

Questionnaire concerning Business, Sports & Fraud

Sports Law Commission

International Business Law Commission

Commercial Fraud Commission

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Sports and Fraud: identifying the relevant framework

1. Are there specific legal forms for sports club (e.g. specific type of company structure, association, etc.) in your jurisdiction?

In Germany, there is no specific sports law dealing with the structure/organisation of sports clubs. Sports clubs are organised in the usual legal forms under German law.

In the past, sports clubs were exclusively organised as associations.

With the sport sector becoming a huge industry many sports clubs participating in professional leagues decided to convert into corporations. In the Bundesliga, Germany's top football league, for example, only four of the 18 clubs are organised as associations (Schalke 04, FSV Mainz 05, Darmstadt 98, VfB Stuttgart) whereas in the DEL, Germany's top ice hockey league, every club is a corporation. Many of the clubs are limited liability companies (GmbH), but there are also limited partnerships by shares (KGaA) or stock corporations (AG).

Aside from professional sports, field clubs are remain organised as associations. The reason for this are regularly tax privileges, which associations enjoy according to Sec. 21 German Civil Code.

Finally, federations as the superordinate organisational structure are associations in terms of sec. 21 German Civil Code, as well.

2. How are sports clubs / players grouped? Are they administrative bodies, associations, federations etc.? Please provide a few examples.

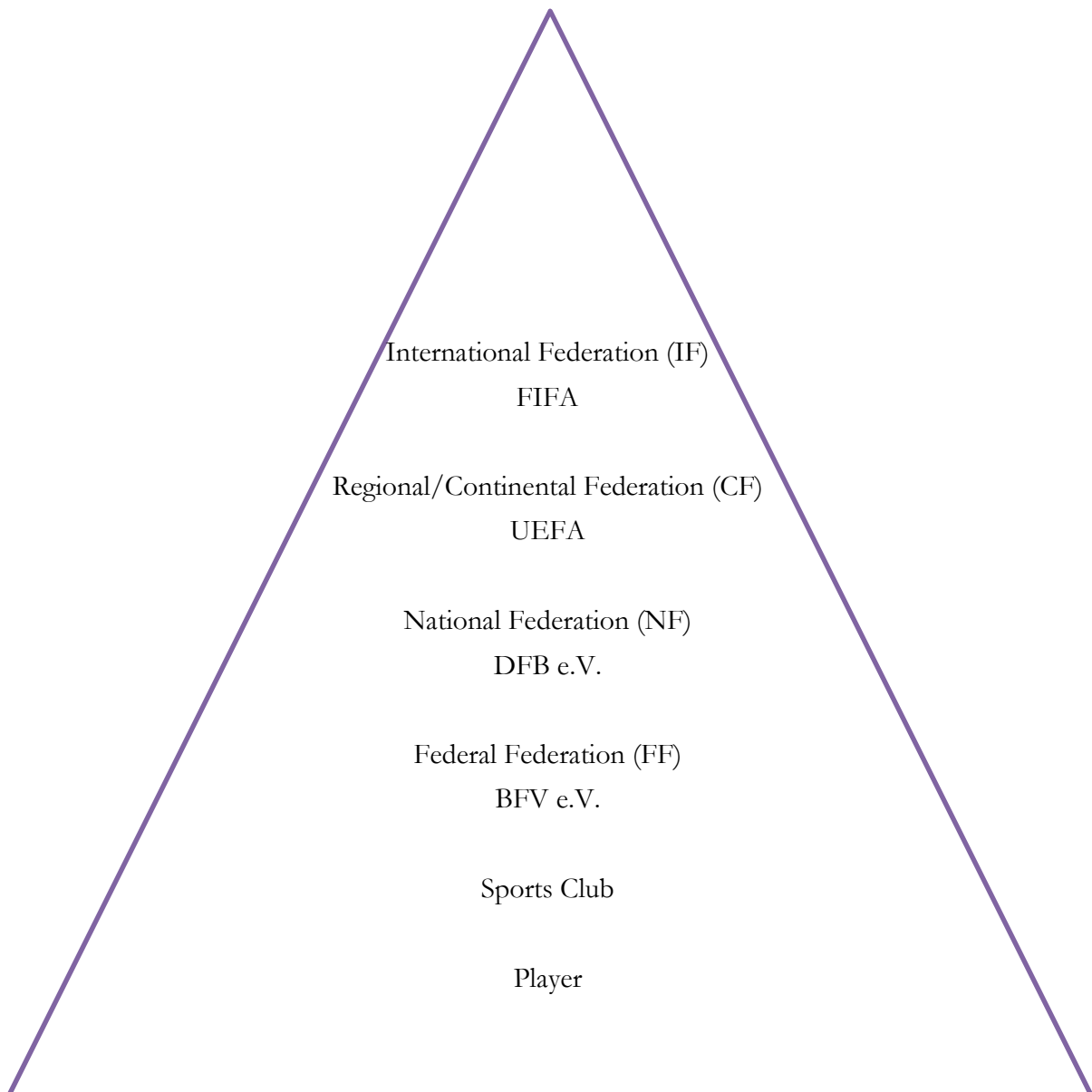
Pyramid scheme, system of indirect membership

Players as well as sports clubs are grouped in a system of indirect membership similar to a pyramid scheme.¹

At the tip of the pyramid is the international federation (“**IF**”). One level below there is often a regional federation (“**CF**”) representing the federations of several countries (“**NF**”). *IF*, *CF* and *NF* each hold the monopoly of representing the sport at that level. In Germany, due to the federal structure there is often another level below the *NF* representing this sport at the federal level (“**FF**”), once again holding the monopoly for its territory.

Except in rare cases where another level below the *FF* exists sports clubs are direct members of the *FF* whereas players are members of the sports club. In case of a

sports club being a corporation, the system of indirect membership is fulfilled either by direct membership of the player in a federation at a higher level or by indirect membership via a cooperation agreement between the corporation and the traditional association.



Players' union

In some fields of sport such as basketball,² football³ and handball⁴ some players are organised in unions. Players' unions are not all that popular and nor powerful and are almost excluded from decision-making processes.⁵

Sports support program

The German Federal Armed Forces initiated an athletics program supporting up to 744 top athletes.⁶ Top athletes in the program are members of the German Federal Armed Forces and enjoy privileges concerning their working hours. Members of the sports promotion program spend 70 % of their working hours on training and competition.⁷

3. What is the relevant regulatory framework for sports associations/clubs/etc. in your jurisdiction? Is State legislation applicable or is self-regulation applicable? Please provide a few examples.

There is no specific law pertaining to sports clubs, therefore general provisions are applicable. Depending on the structure of the sports club, the provisions of the German Civil Code for associations are relevant. If the sports club is a corporation the general provisions for such corporations are applicable (German Stock Corporation Act, German Limited Liability Companies Act).

Association

Associations enjoy the privilege of organisational autonomy which allows them to set their own rules (articles of association) concerning the rights and duties of its members and the internal organisation of the association.⁸ The privilege of organisational autonomy is based on the fundamental right of freedom of association.⁹

The organisational autonomy is limited by the principles of private autonomy as well as the mandatory provisions. Mandatory provisions of corporate law for example are the principle of equal treatment and officer's liability (Sec. 31 German Civil Code).¹⁰ Associations need to have a democratic internal structure which means that the general meeting must make major decisions. It is not permitted to leave those decisions to the board of the association.¹¹

Corporation

Sports clubs organised as corporations must meet the mandatory requirements of the applicable acts.

In Germany, it is not possible for a football club in the top leagues organised as a corporation to obtain an official license if more than 50 % of the voting rights are not kept by the parent company in form of an association ("50+1 rule").¹² As an exception to this rule such an official license may be granted upon application if the corporation supported the association for more than 20 years,¹³ which is a concession to Bayer AG (Bayer 04 Leverkusen) and Volkswagen AG (Vfl Wolfsburg). In

consequence, a dominant influence of an investor like Roman Abramovitsch at FC Chelsea requires a previous support for more than 20 years. Thus German football clubs are not that interesting for investors.

4. Are there any sport-specific risks that you may think of? Are there specific legislation for such risks? The following should be considered:

- Finance in connection with donations or subventions, misappropriation of money;
- Decision making process: nepotism, corruption regarding election or selection of the site for a big sport event;
- Health-issues (doping);
- Competition: match fixing, etc.;
- Online gambling.

Sport-specific risks

In a lot of associations the decision making process is very opaque although the sports sector has become a huge industry. The decisions are of immense economic and political importance. Due to the fact that only a few decision-maker vote in secret ballots there is a higher risk on influence by third parties.¹⁴ In consequence the decision making processes concerning awarding of the football world championships are investigated.

Athletes represent their county in international competitions. The success of the athletes influences the State's reputation. Insofar governments are interested in good results of their athletes. In the past, governments enforced the performance of their athletes and did not shrink from an extensive system of doping.¹⁵ On the other side, anti doping agencies are financially supported by the government to ensure a healthy and clean sport.¹⁶ The financial resources of the NADA are nevertheless insufficient to provide a complete control system.

Match-fixing is a result of the sports sport becoming a huge industry. The most recent suspected cases of match-fixing have in common that dubious backers are trying to gain money by betting. Various sports seem to be affected like tennis,¹⁷ handball¹⁸ or football.¹⁹ Match-fixing is not a new phenomenon. In the season 1970/1971 two clubs tried to prevent relegation by match fixing.²⁰ They paid a lot of bribes in order to win the decisive matches.

Specific legislation

In Germany, there are no sport specific regulations concerning those problems except the *Gesetz gegen Doping im Sport* (Anti-doping law).²¹ Besides doping all other

sport specific risks are tried to handle with the general provisions although those general provisions lead to problems in the application to specifics of sport.²²

The case for compliance

5. How are risks to be evaluated with regard to corruption, fraud and other white-collar crimes? Are there internal control systems? Transparency criteria? Compulsory controls by auditors / administrative?

Risk Evaluation

The pure risk of white-collar crimes (especially corruption and game manipulation) in the German sports industry with regard to both individual athletes and sports associations is substantial, although the number of “black sheep” committing such crimes is believed to be rather low compared to the number of individuals involved in the sports industry.

The high risk of white-collar crimes is principally based on the fact that the sports sector has become an industry in which billions of Euros are involved at various levels. Individuals as well as associations may be drawn to getting “a piece of action” directly (e.g. through profitable earn-outs in the betting industry, attractive prizes) or indirectly (e.g. higher licensing and/or sponsorship fees).

- The **individual athlete** may be accepting bribes in order to manipulate a game (which often goes hand in hand with fraud where betting is involved, *see below*).

Accepting bribes may be attractive particularly in the lower leagues because the bribe may be higher than the actual salary or – in case of a competition – than the actual prize money itself.

- There may also be a **bettor** who knows that a game has been manipulated and places major bets on a certain outcome of a game/match (this risk has dropped significantly in Germany as the betting industry is strictly regulated and monitored for suspicious betting behaviour).
- Finally, there may be **sports associations** bribing officials in order to influence certain decisions. A prominent example are the accusations that the *Deutscher Fußball Bund e.V.* (German Football Association, “**DFB**”) is currently confronted with in view of the FIFA tendering process for hosting the World Cup 2006 in Germany.

The risk of discovery has generally been rather low.

There are primarily two aspects which facilitate white collar-crimes in the sports industry more than in other sectors. One is the close interrelationship between the stakeholders as well as responsible persons (e.g. sponsorship events; long-lasting “friendships” in management level and the tightly knit and nearly exclusive social system). The second factor is that responsibilities within an association are not always clearly defined, thus lowering the risk of individuals being held personally responsible for their misconduct.

The latter is owed to the fundamental right of organizations to structure their organizational set-up including the responsibilities mainly freely (Art. 9 *Grundgesetz*; German Constitution, “**GG**”).

Moreover, it has long seemed that sports associations, where misconduct had been detected, reacted only case-by-case without taking further investigations as well as steps to avoid future misconduct. This attitude has changed in many branches of the sports business – not least due to the pressure by sponsoring companies, politics and the general public – and the awareness of the importance of compliant behaviour has grown as can be taken from the increase of internal control systems being established.

Internal control systems

The decision to install an internal control system lies with the sports association itself.

Over the last ten years, however, the awareness of the importance of compliant behaviour has risen and an increasing number of sports associations have installed internal control systems to avoid and discourage misconduct.

Evaluating all of the internal structures and compliance rules of every sports organization would go beyond the scope of this report. We will therefore focus on three large players in German sports and their internal control systems (not anti-doping control systems, which are often dealt with separately):

- *Deutscher Fußball-Bund e.V.* (German Football Association; “**DFB**”),
- *Deutscher Olympischer Sportbund* (German Olympic Sports Confederation, “**DOSB**”) and
- *Bob- und Schlittenverband Deutschland e.V.* (German Bobsleigh and Toboggan Association, “**BSD**”)

The *DFB*, for example, has established a control committee (*Kontrollausschuss*), which investigates, inter alia, suspicious behaviour (e.g. match-fixing, manipulation or bribery) internally.²³ Furthermore, it has appointed an anti-corruption representative, who may be contacted by any person either in the association or external in cases of suspected bribery.²⁴

The *DOSB* installed a Good-Corporate-Governance-Codex in 2013, which was developed with support by Transparency International Germany.²⁵

According to this codex, an independent “Corporate Governance-Officer” supervises compliance in accordance with the rules of the Good-Corporate-Governance-Codex. Once a year this officer presents a report on the compliance with the Codex to the general assembly. The Executive Committee is obligated to explain possible deviations in a commentary to the Corporate Governance Officer’s report. Both the Good Corporate Governance Officer’s report, as well as the commentary is to be permanently published on the webpage of the *DOSB* (Sec. 8.4 of the Good Corporate Governance Codex).

Finally, just recently in 2014, the *BSD* was the first association organized in the German Sports Association (*Deutscher Sportbund*, “**DSB**”) to agree to an Ethics Code,²⁶ which focusses particularly on the aspect of transparency in decision making,

Although not yet all major sports associations have implemented internal control systems apart from doping control systems, it may be expected that in the next years – progressively more especially larger – sports associations will follow.

External Control Systems

Apart from internal control systems, there may also be external measures of which some are voluntarily, others compulsory:

- Voluntary External Control Systems:

As the establishment of an external control system is voluntarily, the external control systems in place vary with regard to the persons/companies that have been engaged, their task and their competences. For the most part, these external control systems are external service providers supporting the sports associations in the enforcement of their own internal compliance systems:

For example, in their fight against match-fixing (“*Gemeinsam gegen Spielmanipulation*”)²⁷, the *DFB* and *DFL* installed an external ombudsman, who primarily serves as an external contact for whistleblowers in the cases of planned or agreed match-fixing.²⁸ Furthermore, the ombudsman advises on dealing with suspected cases, pursues the information and collects evidence regarding match-fixing.

However, the ombudsman does not have any sanctioning powers.²⁹

Additionally, *DFB* and *DFL* have been using the services of Sportsradar AG since 2005 to monitor games and to detect irregularities. On behalf of *DFB* and *DFL*, Sportsradar AG, in order to prevent and avoid match-fixing, monitors betting activities worldwide and alerts the associations should unusual betting activities be detected.³⁰ Based on this information, *DFB* and *DFL* can

initiate investigations which could lead to sanctions. On 9 January 2016 Sportradar AG's computer-algorithm-based betting surveillance system registered unusually high bets being placed in Asia on a certain outcome in the friendly match between the 3rd German Bundesliga Teams Wehen Wiesbaden and Borussia Mönchengladbach II which took place during the team's training camps in Turkey. Since the Turkish referee had awarded two questionable penalties to the winning team, the DFB and DFL began their investigations.³¹

- Compulsory controls by auditors

Whether or not there is a compulsory control by auditors is dependent upon the legal identity of the sports associations. Generally, the scope of the audit in view of compliant behaviour is limited.

Sports associations organized in the legal form of a "GmbH" (*Gesellschaft mit beschränkter Haftung*, Limited Liability Company) or an "AG" (*Aktiengesellschaft*, stock company) are obligated to submit and publish annual reports certified by chartered accountants. The chartered accountant can refuse a certification if the bookkeeping or the annual reports do not comply with the company's statutes, its articles of association or the law. With this in mind, a chartered accountant may, for example, refuse certification if financial risks are detected resulting from possible unlawful behaviour if these risks are not shown in the annual accounts. Apart from that, the chartered accountant is not obligated to (and may not due to confidentiality) inform potential internal controlling organs nor the prosecution offices of potentially committed white-collar crimes.

Sports associations organized as non-profit organizations, however, are only obliged to submit annual accounts if their annual turnover or annual profit exceed certain limits. Despite that, non-profit organizations must prove that their expenses justify their charitable status. The control of these requirements is subject to the administrative control system dealt with below.

- Compulsory Controls by Administrative Authorities

Aside from the *Nationale Anti-Doping-Agentur* (National Anti-Doping Agency, "NADA"), which is responsible for the doping control system in Germany, there is **no general supervisory authority** controlling the sports associations with regard to compliant behavior.

Administrative control is limited to certain areas, e.g. taxation by the tax authorities or by the prosecutor's office in cases of suspected criminal offences. Thereby it is important to note that under German law only individuals – and not associations – are subject to criminal law.

6. How is compliance applied to sports-organization? What differences are there compared to the “traditional” business world?

Compliance is applied to sports-organizations based on internal rules (e.g. regulations on fair play and ethical behaviour issued by the associations) and – in particular – official laws.

Although it is difficult to compare the compliance systems in the sports industry to those in the “traditional” business world as there is not “the standard compliance system” in any of these sectors, it becomes apparent that compliance issues considered in the “traditional” business world (e.g. data protection law, employment law, export control law, antitrust law, white-collar-crimes, etc.) have a broader scope and are more strictly regulated than compliance issues in the sports-industry. These regulations generally focus on sports-related issues (e.g. anti-doping and white-collar-crimes especially with regard to game manipulation) even if other mandatory laws, e.g. data protection laws, employment law may find relevance in the sports industry.

Whereas compliance systems currently in the sports industry are set up rather voluntarily and serves soft aims (e.g. upholding the prestige of the sport and ensuring fair competitions) the establishment of compliance system in the “traditional” business world is an important piece of good corporate governance and is necessary to facilitate operations e.g. in export control law and avoidance of breach in supervisory management obligations. This difference is reflected in the structure of compliance systems.

The *DFB* compliance system, for example, focusses on game-manipulation. It is thereby not a typical internal compliance system which shall ensure compliant behaviour of the *DFB* itself, but it is rather a network which is to prevent game manipulation by members and the players as well as other involved parties– both internal and external. This is particularly remarkable because game-manipulation itself (e.g. bribing of players to manipulate a game), unless it is conducted in conjunction with fraudulent bets, is currently not a crime under German law (*see below*).

In view of the fact that the compliance system is not primarily meant to avoid game-manipulation by the *DFB* itself, it is not set up as a *DFB*-internal system but as a decentralized network which includes external service providers (e.g. an external ombudsman as contact person for cases of suspected game manipulation as well as Sportsradar AG, providing monitoring services to uncover bet-related match-fixing).

Compliance systems in the “traditional” business world, however, serve other purposes. They are principally set up to avoid misconduct of the business association itself – typically in a broader scope.

In order to be effective in cases of misconduct to (indirectly) minimize fines and avoid personal liability of the management due to supervisory breach a compliance system in “traditional” business requires the selection of trained and sufficient staff

for the internal compliance surveillance, regular training on new developments and changes in law, clear allocation of responsibilities, monitoring systems and evaluation of how any breach can be prevented. This scope makes it clear that internal compliance systems in the “traditional” business industry are more sophisticated than in the sports sector.

7. Could you give examples of internal compliance process / internal decision-making processes?

An internal compliance process / decision-making process shall be laid out by the example of the compliance program of the *DOSB*:

The internal compliance process of the *DOSB* is complex and multi-layered:

Principally, the Board of Directors of the *DOSB* is responsible for good corporate governance aspects. It deals with these and reflects the status quo at its regular meetings. Thereby it is important to note that the Good Corporate Governance Codex only applies to the umbrella organization of the *DOSB* itself and not to the independent 16 Regional Sports Confederations (which are set up according to the 16 Federal States).³² Therefore, the Board of Directors carries the issues of good corporate governance to its affiliated and member associations to ensure compliant behaviours also on lower levels.

The Board of Directors and the Executive Committee shall jointly work together for the good of the *DOSB*. Therefore, the Board of Directors shall report good corporate governance issues to the Executive Committee and shall exchange information on this topic on a regular basis.

The Good Governance Officer of the *DOSB* shall be independent and may not belong to the Board of Directors, the Executive Committee or any other Committee (Sec. 7.2 of the Ethical Code of the *DOSB*). The Good Governance Officer will present to the members association a report on the compliance with the Good Corporate Governance Codex by the *DOSB* once a year.

In the event of any deviations from the codex, the Executive Committee must explain such deviations.

Both the Good Corporate Governance Officer’s report as well as the commentary are to be permanently be published at the webpage of the *DOSB* (Sec. 8.4 of the Good Corporate Governance Codex).

Furthermore, to ensure compliance with the Corporate Governance Codex on every level, each employee of the *DOSB* will be trained on good corporate governance matters at the beginning of their employment.

In case of any suspected misconduct, principally, the compliance process will be as follows (whereby good corporate governance issues may have different consequences

and therefore involve a different decision-making process depending on the issue at stake):

An employee who suspects a violation of the Good Corporate Governance Codex of the DOSB (covering sexual abuse of children and teenager, game-manipulation and doping) shall report their suspicion to their direct superior. If contacting the direct superior is not prudent (e.g. because this person may themselves be involved in the compliance issue at stake), the employee may also contact persons at other position, such as:

- Human Resource Department
- Worker's council
- Good Governance Guidance Council
- Good Governance Officer of the DOSB.
- The contacted person or organ will evaluate the information and coordinate the further procedure. It will
- Investigate the relevant facts
- Potentially seek advise by experts (e.g. from the in-house lawyer)
- Involve other relevant stakeholders such as Human Resource Department and worker's council
- Possibly take up further investigations
- Hear the parties involved
- Forward the outcome of the investigations together with an opinion and advice on measures to be taken to the decision making competent body (e.g. the Board of Directors of the DOSB for misconduct related to the general employees, the Executive Committee for misconduct of the board members involving the Good-Governance Officer) and
- Inform the whistle-blower of the outcome.

The issue of sanctions

8. **According to which provisions (e.g. criminal law, regulatory law, and administrative law, etc.) may a sports association be sanctioned in your jurisdiction?**

The legal means to sanction a sports organization are limited under German law.

The **criminal law provisions** of the German Criminal Code of Justice **do not apply** to sports associations but only to natural persons even if they act on behalf of the sports association. However, the sports association may be subject to the consequences of a criminal act by one of its members. Should an association, as a result of the crime conducted by its member, have gained a profit this profit may be confiscated (Sec. 73 *Strafgesetzbuch*, German Criminal Act “**StGB**”).³³

Furthermore, **associations** may be **sanctioned by fines** if a person in charge (e.g. a member of an organ, the representative, etc.) has committed a crime or a regulatory offence by which duties incumbent upon the association have been violated, or if the association has gained or was supposed to gain a profit (Sec. 30 *Gesetz über Ordnungswidrigkeiten*, Act on Regulatory Offences “**OWiG**”).

This may be the case if a managing director of a sports association uses organisation money to bribe players or referees in order to manipulate the outcome of a crucial match through which the association would get prize money should the match be won.

If the crime was conducted intentionally the fines may amount up to EUR 10 million and up to EUR 5 million, if it was conducted negligently. In case of an administrative offence the fine shall amount to the maximum fine foreseen for such administrative offence.

Whether or not such a fine has ever been imposed against a sports association is unknown to the authors.

Legislation proposals for revision of criminal law / administrative law

In view of the fact that fines may be a calculable risk for an association, a legislative proposal for a revision of the German criminal law was submitted in 2013.³⁴ The revision calls for associations being subject to criminal law in the future by attributing the criminal activities persons acting on behalf of the association to the association itself if these activities are related to the association or if the association directly profited from the criminal offence.

The sanction shall include inter alia serious fines, public denunciation, revocation of subsidies and public contracts as well as the association ultimately being forced to

dissolution. The legislative proposal, however, also provides that if the association has established an efficient and effective compliance system and takes measures to avoid future misconduct it may be exempted from legal consequences.

Furthermore, there is another legislative proposal which aims at renewing the administrative law (Sec. 30 OWiG et al.) by inserting incentives for the establishment of compliance systems (e.g. exemptions from the confiscation of profit or fines) instead of extending the criminal law provisions to associations.³⁵

If any of these proposals will successfully pass the legislation process is unclear at that time.

9. Who may be sanctioned within the association (e.g. the association itself, the board, an employee)? Please provide examples of applicable sanctions in the recent years.

As associations enjoy the privilege of organisational autonomy they are allowed to lay down their own system of sanctions in case of violation of an obligation. Depending on the framework of the association their members may be sanctioned.

A club may be sanctioned if the club itself violates its obligations. In addition a club may also be sanctioned if one of its members violates any obligations as well as for the behaviour of spectators.

In the last season of Germany's 2nd Bundesliga, SV Sandhausen was sanctioned with point deduction because the club did not follow the guidelines of the licensing procedure.³⁶ In Germany's second league of ice hockey EV Landshut did not fulfil the licensing requirements and was excluded from participating in the completion of the season 2015/2016.³⁷

In several cases the association (*DFB*) has sanctioned clubs for offences by their spectators. In several cases spectators have thrown items at referees injuring them.³⁸ The German Court of Sports of the *DFB* decided that the team whose spectator (supporter) had thrown the item lose the game (0:2) although this team had been in the lead (1:0) at the time of the incident. A club is also responsible for other violations by spectators such as the use of fireworks which is not allowed according to the regulations of the *DFB*. Clubs may be imposed with fines up to 200.000,- EUR.³⁹

Clubs or associations responsible for organising the competition sometimes suspend members for a specific period of time or exclude them from the association/competition in case of severe violations of duties and obligations.⁴⁰

- 10. How do those sanctions interact with decisions from State courts? Is there a need for enforcement of the sanctions (i.e. is there a filter / exequatur process by State courts, as in arbitration)? Is there a possibility for State courts to consider a case also examined by a regulatory body, e.g. a federation (i.e. is there a risk of “double jeopardy”)?**

The question how sanctions of an association interact with decisions from State courts depends on whether the sanction of association was imposed by a real court of arbitration according to the provisions of the German Code of Civil Procedure (*ZPO*). If the court of the association is a court of arbitration according to the provisions of the *ZPO* there is just a limited review of State Courts and must be enforced like any other arbitral award.⁴¹

If the organization of the association does not provide a real court of arbitration the decision of its court (*Verbandsgericht*) may be reviewed by State courts or by a court of arbitration should the parties mutually agree on an arbitration clause.⁴²

In case of criminal acts the decision of a club or association can never be final and binding. Investigations by the Public Prosecutor may initiate criminal proceedings as well as a criminal charge of other athletes or third parties.⁴³

Case studies: Online gambling, doping scandals and whistleblowing

11. What are the legal consequences with regards to match-fixing in your jurisdiction? Please specify the relevant legal framework.

Whether or not match-fixing has any legal consequences (namely criminal law) depends upon the context in which it was conducted. Match-fixing *per se* is not a criminal act under German law. Consequently, there are no direct legal consequences.

However, actions, which may have been conducted in connection with the game-manipulation, are often illegal. In such a case, the legal consequences depend on the punishment foreseen in such cases.

- Fraud (Sec. 263 StGB - German Criminal Code)

Match-fixing does not constitute a fraud *per se*. Fraud in the sense of Sec. 263 StGB requires that a person - with the intent of obtaining an unlawful material benefit for themselves or a third person - damages the property of another by causing an error by presenting false facts or suppressing true facts.

Match-fixing does not fulfill these requirements, because no assets are damaged: The fans watching the manipulated game have not suffered a pecuniary loss. They only paid to watch the game. From a financial perspective there is no loss of value even if the game has been manipulated. Non-pecuniary loss, such as loss of an enjoyable game, is not covered by the definition of fraud.

If, however, the person having manipulated the game bets on that fixed game, they act fraudulently by wagering on the manipulated game. According to German jurisprudence a bettor placing a bet implies that he does not know the outcome of that game. By knowing that a match has been fixed (without informing the betting office respectively) he suppresses facts and deceives the betting office, which will suffer financial loss by paying out the rewards for the successful bet.

Thereby it is not necessary, that the person fixing the match also places a bet themselves. They may also be prosecuted for aiding the fraud of another person if they know that a bet will be placed by a bettor aware of the fixed match.

This was the case, for example, in the notorious “Hoyzer”-case from 2005. In this case, Mr. Hoyzer – a professional football referee – had accepted bribes from a bettor, who had then bet on the outcome of several matches. He was found guilty of aiding and abetting the fraud of the bettor and was sentenced to 2 years and 5 months imprisonment.⁴⁴ This rather soft verdict was owed to

the fact that Mr. Hoyzer confessed to the accusations. Usually, the criminal law can render a sentence of up to five years of imprisonment for fraud (in serious cases up to ten years).

- Taking and Offering Bribes in Commercial Practice (Sec. 299 StGB)

Although the field of sports has become a business industry, those who accept or offer bribes to fix competitions may not be subject to prosecution for the criminal act of “taking and giving bribes in commercial practice”. This rule only applies to the acceptance or proposition of bribes in a business transaction as an unfair preference to another in the competitive purchase of goods or commercial services.

- Taking Bribes (Sec. 331 StGB)

A referee or athlete may not even be subject to prosecution for accepting bribes, when taking money in order to fix a game.

The criminal act of taking bribes only applies to those in a public office (e.g. politicians, judges, etc.) but not to referees or athletes.

- Offering Bribes (Sec. 333 StGB)

As counterpart to the criminal provision of “taking bribes”, the offering of bribes is only punishable if the recipient of the proposal of advantage holds a public office.

- Abuse of Trust (Sec. 266 StGB)

A person paying a referee or an athlete to fix a competition may be punishable for abuse of trust according to Sec. 266 StGB when the money used has been entrusted to that person by a third party and through the bribe was diverted from its intended use.

The former CEO of Bayer Leverkusen, Mr. Rainer Calmund, for example, was suspected of having used EUR 580,000 of the club’s money for bribery to manipulate games in order to prevent the club’s relegation in March 2006.⁴⁵ The alleged abuse, however, could not be proven so that the criminal charge was finally dropped.

Draft for new legislation introduced in November 2015

Politics has come to realize the magnitude of fraudulent behavior and bribery in sports. Just recently, in November 2015, a draft for revising the German Criminal Act for crimes related to sports has been submitted. With this act, criminal provisions with regard to match-fixing (e.g. betting fraud and manipulation of professional competitions) shall be enacted.

12. How is online gambling considered in your jurisdiction and how is it dealt with in case of fraud?

Online gambling in Germany is principally illegal unless a provider for online gambling, which has been granted a license by a Federal State, conducts it.

The legal situation with regard to online gambling, however, has become a complex and confusing grey zone as the legal basis for the procurement proceeding for granting these licenses, i.e. the Inter-State Treaty on Gambling of 2012, has recently been declared unlawful by Higher Administrative Court of Hessen (*Verwaltungsgerichtshof Hessen*). In its decision of 18 October 2015 (file no. 8 B 1028/15), the Higher Administrative Court of Hessen also enjoined the Federal State of Hessen, which according to the State Treaty on Gambling of 2012 was competent for the granting of licenses also on behalf of the other Federal States, to grant any licenses to providers for online gambling. In view of this, the tender process for granting such licenses has been stopped. On the one hand this means that currently there is no legal online gambling in Germany until a new legal basis for granting such licenses has been created. On the other hand, however, it is expected by observers that the Federal States will not take action against the providers of online gambling for reasons of lack of a license in the meantime, because the states profit greatly from the gambling industry.

If online gambling is performed in a fraudulent way (e.g. if the match upon which bets can be placed has been fixed), it is subject to strict punishment. Sec. 263a of the German Criminal Act punishing computer fraud (including fraud which is committed via the internet) provides for imprisonment of up to 5 years or a monetary penalty. If such fraud has been conducted professionally the punishment is up to ten years imprisonment.

In 2012 the Federal Court of Justice issued a fundamental judgment with regard to fraudulent online gambling:

In its judgment dated 20 December 2012, the Federal Court of Justice ruled that if a bet is placed over a betting machine in a betting shop or via a web page, the better may be guilty of computer fraud if he knows that the game has been manipulated.

This judgment is fundamental in the jurisprudence on online gambling, match fixing and fraud, because it closes legal loopholes. By its wording the criminal act of com-

puter fraud generally prohibits the manipulation of data processing (“*Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by influencing the result of a data processing operation through incorrect configuration of a program, use of incorrect or incomplete data, unauthorized use of data or other unauthorized influence on the course of the processing...*”).

Generally, the mere placing of the bet itself online or via the machine at the betting offices does not influence the data process in an incorrect way and – strictly speaking – is no unauthorized use of data. However, it was obvious that placing a bet on a manipulated game with a natural person would have been considered fraudulent because the person accepting the bet would have been deceived on the manipulation (it may be expected that the person accepting the bet expects that the bet is placed without any (knowledge of) manipulation of the game).

Furthermore, it was obvious that placing the bet on a manipulated game could not be legal just because it was placed online or with a machine. Therefore, the Federal Court of Justice argued that the criminal act of computer fraud is supposed to close gaps, which might arise because a fraud is conducted via computer. Accordingly, the term “unauthorized” is to be construed fraud-specifically, which means that such unauthorized data usage must be comparable to the deception of a human being without computer in between; it must be “deception-equivalent” (*täuschungsäquivalent*).

Therefore, if one deceives a human being by knowingly placing a bet on a manipulated game, one also “deceives” the betting machine or web page by unauthorized data usage.⁴⁶

13. Are any measures foreseen in your jurisdiction for the protection of “whistle-blowers”?

German law does not provide for any special laws on the protection of whistle-blowers in the private sector.

There are judgments dealing with the protection of whistle-blowers. These judgments, however, mainly deal with labour law aspects in cases of whistle-blowing by employees and are decided on a case-by-case basis. This makes it very hard for a potential whistle-blower to predict the outcome of a reported wrong-doing and to evaluate the risks (e.g. liability for false accusation, mobbing, termination for good cause) of his – primarily altruistic – whistle-blowing.

Furthermore, an increasing number of companies also in the sports industry has begun setting up internal or external whistle-blower systems as part of their compliance system. To protect the whistle-blowers these systems regularly foresee that whistle-blowers may either report wrongdoing anonymously (here: risk of false accusation, no further inquiries possible) or that information reported by them is treated confidential to avoid any disadvantages for the whistle-blower if this is possible with re-

gard to the further investigations and measures to be taken.⁴⁷ Latter is often the case with regard to external whistleblowing systems in which an ombudsman, often a lawyer being obligated to secrecy, shall be contacted in case of any wrongdoing.

14. How is confidential information treated in your jurisdiction? Any risks for whistle-blowers?

Confidential information under German law is protected by various provisions in criminal, competition and data protection law.

If and to what extent the whistleblower may be liable for breach of secrecy and disclosing confidential information particularly depends on the position the whistleblower holds when disclosing the information:

- Whistleblowers disclosing information which had been entrusted to them in view of their particular relationship of trust may be liable for breach of violation of private secrets (Sec. 203 German Criminal Code). A physician or pharmacist may, for example, be liable for violation of private and business secrets according to Sec. 203 German Criminal Act if he unlawfully discloses that his patient uses doping means. For the same reasons may a chartered accountant, for example, be liable, if he discloses that his client acted fraudulently.
- Whistleblowers being employees of a company may be liable for disclosing business secrets if they - during the course of the employment relationship – communicate, without authorisation, a business secret with which they were entrusted or to which they had access to another person, e.g. for personal gain or for the benefit of a third party (Sec. 17 *Gesetz gegen den unlauteren Wettbewerb* - Act Against Unfair Competition).

An intentional breach of these provisions may be subject to a fine or – in severe cases – to imprisonment.

As whistleblowers usually report names or other personal data when reporting misconduct they have to comply with the rules of the Federal Data Protection Act (*Bundesdatenschutzgesetz*), which allows passing on of personal data without the consent of the other party only in limited cases (whereas reporting possible criminal conduct by a third party will regularly be justified). Breaches of data protection laws may be imposed with heavy fines.

Beyond the issues of confidential information there are further risks to which whistleblowers impose themselves when reporting misconduct:

A whistleblower accusing another person of misconduct might be liable to insult or defamation (Sec. 185 et seq. German Criminal Code) if the accusations do not entirely prove right. If and to what extent the fact that the whistleblower acted legitimately may justify the announcement has remained undecided by the courts and depends on the individual circumstances of the case.

Furthermore, a whistleblower may be liable to false accusation (Sec. 164 German Criminal Act).

In both cases the whistleblower is only liable under criminal law if he acted intentionally. The question, whether or not he acted intentionally or negligently, however, can often only be evaluated if criminal proceedings are initiated (which would be dropped again once it has been found that he had acted negligently).

Finally, a whistleblower may be faced with damage claims by the person whom he accused of misconduct, if the accusations do not entirely prove right.

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