

Match fixing no crime

The Swiss Federal Criminal Court (*Bundesstrafgericht*) held that football players allegedly involved in match fixing cannot be subject to criminal sanctions since electronic betting systems cannot be deceived like human beings.

These players of the Swiss football clubs FC Thun and FC Gossau had been accused to having been part of an international network whose members were manipulating football games. On 13 November 2012, the Swiss Federal Criminal Court (*Bundesstrafgericht*) rendered a decision which attracted a lot of public interest. According to media releases, the Federal Criminal Court held that these three players cannot be subject to criminal sanctions for fraud in accordance with the current provisions under the Swiss Penal Code.

The relevant article 146 of the Swiss Penal Code states (tentatively translated): "Whoever, with the intent of unlawfully enriching himself or another, maliciously misleads another person by misrepresentation or concealment of facts, or maliciously reaffirms the error of another, and, thus, causes the deceived person to harm his or another's property shall be sentenced to the penitentiary of up to five years of imprisonment or to a fine...". The court explained that against this background fraud pursuant to the Swiss Penal Code requires, among others, that a human being is misled and not an electronic betting system. As in the case at hand the prosecutors' complaint focused on deception of online platforms only - but not specific persons - the court had to discharge the accused players.

As a result of this outcome, two of the accused players who had always denied to having committed any crime, were to be compensated for legal costs in the amount of CHF 16'500 and 26'000, respectively.

It seems that the Swiss Federal Council has foreseen that such kind of decision could be rendered as it had announced, a few days before the Federal Criminal Court had rendered its decision, to consider to propose an amendment to the current law and to allow to sanction so-called "sports fraud" too. The decision is not yet final, and at the date of this article it was not clear whether an appeal with the Swiss federal Court (the court of highest instance in Switzerland) will be lodged.

This decision raises a number of issues: First, it appears that the judge applying the *nulla poena sine lege* principle had no other choice than discharging the players. As long as the new law is not enacted it will be unlikely that an athlete can, under similar circumstances, be sanctioned for match fixing in Switzerland which is problematic, in particular, as a number of international sports federations are domiciled in Switzerland and corruption in sports in general is a hot topic these days. Second, does this decision mean that the players who had already been sanctioned by the national football federation and banned from playing for two years (and potentially lost money and career perspectives) will now have a claim against the federation for compensation? Third, will the fact that a state court and a football federation came to differing conclusions with respect of the same facts and behavior - i.e. "guilty" vs. "non-guilty" - have an impact on future decisions to be taken by sports federations in match fixing cases? Fourth, more particularly, can sports associations continue to have other definitions of possible misbehaviors and apply different standards of proof than the state courts?

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