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Proposal for a

COUNCIL DECISION

on the conclusion, 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

On 9 July 2014 the Ministers' Deputies of the Council of Europe adopted the Convention on the Manipulation of Sports Competitions.⁵ The Convention was opened for signature on 18 September 2014 at the Council of Europe Conference of Ministers responsible for Sport. According to its Article 32 (1), the Convention is open to signature of the European Union. Since then a number of parties have signed the Convention, including many Member States.

On 2 March 2015, the Commission presented to the Council its proposals for the Council's decisions on the signing of the Convention on behalf of the Union; (i) a proposal for a Council decision on the signing of the Convention on behalf of the Union with regard to matters related to substantive criminal law and judicial cooperation in criminal matters {COM(2015)86} based on Articles 82 (1) and 83 (1) TFEU; and (ii) a proposal for a Council decision on the signing of the Convention on behalf of the Union with regard to matters not related to substantive criminal law and judicial cooperation in criminal matters {COM(2015)84} based on Articles 114 and 165 TFEU. The explanatory memorandum of these Commission's proposals contained a detailed competence analysis of the Convention. The Commission's proposals were last discussed in Coreper on 11 and 20 November 2015. At

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).

this occasion the Presidency concluded that it would not proceed with the file until it had obtained the consent of all delegations.

Against this background, the Union has not yet signed the Convention. The Commission considers that the signature of the Convention should be part of the Union'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

The present proposal concerns the legal instrument concluding the agreement.

2. THE AGREEMENT

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

Most of the provisions on prevention are contained in chapters II and III of the Convention⁹, with Chapter III setting out a number of provisions to facilitate the exchange of information between all interested parties.

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.

By contrast, 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

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.

⁹ See also Articles 27 and 28 of the Convention covering general aspects of cooperation.

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.

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). Article 16 concerns money laundering. At Union level, this is regulated by Council Framework Decision 2001/500/JHA,¹⁰ along with Directive 2014/42EU.¹¹ 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).¹² 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)).

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.¹³ 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.¹⁴ This would cover Article 26 of the Convention.

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ §21 of the explanatory report.

¹⁴ 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

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).¹⁵ The remainder is shared or "supportive" competence.

3. THE LEGAL BASIS OF THE PROPOSED DECISION

3.1. The substantive legal basis

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.¹⁶ 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.¹⁷

The substantive 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,

L190, 18.7.2002, p.1; 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 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.

¹⁵ 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 (OJ L281, 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.1.) 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.).

¹⁶ C-377/12, *Commission v Council*, paragraph 34.

¹⁷ *Ibid.*, at paragraph 34 of the judgment.

Member States are not competent to the relevant aspects which fall in the common commercial policy.

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 substantive 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.

3.2. The procedural legal basis

Article 218(6) TFEU provides that the Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Article 218(6)(a) TFEU provides that, where an agreement '*covers fields to which the ordinary legislative procedure applies*', the Council shall adopt a decision concluding the agreement after obtaining consent of the European Parliament.

As shown above, the Convention on the Manipulation of Sports Competitions covers fields to which the ordinary legislative procedure applies.

In addition, the Council decision on conclusion is subject to qualified majority voting pursuant to Article 218 (8) TFEU.

3.3 Conclusion

The legal basis of the present proposed decision should be Articles 114 and 165 TFEU in conjunction with Article 218(6)(a) TFEU.

Proposal for a

COUNCIL DECISION

on the conclusion, 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

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(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹⁸,

Whereas:

- (1) Provisions on prevention are mainly laid down in chapters II and III of the Convention.¹⁹ 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.²⁰
- (2) 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.
- (3) 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.
- (4) Article 14 on data protection comes under the Union's competence according to Article 16 TFEU and is also exclusive in nature.
- (5) The European Union is promoting 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.
- (6) In accordance with Council Decision [.....] of [.....] the Council of Europe Convention on the manipulation of sports competitions signed by [...] on [...], subject to its conclusion at a later date.
- (7) Certain provisions of the Convention concern substantive criminal law and judicial cooperation in criminal matters and therefore fall within the scope of Title V of Part Three of the TFEU. A separate Decision relating to those provisions is to be adopted by the Council in parallel to this Decision.

¹⁸ OJ C , , p. .

¹⁹ But see also Articles 27 and 28 on cooperation outside criminal matters.

²⁰ See Article 2 (5) TFEU.

(8) The Convention should be approved on behalf of the Union.

HAS ADOPTED THIS DECISION:

Article 1

The Council of Europe Convention on the Manipulation of Sports Competitions is hereby concluded on behalf of the Union.

The text of the Convention is attached to this Decision.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to the deposit of the instrument of approval provided for in Article 32 of the Convention, in order to express the consent of the European Union to be bound by the Convention.

Article 3

This Decision shall enter into force on the day of its adoption. It shall be published in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council
The President*