the following[2] –

- Assessing the compliance of parties' legislation, policies and practices with the Macolin Convention;
- Making recommendations to the parties on measures to ensure efficient co-operation between the relevant public authorities, sports organisations and betting operators;
- Preparing opinions to the attention of the Committee of Ministers of the Council of Europe; and
- Promoting the Macolin Convention and informing relevant stakeholders and the public about the activities undertaken within the framework of the Macolin Convention[3].

II. The Contents of Article 30

A. Constitution of the Follow-up Committee

2. In accordance with the provisions of Article 30, **each party to the Macolin Convention shall appoint a representative or representatives to the Follow-up Committee**, and each party shall also be free to appoint representatives of public authorities responsible for the sport, betting

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1 See Article 1.1 of the Rules of Procedure of the Follow-up Committee on Manipulation of sports competitions as adopted are available here – https://rm.coe.int/t-mc-2020-57-7-t-mc-follow-up-committee-rules-of-procedure/1680a080fe (December 20, 2022) adopted on November 25, 2020 (T-MC(2020)57.7) which makes reference to Article 31.1.

2 See details as available for 'Follow-up Committee' at https://www.coe.int/en/web/sport/follow_up_committee#{%22109592386%22:[3] (December 20, 2022).

3 See also the Agenda adopted in T-MC (2020)67.5, referred to in the List of Decisions, 2nd Meeting, the Follow-up Committee to the Macolin Convention, (T-MC), T-MC(2021)8, Strasbourg, June 24, 2021, available at https://rm.coe.int/t-mc-2021-8-en-list-of-decisions-2nd-follow-up-committee-meeting-23-24/1680a2f5c7 (December 13, 2023), p. 1; further details on the functions of the Follow-up Committee shall be discussed in the commentary to Article 32.

regulation and/or law enforcement (police, justice)[4]. Parties may provide that such persons be one or more delegates of the highest possible rank in the fields relevant to the Macolin Convention including, but not limited to, representatives of public authorities responsible for sport, law-enforcement, betting regulation or sport organisations, given the objectives of the Macolin Convention[5].

3. Additionally, the **Parliamentary Assembly of the Council of Europe as well as other relevant Council of Europe intergovernmental committees shall each appoint, at the invitation of the Follow-up Committee, a representative** in order to contribute to a multisectoral and multidisciplinary approach to implementation of the Macolin Convention[6].

4. Finally, akin to other monitoring mechanisms (other examples being the Committee of the Parties responsible for the implementation of the Convention of the Council of Europe on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health[7]), paragraph 3 of this article provides that the Convention Follow-up Committee **may invite, by unanimous decision, any state which is not a party to the Macolin Convention or any international organisation or body to be represented at its meetings as an observer**[8]. The International Olympic Committee, INTERPOL and GLMS were granted observer status in the Follow-up Committee's first meeting in November, 2020[9]. UEFA and FIFA were granted this status in the 2nd meeting[10].

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4 Para 2 of Article 30 and Explanatory Report, para 214.

5 Article 1 of the Rules of Procedure of the Follow-up Committee – the adopted Rules of Procedure of the Follow-up Committee on Manipulation of sports competitions as adopted are available here – https://rm.coe.int/t-mc-2020-57-7-t-mc-follow-up-committee-rules-of-procedure/1680a080fe (December 20, 2022) adopted on November 25, 2020 (T-MC(2020)57.7).

6 Para 3, Article 30 and Article 6.1 of the Rules of Procedure of the Follow-up Committee, *supra* note 5.

7 CETS No. 211 of 2011.

8 Para 3, Article 30. Observers are appointed for a period of two years after which such observership may be renewed.

9 Decision 4 in List of Decisions, 1st meeting, Follow-up Committee on the Manipulation of Sports Competitions (T-MC), T-MC(2020)82, Strasbourg, November 24-25, 2020 available at https://rm.coe.int/t-mc-2022-3-list-of-decisions-4th-meeting-20220408/1680a6206f (December 13, 2023), p. 2.

10 See decision on 'Pending requests for observer status' in List of Decisions, 2nd meeting, Follow-up Committee on the Manipulation of Sports Competitions, *supra* note 3, p. 1.

5. As stated in the Explanatory Note, the Follow-up Committee **considered and invited certain bodies to participate** in the 1st meeting, including bodies such as Group of States against corruption (GRECO), Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) and the Committee of the Convention for the protection of individuals with regard to automatic processing of personal data (Convention 108)[11]. Enlarged Partial Agreement on Sports (EPAS) was invited as a participant in the 2nd meeting[12]. Since, each meeting has included up to 30 participants and observers.

6. This is considered to be an important feature of the Follow-up Committee – **it enables the Follow-up Committee to benefit, where appropriate, from additional expertise** and experience of organisations already involved in the fight against manipulation of sports competitions or other relevant activities[13].

B. Meetings of the Follow-up Committee

7. The Macolin Convention specified that its Follow-up Committee was to hold its first meeting at the request of the Secretary General of the Council of Europe, within one year from the entry into force of the Macolin Convention. Subsequently, it is to meet at the request of at least one third of the Parties or the Secretary General[14]. Accordingly, it may be noted that the Follow-up Committee has **met five times since November 2020 with the next meetings, the 6th and 7th, scheduled for 2023**[15]**.**

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11 Explanatory Report, para 215 as well as decision 5 in List of Decisions, 1st meeting, Follow-up Committee on the Manipulation of Sports Competitions, *supra* note 9.

12 See "Enlarged Partial Agreement on Sports (EPAS)", in List of Decisions, 2nd meeting, Follow-up Committee on the Manipulation of Sports Competitions (T-MC), T-MC(2021)8, Strasbourg, June 24, 2021, available at https://rm.coe.int/t-mc-2021-8-en-list-of-decisions-2nd-follow-up-committee-meeting-23-24/1680a2f5c7 (December 13, 2023), p. 1.

13 Explanatory Report, para 215.

14 Para 4 of Article 30 and Explanatory Report para 216.

15 See details as available at https://www.coe.int/en/web/sport/follow_up_committee#{%22109592386%22:[4]} (December 12, 2023).

C. Procedure of the Follow-up Committee

8. Under paragraph 5 of Article 30, the Follow-up Committee is to adopt its **own rules of procedure** and did so in its 1st meeting, held in November, 2020[16]. It will be **assisted by the Secretariat of the Council of Europe** in carrying out its functions[17]. Under the adopted rules, certain **Advisory or Ad-hoc groups may also be appointed**, for instance, specific to a major sporting event, to undertake certain tasks which the entire Follow-up Committee is unable to perform[18].

9. Finally, under paragraph 2 of Article 30, it is stated that **each party shall have one vote**[19], as is also confirmed in the adopted Rules of Procedure[20]. Participants and observers, as seen above, may participate in the meetings but shall have no right to vote[21].

16 Rules of Procedure of the Follow-up Committee, *supra* note 5.

17 Explanatory Report, para 217.

18 See Article 5.1 of the Rules of Procedure of the Follow-up Committee, *infra* note 8.

19 Para 2 of Article 30, and Explanatory Report, para 214.

20 See Article 16.1 of the Rules of Procedure of the Follow-up Committee, *supra* note 5.

21 See Articles 6.2, 7.1 and 17.1, of the Rules of Procedure of the Follow-up Committee, *supra* note 5.

Article 31

by

Surbhi KUWELKER

Article 31 – Functions of the Convention Follow-up Committee

1 The Convention Follow-up Committee is responsible for the follow-up to the implementation of this Convention.

2 The Convention Follow-up Committee shall adopt and modify the list of sports organisations referred to in Article 3.2, while ensuring that it is published in an appropriate manner.

3 The Convention Follow-up Committee may, in particular:

a make recommendations to the Parties concerning measures to be taken for the purposes of this Convention, in particular with respect to international co-operation;

b where appropriate, make recommendations to the Parties, following the publication of explanatory documentation and, after prior consultations with representatives of sports organisations and sports betting operators, in particular on:

– the criteria to be met by sports organisations and sports betting operators in order to benefit from the exchange of information referred to in Article 12.1 of this Convention;

– other ways aimed at enhancing the operational co-operation between the relevant public authorities, sports organisations and betting operators, as mentioned in this Convention;

c keep relevant international organisations and the public informed about the activities undertaken within the framework of this Convention;

d prepare an opinion to the Committee of Ministers on the request of any non-member State of the Council of Europe to be invited by the Committee of Ministers to sign the Convention in pursuance of Article 32.2.

4 In order to discharge its functions, the Convention Follow-up Committee may, on its own initiative, arrange meetings of experts.

5 The Convention Follow-up Committee, with the prior agreement of the Parties concerned, shall arrange visits to the Parties.

I. Introduction and Purpose of Article 31

1. For the purpose of the Macolin Convention's monitoring framework, the Macolin Convention Follow-up Committee **is responsible for the follow-up of its implementation** and thus carries out several functions, which are specified in Article 31[1]. The details of such functions are looked at in section II, below.

2. In addition to the functions laid down in Article 31, as noted in the commentary to Article 30 above, the Follow-up Committee, which held its first meeting on November 24-25, 2020, **has taken upon itself[2] the tasks of** assessing compliance of parties' legislation, policies and practices with the Macolin Convention, making recommendations to the parties on measures to ensure efficient co-operation between the relevant public authorities, sports organisations and betting operators, preparing opinions to the attention of the Committee of Ministers of the Council of Europe; and promoting the Macolin Convention and informing relevant stakeholders and the public about the activities undertaken within the framework of the Macolin Convention[3].

II. The Functions of the Follow-up Committee

3. Article 31, under its second and third paragraphs, continues to lay down the scope of functions that the Follow-up Committee may carry out. The second paragraph deals with making and modifying a list of sport organizations for the purpose of identification and setting common grounds for where manipulation might take place and the third paragraph and its sub-parts refer to the ancillary functions of the Committee.

1 Article 31, para 1 and Explanatory Report, para 218.

2 See details of functions as listed on the website of the agenda of the Follow-up Committee, as mentioned in T-MC (2020)67.5.

3 As available at https://www.coe.int/en/web/sport/follow_up_committee (December 18, 2022).

A. Modification of List of Sport Organizations

4. Article 31.2 states that the **Follow-up Committee shall adopt and amend the list of sports organisations referred to in Article 3.2 of the Macolin Convention**, while ensuring that it is published in an appropriate manner. The definitions of sports competitions and sports organisations as specified within the Macolin Convention[4] refer to such a list, in turn to be made under this Article 31, whose adoption and publication are essential for the implementation of the Macolin Convention[5].

5. The Follow-up Committee **in its meeting of October 12, 2021, adopted such a List of Sports Organizations[6].** At the beginning of the document, reference is made to Articles 3's definitions of 'sport competition' and 'sport organization' as well as to Article 31.2, such reference adding emphasis that the Follow-up Committee could both adopt and 'modify', by reviewing at any time, such list, so that it may have "*a dynamic and evolutive nature to reflect the fluid nature of the sports ecosystem which is in constant evolution.*"[7] Thus, this list is not exhaustive[8]. The list also includes international federations as well as private leagues/events, so as to, *first*, reflect the identification of areas wherein governments consider competition manipulation needs combatting in accordance with the Macolin Convention, stressing that such manipulations are not solely betting-related manipulations; and *second,* ensure common understanding among parties of which such bodies and events need focus[9].

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4 Within Articles 3.1 and 3.2 respectively – see commentary to Article 3 above.

5 Explanatory Report, para 219.

6 See "List of Sports Organizations: taken into account to identify sport events falling within the scope of application of the Macolin Convention", T-MC(2021)18rev available at https://rm.coe.int/t-mc-2021-18-en-sports-organisations/1680a41399 (December 15, 2022), at p. 3 onward.

7 *Ibid*., p. 1. The document detailing the list also states detailed criteria involved in selecting such organizations, which includes most important federations governing sport, those organizing events (professional organizations and leagues), some unrecognized but part of the world 'sports movement' and that 'may be subject to manipulation', leaving out those already governed by an identified federation, those organizing amateur/community events – mere economic weight, sporting stake, visibility and relevance for betting is insufficient. Special mention is made of e-sports and its rapid growth, races involving animals (horses and greyhounds, where human participation was not the main focus) which are excluded at the moment – *ibid*., p. 2.

8 *Supra* note 6, p. 1.

9 *Supra* note 6, p. 1.

6. The list of sports organisations will mainly be published on the website of the Enlarged Partial Agreement on Sport (EPAS)[10].

B. Other functions of the Follow-up Committee

7. Other functions of the Follow-up Committee are noted in paragraph 3 of Article 31.

8. Under Article 31.3.1, the Follow-up Committee **may address recommendations to the parties, and in particular, with respect to international co-operation**. The Explanatory Report elaborates that, where appropriate, these recommendations are to be furnished in co-ordination with other relevant bodies of the Council of Europe which prepare recommendations on these or related issues, an example provided being the Group of States Against Corruption (GRECO)[11]. It may be noted that, as provided in Article 30, such bodies may be invited to participate in the meetings of the Follow-up Committee, with up to 30 such external participants and observers being part of meetings previously held[12], and have included institutional exchanges with bodies such as the United Nations Organization on Drugs and Crime[13].

9. Under Article 31.3.2, the Follow-up Committee may, following prior consultations with representatives of sports organisations and sports

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10 So specified in Explanatory Report, para 219. The EPAS provides a platform for intergovernmental sports co-operation between the public authorities of its member states, encouraging dialogue between them, federations and not-for profit organizations.

11 Explanatory Report, para 220; see footnote 10 in KEA Report on Match-fixing in Sport: A mapping of criminal law provisions of EU27, March 2012 https://ec.europa.eu/assets/eac/sport/library/studies/study-sports-fraud-final-version_en.pdf (December 16, 2022), p. 18, which states that in 1999 the Council of Europe established the GRECO to monitor States' compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure / available at; see also Council of Europe/GRECO, "Corruption in Sport", presentations and summary record, Strasbourg, December 16, 2009, p. 28.

12 See, for example, remote participation of over 30 members and 11 in person at Strasbourg in April, 2022 for the 4th meeting – details available at https://www.coe.int/en/web/ sport/follow_up_committee#{%22109592386%22:[3]} (December 17, 2022); in the last meeting held in October 2022.

13 See Decision 14 on "Inter-Institutional Exchange with UNODC", in List of Decisions, 5th meeting, Follow-up Committee on the Manipulation of Sports Competitions (T-MC), T-MC(2022)9, Strasbourg, October 20, 2022 available at https://rm.coe.int/t-mc-2022-9-en-list-of-decisions-5th-t-mc-meeting-20-10-2022/1680a8aeff (December 13, 2023), p. 3.

betting operators, where appropriate, **make recommendations to parties to the Macolin Convention on the conditions to be met by sports organisations and sports betting operators to benefit from the exchange of information** referred to in Article 12.1 of the Macolin Convention, whereby each party is to 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[14].

10. In addition, recommendations may be made on other ways to enhance **operational co-operation between the relevant public authorities, sports organisations and betting operators**, as mentioned in the Macolin Convention[15]. The Explanatory Report provides examples of such situations – for instance, the criteria relating to the restriction of the supply of sports betting mentioned in Article 9.1.b of the Macolin Convention, the definition of irregular sports betting (for example, inconsistent with usual or anticipated patterns of the specific market) or the definition of suspicious sports betting (for example, reliable and consistent evidence)[16]. The drafting of specific guidelines pertaining to Article 9.1.b were considered by the Follow-up Committee in its meeting of October, 2022[17]. In the same meeting, specific to ratifications, the efforts to be made to encourage the status of signatures and ratifications both in Europe and beyond[18] were also noted.

11. Under Article 31.3.3, the Follow-up Committee may also **keep relevant international organisations and the public informed about the activities** undertaken within the framework of the Macolin Convention[19]. It may be noted that the Follow-up Committee, on the other hand, also pointedly makes note of developments across international organizations

14 See commentary to Article 12 above.
15 Article 31, para 3, part 2.
16 Explanatory Report, para 221.
17 See Decision 7, on "Non-Competitive Matches and Illegal Betting", in List of Decisions, 5th Meeting, Follow-up Committee on the Manipulation of Sport Competitions, *supra* note 13, p. 2.
18 *Id*.
19 Article 31, para 3, part 3; Explanatory Report, para 222.

and states that impact its own activities[20], including ratification related developments[21].

12. Finally, under Article 31.3.4, the Follow-up Committee is to also **prepare opinions to be sent to the Committee of Ministers on applications from non-member states** of the Council of Europe asking to be invited by the Committee of Ministers to sign the Macolin Convention[22]. This last function refers to non-member states making such a request pursuant to Article 32.2 of the Macolin Convention, which talks about the Macolin Convention being open for signature by any other non-member state of the Council of Europe on invitation by the Committee of Ministers, discussed in the commentary hereafter[23].

C. Facilitative Functions

13. Article 31 also provides that for facilitating execution of its functions, which are examined more closely in section II below, the Follow-up Committee may, on its own accord, **arrange for a meeting of experts connected to such function**[24] or, with the prior agreement of the concerned parties, arrange visits to such jurisdictions[25]. Instances of learnings through experts, albeit not through a meeting specifically dedicated to this purpose, may be seen in the involvement of experts on data protection, for instance in the Follow-Up Committee's meeting in October, 2022[26].

14. The Explanatory Report explains that the intention behind the inclusion of these facilitative functions is to use a mechanism akin to having a **"peer review"**, which allows for examination by other (external) parties of one party's performance or practices in a particular area, for

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20 See Decision 9, on "Recent Developments at International and National Level", in List of Decisions, 5th Meeting, Follow-up Committee on the Manipulation of Sport Competitions, *supra* note 13, p. 2.

21 See Decision 5, on "Status of Signatures and Ratifications", in List of Decisions, 5th Meeting, Follow-up Committee on the Manipulation of Sport Competitions, *supra* note 13, p. 1.

22 Article 31.3.4; Explanatory Report, para 222.

23 Explanatory Report, para 222; see commentary to Article 32.2.

24 Article 31, para 4, and Explanatory Report, para 223.

25 Article 31, para 5, and Explanatory Report, para 223.

26 See Decision 6, on "Information Sharing and Data Protection", in List of Decisions, 5th Meeting, Follow-up Committee on the Manipulation of Sport Competitions, *supra* note 13, p. 2.

instance, through visits or hearings. The objective of this exercise is to help such a party under review improve its policymaking, adopt best practices and comply with established standards and principles[27].

15. An example cited to emulate in this regard is that of the Organization for Economic Cooperation and Development (OECD), where there is an exchange of experience to address issues of common interest or concern to ensure implementation of common OECD agendas. Through such reviews, each member's development co-operation system is reviewed and assessed by the OECD's Development Assistance Committee approximately every five years, recommending improvements based on trends and lessons and follow-up processes to ensure that these are translated into policies, programmes and practices at the domestic level[28].

[27] Explanatory Report, para 224.

[28] See 'Lessons from Peer reviews', OECD, available at https://www.oecd.org/dac/peer-reviews/lessons-peer-reviews.htm#:~:text=Through%20peer%20reviews%2C%20each%20member's,and%20practices%20of%20the%20member (December 19, 2022).

Article 32

by

Madalina DIACONU

Article 32 – Signature and entry into force

1 This Convention shall be open for signature by the member States of the Council of Europe, the other States Parties to the European Cultural Convention, the European Union and the non-member States which have participated in its elaboration or enjoying observer status with the Council of Europe.

2 This Convention shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a nonmember State to sign the Convention shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by a unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers, after consulting the Convention Follow-up Committee, once established.

3 This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

4 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five signatories, including at least three member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraphs 1, 2 and 3.

5 In respect of any signatory State or the European Union which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Convention in accordance with the provisions of paragraphs 1, 2 and 3.

6 A Contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Convention Follow-up Committee in a manner to be decided by the Committee of Ministers after consultation with that Party.

Commentary on Article 32

1. The entire Chapter IX (Final provisions) represents a **standard part of the nomenclature of international treaties**, notably the ones concluded under the auspices of the Council of Europe. Thus, with some exceptions, Articles 32 to 41 are essentially based on the **Model Final Clauses for Conventions and Agreements concluded within the Council of Europe,** which the Committee of Ministers[1] approved at the Deputies' 315th meeting, in February 1980[2].

2. One of the key features is that the Convention is open for signature by Council of Europe member States, by other States Party to the European Cultural Convention, by the European Union and by States which are not members of the Council of Europe but took part in drawing it up or enjoy observer status with the Council of Europe[3]. Indeed, given the truly transnational character of the risk of manipulation of sports competitions and the necessity of combating this threat beyond European borders, this provision allows the convention to be applied on a wider scale[4].

3. To date (February 2023), the Convention was signed by **32 States** (out of which **three – Australia, Russia[5], and Morocco – are not Members of the Council of Europe**).[6]

4. The Convention was so far **ratified by nine States**, which are: France, Greece, Iceland, Italy, Norway, Portugal, Republic of Moldova, Switzerland and Ukraine[7].

5. As to the **European Union**, its signature was effectively blocked by **Malta**, which questioned before the European Court of Justice the compatibility of the definition of illegal betting as formulated in the Convention with European law [8].

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1 https://www.coe.int/en/web/conventions/model-final-clauses (06/12/2022).

2 Explanatory Report, at 225.

3 Explanatory Report, at 226.

4 Explanatory Report, at 227.

5 For a discussion on the current status of Russia, see Commentary to Article 40.

6 See the state of signatories here: https://www.coe.int/fr/web/conventions/full-list?module=signatures-by-treaty&treatynum=215 (15/02/2023).

7 Idem.

8 Request for an opinion submitted by the Republic of Malta pursuant to Art. 218(11) TFEU, Opinion 1/14, 2014/C 315/37. This request was later withdrawn. For more details, see our commentary to Articles 30 and 31.

6. According to Art. 32 para. 4, the Convention will enter into force on the first day of the month following the expiration of a period of three months after the date on which five signatories, including at least three member States of the Council of Europe, have expressed their consent to be bound by the convention. It is thus apparent that the number of ratifications, acceptances or approvals required for the entry into force of the Convention is not very high in order not to delay unnecessarily the entry into force of the Convention but reflects nevertheless the belief that a minimum number of Parties is needed to successfully set about addressing the major challenge of combating manipulation of sports competitions[9].

7. Concretely, the Convention entered into force on the 1st of September 2019.

8. Currently, the doctrine[10] considers that the signature and ratification pace is not totally satisfactory and constitute one of the perfectible promises of the Convention.

9. Finally, Article 32 seeks to ensure the widest possible reach of the Convention, as it permits any other non-member State of the Council of Europe, which did not participate in the elaboration of the Convention, to sign it. The decision to invite such a non-member State to sign the convention is taken by the Committee of Ministers by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers, after consulting the Convention Follow-up Committee[11].

9 Explanatory Report, at 228.

10 DIACONU M., The Macolin Convention against Competition Manipulation: Promises, Achievements and Pitfalls, Swiss Review of International and European Law, 33 SRIEL (2023).

11 Explanatory Report, at 229.

Article 33

by

Madalina DIACONU

Article 33 – Effects of the Convention and relationship with other international instruments

1 This Convention does not affect the rights and obligations of Parties under international multilateral conventions concerning specific subjects. In particular, this Convention does not alter their rights and obligations arising from other agreements previously concluded in respect of the fight against doping and consistent with the subject and purpose of this Convention.

2 This Convention supplements in particular, where appropriate, applicable multilateral or bilateral treaties between the Parties, including the provisions of:

a. the European Convention on Extradition (1957, ETS No. 24);

b. the European Convention on Mutual Assistance in Criminal Matters (1959, ETS No. 30);

c. the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990, ETS No. 141);

d. the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS No. 198).

3 The Parties to the Convention may conclude bilateral or multilateral treaties with one another on the matters dealt with in this Convention in order to supplement or strengthen the provisions thereof or to facilitate the application of the principles embodied therein.

4 If two or more Parties have already concluded a treaty on the matters dealt with in this Convention or have otherwise established relations in respect of such matters, they shall also be entitled to apply that treaty or to regulate those relations accordingly. However, when Parties establish relations in respect of the matters dealt with in this Convention other than as provided for therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.

5 Nothing in this Convention shall affect other rights, restrictions, obligations and responsibilities of Parties.

Commentary on Article 33

1. This article does not call for any specific comments, following instead the standard approach in international public law[1]. Thus, in accordance with the 1969 **Vienna Convention on the Law of Treaties**, Article 33 seeks to ensure that the convention **harmoniously coexists with other treaties** dealing with matters covered also by this Convention[2].

2. In particular, the Convention supplements the provisions of Convention 24 (on extradition, entered into force in 1960), Convention 30 (on mutual assistance in criminal matters, entered into force in 1962), Convention 141 (on laundering, search, seizure, and confiscation of the proceeds from crime, entered into force in 1993) and the subsequent Convention 198 (on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, entered into force in 2008).

3. In addition, the Parties may conclude **other bilateral or multilateral agreements** in order to supplement or strengthen the application of this Convention. Obviously, when Parties establish such other instruments, they will do so in a manner that is not inconsistent with the Convention's objectives and principles[3].

4. Finally, the Convention does not alter rights and obligations arising from other agreements previously concluded, most notably on the **fight against doping**, which are consistent with the subject and purpose of this Convention[4].

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1 For a detailed comment on the law of the treaties, see DÖRR O., SCHMALENBACH K., *Vienna Convention on the Law of Treaties. A Commentary*, Springer-Verlag Berlin Heidelberg 2012.

2 Explanatory Report, at 230.

3 Explanatory Report, at 231.

4 Explanatory Report, at 232.

Article 34

by

Madalina DIACONU

Article 34 – Effects of the Convention and relationship with other international instruments

1 Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in Chapters II to VII are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality into its domestic law.

2 Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, inter alia include judicial or other independent supervision, grounds justifying the application, as well as the limitation of the scope and the duration of such power or procedure.

3 To the extent that it is consistent with the public interest, in particular the sound administration of justice, each Party shall consider the impact of the powers and procedures in these chapters upon the rights, responsibilities and legitimate interests of third parties.

Commentary on Article 34

1. Similarly to Article 33, Article 34 ensures, in particular, that the measures taken within the framework of this Convention will be subject to the conditions and safeguards provided for under domestic law and international law, specifically the **European Convention on Human Rights** (CETS 5) and the United Nations' **International Covenant on Civil and Political Rights (1966**), as well as other applicable international

human rights instruments, and whereby these conditions and safeguards shall incorporate the principle of proportionality[1].

2. Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, inter alia include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure[2].

3. For a detailed analysis on the relationship between the Convention and **human rights principles**, see the commentary on **Article 2** here above.

1 Explanatory Report, at 233.
2 Explanatory Report, at 234.

Article 35

by

Madalina DIACONU

Article 35 – Territorial Application

1 Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

2 Each Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such a territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Commentary on Article 35

1. According to international law practice, some treaties may identify or exclude, explicitly or by necessary implication, the territory(ies) of the Parties to which they relate (limited territorial application); in other cases, they may wish to apply to the activities of a Party or its nationals outside its territory (extraterritoriality)[1].

[1] For a detailed comment on the law of the treaties, see DÖRR O., SCHMALENBACH K., DÖRR O., SCHMALENBACH K., *Vienna Convention on the Law of Treaties. A Commentary*, Springer-Verlag Berlin Heidelberg 2012.

2. In the Macolin Convention, Article 35 is dedicated to these territorial issues. According to it, any contracting State or the European Union may specify the territory or territories to which this Convention shall apply. It can also choose to extend the application of this Convention to any other territory specified in a declaration addressed to the Secretary General of the Council of Europe, and for whose international relations it is responsible or on whose behalf it is authorized to give undertakings[2].

3. Evidently, the possibility of allowing for a (very) limited territorial application of the Convention may undermine the efficacy of the entire treaty; it would thus be contrary to the Convention's object and purpose for any contracting Party to exclude parts of its main territory from the convention's scope. Indeed, in international law, treaties **must have legal force in the metropolitan territory of the Parties**. Therefore, this provision is only concerned **with territories having a special status, such as overseas territories**[3].

4. To date (February 2023), no Party has opted to apply the possibilities provided for in Article 35 of the Convention, with the exception of Azerbaijan, which used this possibility to declare itself "unable to guarantee the implementation of the provisions of the Convention in its territories occupied by the Republic of Armenia (the Nagorno-Karabakh region of the Republic of Azerbaijan and its seven districts surrounding that region), until the liberation of these territories from the occupation and the complete elimination of the consequences of that occupation"[4].

2 Explanatory Report, at 235.

3 Explanatory Report, at 236.

4 See https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=215&codeNature=0.

Article 36

by

Madalina DIACONU

Article 36 – Federal Clause

1 A federal State may reserve the right to assume obligations under Chapters II, IV, V and VI of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities, provided that it is still able to co-operate under Chapters III and VII.

2 When making a reservation under paragraph 1, a federal State may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for the measures set out in Chapters III and VII. Overall, it shall provide for a broad and effective enforcement capability with respect to those measures.

3 With regard to the provisions of this Convention, the application of which comes under the jurisdiction of each constituent States or other similar territorial entities that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States of the said provisions with its favourable opinion, encouraging them to take appropriate action to give them effect.

Commentary on Article 36

1. Expectedly, the Convention contains a federal clause, whereby a federal State may reserve the right to apply the provisions of Chapters II, IV, V and VI consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities provided that it is still able to assume its obligations to co-operate under Chapters III and VII. However, the Convention provides that this provision shall not undermine the effective application of the present convention. In addition, it is the responsibility of

Parties to inform its constituent States of these provisions and to encourage them to take appropriate action to give them effect[1].

1 Explanatory Report, at 237.

Article 37

by

Madalina DIACONU

Article 37 – Reservations

1 By a written notification addressed to the Secretary General of the Council of Europe, any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it avails itself of the reservations provided for in Article 19, paragraph 2 and in Article 36, paragraph 1. No other reservation may be made.

2 A Party that has made a reservation in accordance with paragraph 1 may wholly or partially withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect on the date of receipt of such notification by the Secretary General. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date on which the notification is received by the Secretary General, the withdrawal shall take effect on that later date.

3 A Party that has made a reservation shall withdraw such reservation, in whole or in part, as soon as circumstances so permit.

4 The Secretary General of the Council of Europe may periodically ask Parties that have made one or more reservations for details about the prospects of withdrawal of such reservation(s).

Commentary on Article 37

1. Another classical provision of international public law, Article 37 specifies that the Parties may make use of the **reservations** provided for in Article 19, paragraph 2 and in Article 36, paragraph 2, only when they give their assent to the Convention. They then may withdraw such reservations as soon as possible, and they can receive requests from the Secretary

General of the Council of Europe about the prospects of withdrawal of such reservation(s)[1].

2. According to the definition contained in Article 2(1)(d) Vienna Convention on the Law of Treaties, a reservation means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby **it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State**."[2]

3. Thus, according to the law of the treaties, reservations define the content and extent of a legal obligation for a Party to a treaty, **allowing States to accommodate their specific interests in the framework of multilateral treaties**[3].

4. To date (February 2023), **France, Greece, Italy, Poland, Portugal, and Switzerland** have used the faculty of making reservations to the Convention[4].

5. For example, **France** and **Switzerland** have reserved the right not to apply Article 19 para. 1.d of the Convention, concerning jurisdiction over offenders having their nationality or habitually residing in their territory[5].

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1 Explanatory Report, at 238.

2 For a detailed comment on the law of the treaties, see DÖRR O., SCHMALENBACH K., *Vienna Convention on the Law of Treaties. A Commentary*, Springer-Verlag Berlin Heidelberg 2012.

3 See also MALGOSIA FITZMAURICE, PANOS MERKOURIS, *Treaties in Motion: The Evolution of Treaties from Formation to Termination*. Cambridge, UK: Cambridge University Press, 2020, DOI: 10.1017/9781108863407.

4 See the list here: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=215 (15/02/2023).

5 See our commentary on Article 19.

Article 38

by

Madalina DIACONU

Article 38 – Amendments

1 Amendments to articles of this Convention may be proposed by any Party, the Convention Follow-up Committee or the Committee of Ministers of the Council of Europe.

2 Any proposal for an amendment shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the Parties, the member States of the Council of Europe, non-member States having participated in the elaboration of this Convention or enjoying observer status with the Council of Europe, the European Union, any State having been invited to sign this Convention and the Convention Follow-up Committee at least two months before the meeting at which it is to be considered. The Convention Follow up Committee shall submit to the Committee of Ministers its opinion on the proposed amendment.

3 The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Convention Follow-up Committee and may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe.

4 The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5 Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the first day of the month following the expiration of a period of one month after all Parties have informed the Secretary General of their acceptance thereof following their respective internal procedures.

6 If an amendment has been adopted by the Committee of Ministers, but has not yet entered into force in accordance with paragraph 5, a State or the European Union may not express their consent to be bound by the Convention without accepting at the same time the amendment.

Commentary on Article 38

1. According to Article 38**, amendments to the Convention may be proposed by the Parties, the Convention Follow-up Committee or the Committee of Ministers of the Council of Europe**. These amendments shall then be communicated to all member States of the Council of Europe, signatories, Parties, non-member States having participated in the elaboration of the Convention, or enjoying observer status with the Council of Europe, the European Union, as well as any State having been invited to sign this convention. The Convention Follow-up Committee shall submit to the Committee of Ministers its opinion on the proposed amendment[1].

2. The amendment procedure is straightforward: the Committee of Ministers considers the proposed amendment and any opinion submitted by the Convention Follow-up Committee and may possibly adopt the amendment[2] by the **qualified (two-thirds) majority** provided for in Article 20.d of the Statute of the Council of Europe[3].

1 Explanatory Report, at 239.

2 Explanatory Report, at 240.

3 According to this article: "All other resolutions of the Committee, including adoption of the budget, of rules of procedure and of financial and administrative regulations, recommendations for the amendment of articles of this Statute, other than those mentioned in paragraph a.v above, and deciding in case of doubt which paragraph of this article applies, require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee".

Article 39

by

Madalina DIACONU

Article 39 – Settlement of disputes

1 The Convention Follow-up Committee, in close co-operation with the relevant Council of Europe intergovernmental committees shall be kept informed of any difficulties regarding the interpretation and application of this Convention.

2 In the event of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation, conciliation or arbitration, or any other peaceful means of their choice.

3 The Committee of Ministers of the Council of Europe may establish settlement procedures which may be used by the Parties to a dispute, subject to their consent.

Commentary on Article 39

1. Unsurprisingly, Article 39 provides that in the event of a dispute between Parties as to the application of this Convention, they shall seek a settlement through **peaceful means**, and that the Committee of Ministers of the Council of Europe may establish settlement procedures, the application thereof being subject to the consent of the Parties to the dispute[1].

2. Article 39 also requires that the Convention Follow-up Committee (which was established in November 2020), as well as the other relevant bodies of the Council of Europe, be informed of any difficulties regarding the interpretation and application of this Convention[2].

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1 Explanatory Report, at 241.

2 Explanatory Report, at 242.

Article 40

by

Madalina DIACONU

Article 40 – Denunciation

1 Each Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Commentary on Article 40

1. In accordance with the Vienna Convention on the Law of Treaties (1969), Article 40 provides for the possibility for any Party to denounce the convention[1].

2. In international public law, *denunciation* and *withdrawal* are used interchangeably[2] to refer to a unilateral act by which a State that is currently a party to a treaty ends its membership with that treaty.

3. In the case of multilateral agreements, denunciation or withdrawal generally **does not affect the treaty's continuation in force for the remaining parties**[3].

4. The "exit" clause of the Macolin Convention is relatively straightforward, as it allows any Party to terminate its commitments under this Convention, **at any time, through a notification** addressed to the Secretary General.

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1 Explanatory Report, at 243.

2 UN Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook* (UN Sales No E04V3 2003) ('Final Clauses Handbook') 109 ("The words denunciation and withdrawal express the same legal concept").

3 HELFER L.R., Terminating Treaties, in *The Oxford Guide to Treaties* 634-649, Duncan Hollis ed., Oxford University Press, 2012, p. 635.

5. The withdrawal becomes effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

6. As to the **legal effects** of the exit, according to the Vienna Convention on the Law of Treaties (Article 70), the termination of a treaty "releases the parties from any obligation further to perform the treaty". Termination does not, however, affect any right, obligation or legal situation of the parties created through the execution of the treaty *prior* to the date that the termination takes effect (Art 70(1)(b) VCLT).

7. To date (18.01.2023), the Macolin Convention **has not been denounced by any Party**.

8. In February 2022, 42 out of 47 CoE Member States voted for the **Russian Federation** to be suspended from CoE membership in reaction to the invasion of Ukraine. On 15 March 2022, Russia formally announced its withdrawal from the organization, and its membership was due to terminate on 31 December 2022. However, on 16 March 2022, the Committee of Ministers voted to expel Russia from the Council with immediate effect. This succession of events does not entail the withdrawal of the Russian Federation from the Macolin Convention (which was not requested), it merely means that **the Russian Federation is now one of the non-members of the Council of Europe signatories of the Convention**.

Article 41

by

Madalina DIACONU

Article 41 – Notification

The Secretary General of the Council of Europe shall notify the Parties, the member States of the Council of Europe, the other States Parties to the European Cultural Convention, the non-member States having participated in the elaboration of this Convention or enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention in accordance with the provisions of Article 32, of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Convention in accordance with Article 32;

d. any reservation and any withdrawal of a reservation made in accordance with Article 37;

e. any declaration made in accordance with Articles 9 and 13;

f. any other act, notification or communication relating to this Convention.

In lieu of the Commentary on Article 41

The contents of this Article being self-evident, we renounced commenting on it, which explains why our book is entitled "40 Commentaries of the Macolin Convention"...