



# Effective sanctioning of match-fixing: the need for a two-track approach

**Dr Ben Van Rompuy** argues that focusing on the criminal prosecution of match-fixing offences can be inefficient and may even be counter-productive in deterring potential offenders, and that sports organising bodies should pay more attention to using the full range of their own powers and sanctions

**E**ven when sports governing bodies profess a zero-tolerance policy to match-fixing, they usually are still quick to point out that fighting crime is primarily the task of law enforcement and prosecuting agencies. After all, so the argument goes, sports governing bodies do not have the investigative powers or legal capacities to tackle the problem by themselves. Accordingly, various stakeholders, with the 'European football family' at

the forefront<sup>1</sup>, have called on governments to establish sports fraud as a specific criminal offense and to prioritise the criminal investigation and prosecution of those involved in match-fixing cases.

The problem of match-fixing evidently reaches beyond the realm of sport. The investigation and prosecution of criminal organisations and individuals outside the sports world are wholly a matter for public authorities. This should not mean, however, that sports



governing bodies should refrain from taking (parallel) disciplinary action against those falling under their jurisdiction. Instead of passing the hot potato around, law enforcement agencies and sports governing bodies must use their respective powers and resources in the most effective and efficient way possible.

### **Criminal prosecution is not a quick fix**

From a practical and empirical standpoint, there is nothing to suggest that criminal sanctions against match-fixing play a significant role in deterring misconduct. Empirical deterrence research persistently finds that the perceived likelihood of detection and enforcement – not the severity of the sanctions imposed – makes the most difference to compliance behaviour<sup>2</sup>. Unfortunately, the track record of criminal sanctioning of match-fixing is underwhelming. Europol's match-fixing revelations earlier this year, for example, were reminiscent of the press conference held by UEFA and the German police in Bochum in 2009. Europol officials stated at the conference that this was the biggest match-fixing scandal ever to hit Europe, but “only the tip of the iceberg”, and involved hundreds of suspected matches including World Cup and European Championship qualifiers. Europol did not add that of the more than 200 suspects identified in the Bochum investigation only around a dozen have been convicted.

The standard technical defence is that match-fixing is extremely difficult to prove: there usually is no irrefutable evidence of deliberate underperformance and no traceable money trail. The use of specific investigation techniques (such as interception of communications, searches and access to bank accounts) is therefore crucial, but they are only permitted under strict conditions. While there

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are no unified standards, generally such techniques must be court-ordered and would already require sufficient evidence of criminal association.

Consequently, most of the successful criminal investigations into match-fixing have been either accidental by-products of inquiries into non-sports related criminal activities (for example narcotics, prostitution or money laundering) or spillovers from investigations that were initiated in other jurisdictions. Nearly all other successful criminal investigations have been triggered by whistleblowers and/or have relied on witnesses to provide corroborated evidence. The obvious problem here is that criminals can be powerful and ruthless in enforcing a code of silence through intimidation and retaliation. Individuals involved in a match-fixing scheme or those external to it will only assume the risk of cooperation if

they are confident that effective action against corruption will be the result. It is recognised in the jurisprudence of the European Court of Human Rights (ECHR) that the use of anonymous witness statements may be admissible, but only in exceptional circumstances and under strict conditions. The needs of the criminal proceeding must be carefully balanced against the rights of defence of the accused, which typically include the right to challenge and question the witness. Procedural safeguards could consist of the cross-examination of anonymous witnesses over the phone and an in-depth check of the identity of the witnesses by the court. In this scenario, however, their testimony cannot furnish decisive evidence.

To the already low chance of detection and speedy investigation, one can add the low chance of prosecution and sentencing. Even in countries with a mandatory system of prosecution, public prosecutors – who have the burden of proving the guilt of the accused under a high standard of proof (beyond reasonable doubt) – inevitably must direct their limited resources to the most important cases that have a realistic prospect of conviction. The degree of harm is an important consideration. While the seriousness and public interest of prosecuting match-fixing might be self-evident in the eyes of the sports world, it may not be immediately apparent to a public prosecutor.

The introduction of specific criminal law provisions on sports fraud, as advocated by various stakeholders, would have little immediate bearing on the low levels of prosecution. If the commitment to criminalisation simply means putting sports fraud on the statute books, it is merely an exercise of gesture politics intended more to capture headlines than to deter misconduct.

The aim here is not to undermine the efforts to ensure effective investigation and criminal prosecution of the manipulation of sports results. It is indispensable that applicable criminal law provisions (on bribery, fraud, extortion and so on) and a range of appropriate sanctions are available. Initiatives like the proposed Council of Europe convention on match-fixing are therefore important – even more so

because they aim to facilitate cross-border cooperation<sup>3</sup>. Rather, the argument is that criminal prosecution, because it is uncertain, can only be one component of a broader set of enforcement mechanisms and deterrents. The possibility of criminal prosecution should not be a reason for sports governing bodies to shirk their responsibilities.

### **Disciplinary sanctions**

Faced with the enormous threat of match-fixing, most international sports governing bodies are currently focusing on training, education and other means of prevention. There is, however, an equally strong need to support prevention by vigilantly pursuing disciplinary action against participants in the activity.

Of course, sports governing bodies are powerless against criminal gangs and individuals outside the sports



The February 2013 press conference at The Hague, in which Europol claimed to have uncovered 380 suspicious football matches, including World Cup qualifiers

world. One should not forget that while not every match-fixing case has a criminal component, it will always have a disciplinary component. The manipulation of sports events can only occur with the involvement of a person covered by the rules and regulations of the sports governing body – for example a player, coach, agent or official. There are at least five good reasons why disciplinary proceedings ought to be the starting point of most, if not all, investigations into match-fixing.

First, the intelligence that is needed to prepare and progress disciplinary proceedings is low in comparison with criminal proceedings. Simple rumours and various other pieces of information can trigger a disciplinary investigation. Let's take the example of suspicious betting patterns. The detection of irregular betting activity can directly trigger an investigation and may even provide compelling evidence to satisfy the requisite standard of proof (that is, preponderance of evidence or balance of probability). In the case of the Macedonia football club FK Pobeda at the Court of Arbitration for Sport, for instance, the panel primarily relied on the report of a betting expert in order to conclude that the games had been fixed<sup>4</sup>. A decision on any criminal charges, on the other hand, would require much more significant intelligence work since there can be many explanations

for suspect betting activity. At most, this intelligence can be used as circumstantial evidence.

Second, the frequently used argument that sports governing bodies lack the investigative powers to find conclusive evidence of match-fixing is flawed. Several international sports governing bodies (International Tennis Federation, International Cricket Council, International Ski Federation) have recently adopted anti-corruption rules that give them potent tools for evidence gathering<sup>5</sup>. Apart from interrogating participants, their respective integrity units are entitled to request "all information relating to the alleged offence", which may include telephone records, bank statements, text messages received and sent, internet service records, and records stored on computer hard drives and other devices. To take part in the events organised by these sports bodies, the participants are required to waive any rights or defences provided by data protection laws or other laws to withhold the information requested. One may question whether the use of such extensive powers is legitimate. At least as long as these regulations remain unchallenged, however, participants who refuse to comply cannot compete.

Third, disciplinary proceedings enable quicker action and might even enable disruptive action to pro-actively eliminate opportunities to corrupt a sports competition.

Building up the evidential trail for criminal prosecution, on the other hand, can be very time consuming and, therefore, can only be retrospective.

Fourth, investigators operating under the auspices of worldwide sports governing bodies can more easily operate internationally, whether in conjunction with national federations or otherwise. For their disciplinary purposes, the investigators are not restrained by cross-jurisdictional issues.

Fifth, there is no empirical support for the contention that the stigma of criminal sanctions influences compliance behavior. As stressed before, participants' perception of the probability of detection and sanctioning is the most powerful deterrent. Moreover, the Court of Arbitration for Sport has accepted lifetime bans for athletes as an appropriate sanction for match-fixing, even for first-time offenders. Depending on how long the athlete expects to be performing and the particular sport, the penalty of a lifetime ban could be more severe than a prison sentence of a limited duration.

### A two-track approach

In light of the above, it is clear that disciplinary measures have a fundamental role to play in an effective strategy to combat match-fixing. The fact that a match-fixing case could potentially also involve a criminal offence should not compromise the willingness of sports governing bodies to prepare and to progress disciplinary proceedings against all suspected breaches of their regulations or codes of conduct.

When an initial suspicion about the manipulation of sports events is raised, the precise nature or gravity of the case may still be unclear. Sports governing bodies will generally be best placed to swiftly gather more comprehensive information so it can be determined whether the case might merit a criminal investigation. Yet even when there are sufficient indications of potential criminal activity, the sport governing body should not take a back seat. Instead, a two-track approach of disciplinary and criminal proceedings must be envisaged.

It is common practice for sports governing bodies to stay disciplinary investigations and proceedings once criminal investigations are contemplated or have begun. Often it is argued, also by law enforcement agencies, that concurrent proceedings may present a substantial risk of prejudice or "obstructing justice"<sup>6</sup>. However, there is no general rule that criminal proceedings must take precedence over disciplinary proceedings or that disciplinary investigations or proceedings have to await the outcome of a criminal investigations or proceedings. In all but the most exceptional cases, nothing would legally obstruct the sovereignty of a sport governing body to sanction participants for breach of applicable regulations.

Furthermore, concurrent disciplinary and criminal proceedings and sanctions are unlikely to constitute a breach of the fundamental legal principle of *ne bis in idem* (that is, a person cannot be prosecuted or punished multiple times for the same offence). Criminal and disciplinary procedures are different in character and



In 2010, Rick Parry successfully called for the creation of the Sports Betting Intelligence Unit, after his investigation into suspicious gambling in UK sport

result. They serve different purposes, the charges brought under the respective procedures are significantly different, for the most part they will target different persons, and they require, as discussed above, different evidence. The issue of double jeopardy would only arise if there could be a case to be made that a sanction, albeit disciplinary in form, reveals a punitive intent and thus must be qualified as a criminal penalty.

To determine the boundaries between a criminal and disciplinary sanctions, the ECHR case law developed three criteria: the legal classification of the offence in national law; the nature of the offence; and the degree of severity of the sanction. However, what matters primarily is the second criterion. The fact that a lifetime ban has severe consequences for the athlete concerned does not render the sanction criminal<sup>7</sup>.

Furthermore, nothing would prevent the criminal court from duly taking into account the seriousness of a previous disciplinary sanction when determining the appropriate criminal sanction. By and large, the difficulties

that could arise from parallel disciplinary and criminal investigations and proceedings pale in comparison to the advantages. In addition to sending out a strong signal for deterrence purposes, a two-track approach may create invaluable synergies – which would generally be particularly beneficial to the criminal investigations.

With regard to participants, disciplinary action by the sports governing bodies will often be the most effective – and even the only possible first course of action to take.

## The difficulties in parallel investigations pale in comparison to the advantages

When it is suspected or evident that criminal conduct has taken place, either by the participant(s) or outside fraudsters, it becomes necessary to share relevant information with law-enforcement agencies.

Various scenarios are possible. The sports governing body may seek to engage the police or other public authorities because there is a need for collaboration. More importantly, the evidence gathered in the context of the disciplinary investigation may trigger the initiation of a second, criminal enforcement track. Subject to certain restrictions, evidence secured under disciplinary powers can be passed on to law enforcement agencies for the purpose of a criminal investigation. The information flow would typically be one-way. It is possible, however, that certain information secured under criminal powers can be disclosed for the purpose of the disciplinary proceeding – notably when law enforcement agencies find that there is insufficient evidence to justify a criminal prosecution.

To facilitate the exchange of intelligence and evidence, it is useful that sports governing bodies and relevant public authorities enter into information-sharing agreements. Such agreements or protocols are not intended to create legally enforceable obligations, but to foster a collaborative working relationship and formulate clear lines of communication.

The establishment of a pan-sports integrity unit that coordinates the gathering, analysis and exchange of intelligence related to match-fixing is even more suitable to support an effective sanctioning strategy. An interesting example is the Sports Betting Intelligence Unit (SBIU), which was created within the UK Gambling Commission in 2010. The SBIU acts as the gateway for information on potentially corrupt betting activity related to British sporting events. Once a piece of information is received by the SBIU, from whatever source, it will inform, develop and coordinate the appropriate course of action through to when the case is closed. A detailed investigative decision-making framework documents how the SBIU will determine whether to refer the case to a sports governing body or betting operator, to proceed to criminal prosecution, to issue a caution or to take no further action. The underlying presumption of this decision-

making framework is that only more serious cases would potentially be appropriate for criminal sanction: disciplinary action by the sports governing body would frequently be the most effective or efficient approach<sup>8</sup>.

### Effective and rapid sanctions

When sports governing bodies invoke the rhetoric of zero-tolerance for match-fixing, they generally presuppose legislative action and a more active pursuit of criminal investigation and prosecution. The concern rehearsed in this article is that an over-enthusiastic reliance on criminal prosecution is unproductive and might even be counter-productive. Empirical research on compliance in other areas of law and regulation shows that people's perception of the likelihood of detection and sanctioning is the most powerful influence on behaviour.

Since criminal prosecution is a formidable task and match-fixing will always involve individuals working within the reputation and influence of the sport, only an integrated two-track approach of parallel disciplinary and criminal proceedings can improve on the low levels of prosecution. Sports governing bodies should not pass the hot potato around because criminal organisations are also involved. Unless their internal regulations and codes of conducts are of a merely symbolic nature, the sports governing bodies must do all that is within their powers – which can be much more extensive than some would suggest – to punish those who violate them. ■

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