

Hooliganism: The efficiency of the Swiss legal landscape

The recent violence between Russian and British supporters at Euro 2016 has demonstrated the seriousness of hooliganism in football. One of the worst events in the recent past involved a march by 'fans' on Easter Monday 2014 to the Swiss Cup Final in the Stade de Suisse in Berne, in which cars and buildings were vandalised. Five police officers were injured, material damage amounted to around CHF 40,000 and 45 people were arrested. In light of such events, the question arises as to whether the current legislative landscape is robust enough and whether enough is being done by the authorities, the clubs and the football governing bodies to combat 'fan' violence. In this article, Dr András Gurovits, Partner at Niederer Kraft & Frey, outlines the limits that clubs face in their efforts to combat hooliganism in the Swiss context, the relevant Swiss legal framework and the efficiency of the applicable rules.

Monopoly on the use of force

In accordance with the Swiss Federal Constitution, the Cantons (and, to a certain limited extent, the Federal Government) have to ensure the country's safety and to protect the population. This constitutional rule results in the 'monopoly on the use of force' by the state. Within their monopoly to use force, the Cantons are responsible for guaranteeing public order and safety on their territory. The monopoly to use force triggers the Cantons' obligation to protect the population and sets constraints on the work of private individuals in the areas of safety. Private individuals and organisations, such

as football clubs and private security firms do not have rights of intervention by force.

In addition, under Swiss law clubs do not, in general, have any right of intervention outside the stadium and the relevant adjacent areas under the control of the club (or the stadium operator). In sum, a football club in Switzerland is neither authorised to take measures aimed at ensuring public order outside a stadium, nor does it have the right to apply physical force to prevent riots within or outside the stadium as this right is exclusively reserved by the police. As a consequence of these restrictions clubs have to cooperate with the state authorities in order to ensure that the state and the club undertake all relevant measures within their sphere of competence so that the safety of the spectators and the general public is protected on match days.

The four legal pillars

Under Swiss law, the fight against hooliganism is based on four pillars: criminal law; administrative law; civil law; and the regulatory framework of football's governing bodies, i.e. the Swiss Football Association ('SFA') and the Swiss Football League ('SFL').

This legal framework is compliant with the provisions of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches which is in force in 42 countries, including Switzerland. The aim of this Convention is to develop a joint approach to tackling violence and to adopt best practices at international level. In order to strengthen security in an international context, the Swiss Federal Council very recently approved the revision of the Convention and instructed the Federal Department of Justice and

Police to sign the amendment to the Convention, which it did on 3 July 2016. A consultation paper will now be drafted and sent to the Swiss parliament by the end of 2017. The revision is not expected to affect current legislation, but is nonetheless regarded as important in the context of harmonisation of the measures undertaken by the 42 Member States to the Convention in their fight against hooliganism.

Criminal law

If at the occasion of a football game persons are injured or damage is caused to property, the relevant provisions of the Swiss Criminal Code ('SCC') apply. Such crimes would typically include assault pursuant to Article 122 and Article 123, brawling pursuant to Article 133, offences against property pursuant to Article 144, and rioting according to Article 260 of the SCC.

In order for these provisions to apply it does not matter whether the relevant acts have been committed at the occasion of a football or other sports event. These crimes are punishable according to the basic principles of the SCC and are (also) prosecuted if committed by fans before, during or after a football match.

Very recently the Swiss media reported that a football fan was sentenced to a fine of CHF 20,000 for knocking down several fans of an opposing football club. In light of the offender's income the fine was high, although in the general public's opinion imprisonment would have been the more appropriate sanction. The court, however, held that a fine was the appropriate sanction, but explained that the offender would have to go to jail in case of recidivism.

The SCC provides a framework to punish hooligans for the crimes they commit at matches. The problem faced by the police is that

offenders often manage to disappear into the crowd.

Administrative law

Administrative law provisions are in force that address hooliganism at sports events in Switzerland. Switzerland has a very federalist structure according to which every area of legislation which the Constitution does not expressly confer to the Confederation's competence remains with the Cantons. Among others, the Cantons remain competent in respect of the police and law enforcement system, which means that the Cantons are responsible for combating hooliganism.

However, as hooliganism has become a plague which can no longer be fought by the Cantons alone, in 2010 the Cantons joined forces and enacted an inter-Cantonal administrative agreement, the Concordat on Measures to Combat Violence during Sports Events ('Concordat'). The Concordat provides measures aimed at increasing security on match days.

The Concordat distinguishes measures to be taken by the police as well as those to be applied by the clubs. The former include the right and obligation of the police to, in respect of fans that due to their personal track record are regarded as potentially dangerous, (i) designate off-limit areas, which prevent the respective fan from entering the zone surrounding the stadium on match days, (ii) oblige fans to report with the police on match days, and (iii) take a fan into police custody on match days if the other measures appear to be insufficient. The Concordat also authorises the public authorities to impose on the clubs the obligation to obtain a permit before organising a match.

The Concordat also triggered the implementation of a database

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(Hoogan) identifying fans that have a track record as wrongdoers and subject to specific measures. The database is operated by the Federal police and can be accessed by the Cantonal police and customs officials (in respect of fans intending to leave the country).

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The applicable provisions grant clubs rights and obligations to increase security within the stadium. For instance, the Concordat allows the authorities to authorise private security firms commissioned by the clubs to perform admission checks and conduct clothed body searches, irrespective of any suspicion. The club can also, either on its own initiative or as recommended by an authority, issue a ban on certain people entering the stadium. Moreover, clubs may also be obliged to request proof of identity to ensure that no one is admitted who has had a stadium ban or is subject to other measures pursuant to the Concordat.

However, none of the provisions empower clubs to order measures of force to protect spectators from rioting fans. The boundaries set for the clubs in combating violence in stadiums are derived, by way of example, from the 'sample agreement concerning violence in sport' which, according to the Concordat, the clubs shall enter into with the authorities. Article 2 reads: '1 The sports club [...] is responsible for the safety in the stadium [...] and on the surrounding private area. It can delegate tasks in the area of security to the stadium operator.

2 The authority guarantees safety in the public area. It intervenes on the private premises in the surrounding area of the stadium

[...] and in the stadium itself if [...] this is agreed with the sports club [...]; there is a substantial risk to safety (for instance attacks on physical integrity); or [...] a police assignment is necessary for investigation reasons.'

It follows from the above that the state's monopoly on using force remains. If there are violent disputes in the stadium, it is the responsibility of the police to intervene, as is also the case outside of the stadium. The clubs have their hands tied with regard to measures to curb violence.

Civil law

Under civil law we have to discuss whether a club can be held liable if a person suffers an injury or damage because of the violent acts of 'fans.' Such civil law liability could, as a rule, be based on contract (i.e. the 'ticket contract' between a spectator and a club) or on tort (e.g. *vis-à-vis* a neighbour whose car or house has been damaged by violent fans on their way to or from the stadium). Liability of the clubs under civil law may also be considered a means to combat violence as the potential exposure to liability claims will usually motivate the clubs to place special emphasis on the safety of the spectators. In a nutshell, the relevant Swiss statutory provisions can be summarised as follows:

As a rule, Swiss law requires that for a club to become liable the club must be at fault, in breach of a contract or have acted with some degree of negligence. For these reasons, Swiss law would not allow a club to be held responsible for damages caused by fans outside the stadium (and the adjacent areas under the club's control). As explained above, a club does not have the right of intervention outside the stadium. As a consequence, if the club does not

intervene outside a stadium it cannot be considered as having acted negligently or deemed otherwise at fault.

If, however, a spectator or other person is damaged within the stadium, the club could, in principle, become liable for compensation based on general principles of Swiss contract and tort law. In such a case, the plaintiff would have to prove that the club did not take the appropriate precautionary measures given the circumstances and, by the same token the club could discharge itself of such liability if it demonstrates that it had taken measures appropriate to the circumstances. When assessing what is appropriate one has to acknowledge that measures that ensure complete protection against all possible incidents do not exist and cannot be expected from the club. However, clubs can be expected to take appropriate protective measures that the spectator reasonably expects. In this regard, regulations issued by the sports governing body on the topic of safety and security measures in stadiums are useful. In Switzerland, the SFL has issued very detailed security regulations that the clubs must comply with, and a court that is called upon to assess an incident would position itself in accordance with such provisions. If an organising club does not comply with these regulations, it may only be able to assert in exceptional cases that the specified measures were excessive.

Regulatory framework of the sports governing bodies



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Apart from the statutory provisions set out in Swiss law, relevant regulations issued by the sports associations contribute to combating hooliganism. Non-observance of these regulations by the clubs would not by itself trigger sanctions by the authorities, but would expose the club to sanctions by the sports governing body. Such sanctions (e.g. deduction of points or expulsion from the championship) may harm the club, so the sanction regime of the sports governing body typically serves as an effective tool to motivate clubs to implement appropriate safety measures.

In accordance with the regulations of the SFA, for instance, a club can be held liable and sanctioned if its fans cause damage within a stadium, even if no fault is attributable to the club. The range of sanctions is wide and includes a fine, annulment of the game result, defeat by forfeit, reduction of stadium capacity, a ban on playing in the home arena and expulsion from the championship. Because these rules introduce a strict liability of the clubs for the misbehaviour of their fans, they have been criticised for unfairly punishing a club, but despite such criticism these rules are being applied by the disciplinary bodies of the SFA and SFL.

Conclusion

In Switzerland, the fight against hooliganism is based on the Criminal Code, administrative law, civil law and the regulatory framework of the sports governing bodies. Because of the so-called

monopoly of the state to use force, the clubs are prevented from applying measures by force, and they are not allowed to undertake measures to protect persons and property outside the stadium and the areas adjacent to the stadium. The problem is that hooliganism continues to be a problem.

The Hoogan database provide an accurate view of the problem:

In January 2012, 544 persons were registered subject to 'active' measures under the Concordat. This number increased to 650 in July 2014 and to 820 in July 2015. It then slightly decreased to 785 in January 2016.

In January 2016, a total of 1,585 person were registered in Hoogan. This number also includes fans subject to criminal sanctions for crimes committed at sports events that are not subject to specific measures under the Concordat. While this number increased from July 2015 (1,535) and July 2014 (1,485), the number of person that were newly registered decreased to 178 against July 2015 (214).

The Hoogan database further indicates that most of the registered wrongdoers are male. As per January 2016, 1,571 males and 14 females were registered. The data also indicates that the vast majority of violent fans are between 19 and 29 years of age (77%), and 16% are between 30 and 39.

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WORLD SPORTS LAW REPORT TO RELAUNCH AS WORLD SPORTS ADVOCATE

World Sports Law Report is to be relaunched as of 1 October 2016 as World Sports Advocate. The October edition of the publication will be the first to feature a new design and the publication will soon have a new website. Subscribers will receive detailed correspondence outlining the impending changes in the lead up to October. For further information, please contact alastair.turnbull@e-comlaw.com