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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Council of Europe Convention on the manipulation of sports competitions with regard to matters not related to substantive criminal law and judicial cooperation in criminal matters

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Match-fixing is widely regarded as one of the major threats facing contemporary sport. Match-fixing undermines the values of sport such as integrity, fair play and respect for others. It risks alienating fans and supporters from organised sport. Moreover, match-fixing often involves organised criminal networks active on a global scale. It is a problem that has now become a priority for public authorities, the sport movement and law enforcement agencies worldwide. To respond to these challenges, the Council of Europe invited parties to the European Cultural Convention during the summer of 2012 to begin negotiations for a Convention of the Council of Europe against the manipulation of sports results. Negotiations began in October 2012 with the first meeting of the drafting group of the Council of Europe.

On 13 November 2012 the Commission adopted "*the recommendation for a Council decision authorizing the Commission to participate, on behalf of the Union, in the negotiations for an international convention of the Council of Europe to combat the manipulation of sports results*"[1]. The Commission's recommendation was transmitted to the Council Working Party on Sports on 15 November 2012. Following discussions in the Council Working Party, the Council split the draft Council decision into two decisions due to the addition of substantive legal bases by the Council, including a legal basis stemming from Part 3, Title V TFEU.[2] One decision on matters relating to betting and sport was adopted by the Council on 10 June 2013.[3] The other decision was adopted by the Council on 23 September 2013 and concerned matters related to cooperation in criminal matters and police cooperation.[4]

The Commission, in accordance with the relevant Council decisions, took part in the subsequent negotiations, which culminated on 9 July 2014 with the adoption by the Ministers' Deputies of the Council of Europe Convention on the Manipulation of Sports Competitions.[5] The Convention was subsequently opened for signature on 18 September 2014 at the Council of Europe Conference of Ministers responsible for Sport. According to its Article 32 (3), the Convention is open to signature of the European Union. Since then a number of parties have signed the Convention, including some Member States.

Given the international dimension of match-fixing, the Convention is also open to non-European countries. This aspect is crucial since world-wide cooperation, notably with countries where sports betting is widespread such as South-East Asian countries, is considered an essential element in effectively fighting trans-national organised crime networks involved in match-fixing and operating in different continents. The Commission considers that the Convention can be an effective instrument in the fight against match-fixing.

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1 COM(2012)655 final.

2 The Commission issued a statement to the Council minutes in which it disagreed with the insertion of the substantive legal basis, see Council document No 10509/13.

3 Council Decision 2013/304/EU of 10 June 2013 authorizing the European Commission to participate, on behalf of the EU, in the negotiations for an international convention of the Council of Europe to combat the manipulation of sports results with the exception of matters related to cooperation in criminal matters and police cooperation, OJ L170, 22.6.2013, p.62.

4 Council Decision authorizing the European Commission to participate, on behalf of the EU, in the negotiations for an international convention of the Council of Europe to combat the manipulation of sports results as regards matters related to cooperation in criminal matters and police cooperation, Council document No 10180/13.

5 Malta voted against the Convention, and submitted a request to the European Court of Justice for an opinion on the Convention pursuant to Article 218(11) TFEU on 11 July 2014 (Opinion 1/14).

Article 165 TFEU states that Union action shall be aimed at developing the European dimension in sport by, inter alia, promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports. In addition, Article 165 TFEU calls for the Union and the Member States to foster cooperation with international organisations in the field of sport, in particular the Council of Europe. EU action can help address transnational challenges encountered by sport in Europe such as match-fixing, where concerted efforts and a closely coordinated approach are necessary.

One of the main objectives of the Convention is to promote national and international cooperation, with Chapter III setting out a number of provisions to facilitate the exchange of information between all interested parties. The fight against match-fixing requires close cooperation between the sport movement, governments, betting operators, law enforcement authorities and international organisations. Such a wide range of interested parties has its' own challenges; the EU can help bring together and ensure a coordinated approach.

Member States are at various stages of development in the fight to tackle match-fixing. The transnational nature of match-fixing will likely involve working with the Member States with varying degrees of experience, creating the need for the sharing of good practice and development of competences. Here, the EU has an important role to play in capacity-building, catalysing cooperation and ultimately helping to implement the Convention.

The signature of this Convention should be part of the Commission's efforts to participate in the fight against match fixing, in conjunction with other tools such as the forthcoming Commission initiative on betting-related match-fixing in line with the 2012 Commission Communication on online gambling,[6] the work of the EU Expert Group on match-fixing, and Preparatory Actions and projects dedicated to match-fixing.[7]

According to the Council decisions authorizing the opening of negotiations the accession by the Union should be preceded by a competence analysis, stating that " *the legal nature of the Convention and distribution of powers between the Member States and the Union will be determined separately at the end of the negotiations on the basis of an analysis of the precise scope of the coverage of the individual provisions".*

This competence analysis is set out in the following:

Nature and scope of the Union's competence

Pursuant to Article 1 of the Convention, its purpose 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*". For this purpose, the ultimate objective of the Convention is "*to protect the integrity of sport and sports ethics*". It does so by taking a number of measures that aim at preventing, detecting and sanctioning the manipulation of sports competitions. In view of that purpose, the Convention also promotes international cooperation and sets-up a monitoring mechanism to ensure that the provisions laid down in the Convention are followed up.

The Convention thereby embodies a multifaceted approach to address the manipulation of sports competitions. Accordingly, measures to be adopted vary in nature and affect different areas of law, with the prevention aspect being pervasive.[8] Other areas of law concerned are

[6] http://ec.europa.eu/internal_market/gambling/communication/index_en.htm

[7] By way of recent example: http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/other-programmes/cooperation-between-public-private/index_en.htm

[8] Prevention is addressed in Chapters II and III as well as in Articles 27 and 28 of the Convention.

substantive criminal law, judicial cooperation in criminal matters, data protection, and also regulation of betting activities.

Prevention (Chapters II-III, Articles 4-14)

Most of the provisions on prevention in the Convention could be covered by Article 165(4) first indent TFEU concerning supportive measures in the field of sports.[9] However, this type of competence is limited in its scope, as it excludes any harmonization of the laws and regulations of the Member States. Article 165 TFEU refers to the "promotion", "cooperation" or "incentive" measures. As a consequence, the Union's competence does not supersede that of the Member States in that area.[10]

By contrast, measures in relation to betting services may touch upon the internal market freedoms concerning the right of establishment and the freedom to provide services, to the extent that betting operators exercise an economic activity. As regards Article 3(5)(a) and 11 in particular, the definition of "illegal sports betting" refers to any sports betting whose type or operator is not allowed by virtue of applicable law in the jurisdiction of the Party, where the gambler is located. The term "applicable law" includes EU law. This implies that any right granted by EU law must also be borne in mind and that national law of the Member States has to be in conformity with EU law in particular with internal market rules.

Articles 9 to 11 envisage measures that could lead to a certain degree of approximation of laws. For instance, Article 9 of the Convention proposes an indicative list of measures which could be applied by the respective regulatory betting authority *"where appropriate"* to combat the manipulation of sports competitions in relation to sports betting. Article 10(1) of the Convention states that "*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 (…)"* (emphasis added). Article 10(3) of the Convention aims at establishing reporting obligations by stating: "*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 (...)"* (emphasis added). Finally, Article 11 of the Convention on illegal sports betting grants even greater leeway to the Parties. It reads: *"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 (…)".*

This shows that Articles 9, 10(1) and 10(3) of the Convention create a basis for possible harmonisation under Article 114 TFEU, to the extent that betting operators exercise an economic activity. Article 11, which contains even more flexible wording, still involves some degree of approximation of provisions which may also be covered by Article 114 TFEU on the establishment and functioning of the internal market.

In addition, Article 11 of the Convention may also affect services provided from a third country. The measures in question, which concern directly "access" of such services, would be covered by the Union's common commercial policy pursuant to Article 207 TFEU.

Article 14 of the Convention on data protection comes under the Union's competence according to Article 16 TFEU.

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[9] Notably Articles 4, 5(1), 6, 7 of the Convention on encouragement of certain actions by sports organisations and Article 8 of the Convention, as well as certain aspects of Articles 9, 10(2), 12 and 13 of the Convention.

[10] See Article 2(5) TFEU: "*In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas."*

Law enforcement (Chapters IV-VI; Articles 15-25)

Chapter IV concerns criminal law and cooperation with regards to enforcement (articles 15 to 18). Article 15 of the Convention does not impose the overall incrimination of conduct of manipulation of sports competitions, but only certain forms (where they involve corruption, coercion or fraud). This could be covered by Article 83(1) TFEU when committed by organised crime or through corrupt practices.[11] However, Article 15 is not limited to organised crime and it also includes coercion and fraud without any corruptive behaviour. In this context, the relevant EU *acquis* is limited.

Article 16 concerns money laundering. At Union level, this is regulated by Council Framework Decision 2001/500/JHA,[12] along with Directive 2014/42EU.[13] Article 16(3) of the Convention falls under EU competence and Article 114 TFEU; Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing is based on Article 114 TFEU.[14] As the directive does not cover specifically sports competitions, it does not interfere with Article 16(3) of the Convention, which concerns "sports betting operators" only. Competence over Articles 17, 18, 22 and 23 (in chapters IV and VI) is linked to the competence under Articles 15 and 16 of the Convention.

Chapter V on jurisdiction, criminal procedure and enforcement measures, and Chapter VI on sanctions and measures, contain provisions which accompany the substantive criminal law provisions contained in Article 15 to 18 of the Convention. Article 19 of the Convention (jurisdiction) is an accessory provision to the establishment of the criminal provisions. Articles 20, 21 and 25 of the Convention (investigative measures, protection measures, seizure and confiscation) are criminal procedural measures which may be covered by Article 82(2) TFEU (points (a) and (b)).

International cooperation (Chapters VII; Articles 26-28)

Chapter VII concerns international cooperation in judicial and other matters. It is important to note that the Convention does not contain any legal regime that would replace existing rules, and it is therefore without prejudice to instruments which already exist in the field of mutual assistance in criminal matters and extradition.[15] In this context, there is a comprehensive set of instruments at European level in order to facilitate judicial cooperation in criminal matters which would apply either to the different *modi operandi* of match-fixing or upon criminalization of match-fixing as a new offence in the domestic legal order of the Member States.[16] This would cover Article 26 of the Convention.

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11 Council Framework Decision 2003/568/JHA on combating corruption in the private sector, OJ L 192, 31.07.2003, p.54.

12 Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182, 5.7.2001, p.1.

13 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

14 The directive sets out the framework designed to protect the soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole, against the risks of money laundering and terrorist financing.

15 §21 of the explanatory report.

16 Council Act of 29.5.2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C197, 12.7.2000, p.1; Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ L190, 18.7.2002, p.20; Council Framework decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, OJ L196, 2.8.2003, p.45; Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders; Council Framework Decision 2008/978/JHA on the European evidence warrant, OJ L350, 30.12.2008; Council

Articles 27 and 28 of the Convention are general provisions on cooperation which are covered by Article 165 TFEU.

Conclusions

Certain offences are currently not covered by Article 83(1) TFEU. The Union has competence over the rest, but is exclusive only over two provisions - Article 11 (to the extent that it applies to services from and to third countries) and Article 14 on data protection (in part).[17] The remainder is shared or "supportive" competence.

2. LEGAL ELEMENTS OF THE PROPOSAL

As far as the legal basis is concerned, it is established case-law that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and the content of the measure.[18] If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measures must be founded on the various corresponding legal bases.[19]

The legal bases which potentially have relevance here are: Article 16 TFEU (data protection), Article 82(1) and 82(2) TFEU (judicial cooperation in criminal matters), Article 83(1) TFEU (substantive criminal law), Articles 114 TFEU (establishment and functioning of the internal market), Article 165 TFEU (sports) and Article 207 TFEU (common commercial policy).

Taken as a whole, the objective of combatting the manipulation of sports competitions contains elements of prevention and cooperation which are mainly covered by Article 165 TFEU and elements of cooperation and approximation which are covered by Articles 114 (for the non-criminal provisions), Article 207 TFEU (insofar as those provisions relate to access by third country betting operators) and Articles 82(1) and 83 TFEU (for criminal matters).

Insofar as the betting services are concerned, Articles 114 and 207 TFEU may be relevant, depending on whether the services are "intra EU" or not. It appears that the internal market aspect is more prominent in the Convention as a whole, whereas the common commercial policy aspect appears to be present only in Article 11 of the Convention. However, even if Article 207 TFEU is not mentioned and considered ancillary to the internal market aspects, Member States are not competent to the relevant aspects which fall in the common commercial policy.

Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L328, 15.12.2009, p.42; Directive 2014/41/EU regarding the European Investigation Order in criminal matters, OJ L130, 1.5.2014, p.1; Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p.39.

[17] Relevant legislative acts may include Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJL281, 23.11.1995, p.31.), Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.01.2001, p.l.) and Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p.60.).

[18] C-377/12, *Commission v Council*, paragraph 34.

[19] *Ibid*, at paragraph 34 of the judgment.

As regards data protection, it is not the main objective of the Convention and its provisions are simply incidental. Nowadays many Conventions of the Council of Europe will recall that data protection needs to be respected, even if such obligations may flow from other Conventions as well (such as Convention No 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data), insofar as the Parties to each Convention may not be identical.

As a consequence, for the EU to exercise its competences over the entirety of the Convention (excluding the elements over which it would have no competence), the main legal bases are Articles 82(1), 83(1), 114 and 165 TFEU.

It follows from the intertwined nature of the Convention, and the fact that it involves competences which may be exclusive of the EU and competences not granted to the EU, that it is not possible for the Union or the Member States to conclude the Convention in isolation.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 165 TFEU in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) On 10 June 2013, the Council authorised the Commission to participate, on behalf of the European Union, in the negotiations for an international convention of the Council of Europe to combat the manipulation of sports competitions (hereinafter referred to as "the Convention") with the exception of matters related to cooperation in criminal matters and police cooperation.

(2) On 23 September 2013, the Council adopted a second authorization for the Commission to participate, on behalf of the European Union, in the negotiations for the Convention as regards matters related to cooperation in criminal matters and police cooperation. [20]

(3) The negotiations were successfully concluded by the adoption of the Convention by the Council of Europe Committee of Ministers on 9 July 2014.

(4) Provisions on prevention are mainly laid down in chapters II and III of the Convention.[21] These provisions may potentially be covered, in full or to a large extent, by Article 165 TFEU. It is to be mentioned that Article 165 TFEU is only a supportive competence which excludes any harmonization measures and does not supersede the competences of Member States in these areas.[22]

(5) Other measures, notably Articles 9, 10 (1) and (3) and 11 of the Convention contain some limited approximation of laws which can be covered by Article 114 TFEU.

(6) Article 11 may also affect services provided from a third country. The measures in question, which concern directly "access" of such services, are covered by common commercial policy (Article 207 TFEU). Member States are not competent to the relevant aspects which fall in the common commercial policy.

(7) Article 14 on data protection comes under the Union's competence according to Article 16 TFEU and is also exclusive in nature.

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20 Council document No 10180/13.

21 But see also Articles 27 and 28 on cooperation outside criminal matters.

22 See Article 2 (5) TFEU.

(8) The European Union is promoting the signing of the Council of Europe Convention on the manipulation of sports competitions, as a contribution to the European Union's effort to combat the manipulation of sports competitions in order to protect the integrity of sport and sports ethics in accordance with the principle of autonomy of sport.

(9) Therefore, the Convention should be signed on behalf of the European Union, subject to its conclusion at a later date.

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Council of Europe Convention on the Manipulation of Sports Competitions is hereby approved on behalf of the Union, subject to the conclusion of the said Convention.

The text of the Convention to be signed is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Convention, subject to its conclusion, for the person(s) indicated by the negotiator of the Convention.

Article 3

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union.*

Done at Brussels,

For the Council
The President