

Ellex Raidla Advokaadibüroo

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Analysis of Estonian Laws Related to the Punishment of Match-Fixing

Final Report

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Stage III of the analysis – possible recommendations for the amendment of legislation

This report provides an overview of the legal situation related to match-fixing in Estonia. First, the known Estonian practices are briefly summarised, and the legislation and procedural experience of the reference countries are described. An in-depth discussion of this topic is included in the first stage interim report. Thereafter, the main problems related to Estonian legislation that emerged during the resolution of the sample cases prepared for the second interim report or the general analysis of practices are highlighted. Finally, the problems and advantages related to the preservation of the current legal situation and the introduction of new special provisions are analysed based on what has been previously known, and sample wording is proposed for the special provisions. Interim reports I and II have also been included with the analysis, along with an additional explanation about the damage (see appendices 1–3). When referring to the previous interim reports, the continuous numbering of this document has been used throughout.

1. Current practices and legislation of Estonia and the reference countries

The following reference countries were used in the analysis of the first interim report: Austria, Italy, Lithuania, Latvia, Germany and Finland. The criteria for selecting the countries included the similarities of their legal systems, extensive experience in the field, or similar local conditions. All the aforementioned countries have encountered and dealt with problems related to sports manipulation. Italy, Lithuania, Latvia and Germany have also established special elements. The Lithuanian and Latvian elements are primarily focused on the commission of the manipulative acts, while Germany and Italy have sanctioned the acceptance and soliciting of influence, as well as the solicitation/offering of rewards for the influence.¹ In addition to sports manipulation, Germany has established special elements of sports betting fraud, whereby demanding/offering a reward is also punishable,² and only the context of the act is different. In Lithuania, Latvia and Germany, the special elements of sports betting fraud and the manipulation of professional sports competitions, which have been in force for a few years, have yet to be widely active, and no court decisions have been made based on them. Italy, as the country with the longest experience with these special elements, has used the provision somewhat successfully. The main problems for the state, however, have been that insufficient attention is paid to the actual and continuous implementation of the provisions, and the share of criminal associations in sports manipulations has not been dealt with sufficiently.³

¹ See also the first interim report

² Strafgesetzbuch. Available online: <https://www.gesetze-im-internet.de/stgb/>

³ First interim report, p. 37.

However, Austria and Finland have been able to successfully process betting fraud based on the already existing elements, as well as based on fraud and private sector bribery. In Austria, the Supreme Court has already made one fraud conviction.⁴ In Finland, the approach has been to proceed the act based on the fraud provision if the victim is known, and based on a bribery case if there is no victim (and thus also no identifiable damage).⁵

Estonian public jurisprudence is limited to one district court acquittal decision. This ruling was based primarily on a contest between fraud (Penal Code §209) and the prohibition on playing toto (lottery) (misdemeanour, Gambling Act §100) – it was found that the necessary elements of misdemeanour are a special provision in regard to a criminal offence, but due to the statute of limitations, it was no longer possible to apply them.⁶ Based on the decision, the wording in §100 of the Gambling Act was also changed in order to avoid any future problems. Since then, the fraud provision has not been used in court in the context of sports manipulations. One court ruling can be found regarding a violation of the ban on playing toto, whereby the Tax and Customs Board was obligated to deal with the case of a basketball referee who had bet on the games he officiated.⁷ The final outcome of the proceedings is unknown.

Based on current practice, it is possible to state that in Estonia today, it is theoretically possible to use the necessary elements of two criminal offences and one misdemeanour to prosecute match-fixing and other sports-related manipulations, respectively fraud (Penal Code §209), private sector bribery (Penal Code §402³ and Penal Code §402⁴), and violation of the ban on playing toto (Gambling Act §100). However, as described above, no one is known to have been convicted on the basis of any of these elements, and there is no case law related to sports that have involved the necessary elements of bribery. If certain prerequisites were met, the participants in a manipulation could potentially be considered to be a criminal organisation (Penal Code §255). The prosecution tried this approach in criminal case no. 1-13-10786⁸, however, there has been no case that has led to conviction with regard to criminal organisations.

When assessing the legal situation regarding sports manipulation, one must, among other things, focus on the question of whether any actions related to sports can and should be criminalised. By signing the Council of Europe Convention on the Manipulation of Sports Competitions (Macolin Convention)⁹, Estonia has agreed that sports manipulation needs to be criminalised. Although Estonia has yet to ratify the document¹⁰, it is still important to consider

⁴ Austria Supreme Court decision (28.01.2016) no. 12 Os 77/15p. (Oberster Gerichtshof. Beschluss 12 Os 77/15p). Available online: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20160128_OGH0002_0120OS00077_15P0000_000/JJT_20160128_OGH0002_0120OS00077_15P0000_000.pdf

⁵ First interim report, p. 54.

⁶ Tallinn Circuit Court of Appeal resolution 1-13-10786, p 12.

⁷ Harju County Court order 4-15-10855.

⁸ Tallinn Circuit Court of Appeal resolution 1-13-10786, p 12.

⁹ Entire text of the convention is available online: <https://rm.coe.int/16801cdd7e>

¹⁰ Estonia approved the convention; Government of the Republic resolution no. 276, dated 10.06.2022 <https://www.riigiteataja.ee/akt/205082016001> (late visited on 10.06.2022).

whether the convention will introduce an additional criminalisation obligation as compared to the existing legislation. Actually, the commission of sports-related fraud was already criminalised when, motivated by case no. 1-13-10786, the wording "if the necessary elements of fraud are not fulfilled" was added to §100 of the Gambling Act.¹¹ This suggests that in similar situations, wherein sports betting has been manipulated, the lawmaker considers it possible and proper to initially determine the case as fraud, and only after the necessary elements have not been fulfilled, should the case be processed as misdemeanour, if it is appropriate based on the circumstances.¹²

If, however, one takes the position that sports manipulation requires additional criminalisation, it is important to pay attention to the problems related to the possible duplication of provisions, i.e. where a special provision is established, it should be clearly specified to which existing paragraphs (e.g. fraud, bribery) it applies in the form of special elements, along with whether any act may form both special and basic elements. In addition, when establishing a new provision, one should be sure that the principle of *ultima ratio* is observed, i.e. all other ways of dealing with sports manipulation have been exhausted and a criminal penalty must be imposed.

¹¹ Documents related to the processing of the Gambling Act Amendment Act 260 SE, including the draft and explanatory letters, available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fc56f58f-2397-424b-b1d6-bed029c1a5ff>

¹² First interim report, p. 24

2. The main problems in the current legislation

Specific major problems have become apparent in both cases of the necessary elements of criminal offence (Penal Code §209, §402³, §402⁴), in the practices of the investigative agencies, as well as in the resolution of the typical cases that were compiled for the second interim report which, based on the aforementioned, hinder the successful processing of the acts committed based on these elements.

2.1. Necessary elements of bribery, Penal Code §402³ and §402⁴

Special subjects. The necessary elements of bribery in the private sector are a relatively new concept and, therefore, there is insufficient practice based on which it can, for example, be confidently stated that the players of a sports club qualify as competent persons in regard to the economic activities of the club. This definition definitely does not apply to persons who are otherwise associated with the club (e.g. former players, in example case 1).¹³ Therefore, they cannot be prosecuted as perpetrators based on the necessary elements of bribery. Even with active players, there are issues related to the question of the subject because the line between a competent person in private law and an employee who is not included under this definition is unknown. Apparently, it is easier to confirm that a coach qualifies as a special subject, since his competence includes making important decisions regarding the sports club in a broader and more strategic way. It is known that a competent person does not have to be a senior employee. Based on the comments to the Penal Code, the subject can also be an employee, official, commissioner or representative of a person in private law. What is important is that the person be an employee of a legal person based on an employment relationship, or a competent representative.¹⁴

Due to the aforementioned comment, the requirement of special subjects can cause problems, especially if a player is connected to the team in a way other than an employment contract, i.e. the connection to the club is weaker and qualification as a special subject is more questionable. Since in Estonia, even in the higher leagues, it cannot be taken for granted that all the athletes have signed employment contracts with their clubs, defining a competent person may still be problematic in practice and hinder the proceedings related to match-fixing based on the necessary elements of bribery. If athletes do not qualify as special subjects, the prosecution of bribers is also hindered. In the event that the person offering the bribe mistakenly believes that the athlete is a competent person, according to §26 of the Penal Code, the person can only be punished for an impossible attempt to bribe.¹⁵

¹³ Second interim report, p 67.

¹⁴ Pikamäe, P; Sootak, J. Criminal Code. Comments. Tallinn: Juura 2021, p 1153, p 4.1. See also the second interim report, p 68.

¹⁵ Penal Code. Comments. p 906, para. 3.

Receiving compensation. As shown in sample case no. 4, among other things, the necessary elements of a bribe may not be fulfilled, among other things, because it is impossible to establish that the person who had agreed to the sports manipulation would not benefit from it. Since equivalence relation is an important part of the necessary elements of bribery, the existence of a wrongful agreement and the promised benefit must be proven. Thus, for example, a coach cannot be held liable even if it is proven that he agreed to the match-fixing, but did not receive nor was supposed to receive any favour for it.

2.2. Fraud

Damage and its amount. Since collusive betting often takes place in the betting offices in Asian markets, it is difficult to identify someone as a victim in the proceedings in Estonia. In court practice, it has been found that the damage caused by betting fraud is comprised of property damage to the betting office.¹⁷ If there is no victim, in turn, it is impossible to identify the damage, which is an unwritten necessary element of fraud,¹⁸ because in most cases, there is no benefit without harm, i.e. the perpetrator's purpose of obtaining material gain is not fulfilled as a necessary element of the case.

In practice, determining the damage amount is also likely to be problematic. Generally, the damage amount is assessed by comparing the prior and subsequent status of the victim's assets, whereas the temporal turning point is the use of the assets.¹⁹ However, the amount of damage will probably be calculated somewhat differently in the case of betting fraud. A betting house's loss is probably not the entire amount it paid out due to the alleged match-fixing, but the difference between the amount that was paid out and the amount that would have been paid out if the match had not been fixed.²⁰

¹⁶ Second interim report, p 92.

¹⁷ Second interim report, p 79.

¹⁸ Varavastased süüteod, p 139.

¹⁹ Kairjak, M; Sootak, J. Varavastased süüteod. Tallinn: Juura 20, p 167.

²⁰ Second interim report, p 79.

Fraud and asset disposal. These, as necessary elements, precede the development of damages and are directly related to it. Identifying them is problematic for similar reasons. To date, case law has considered the moment when the betting office pays the winning amount to the fraudulent bettor to be the disposal of assets according to the necessary elements.²¹ However, it is difficult to determine when this actually occurs if both the person making the fraudulent bet and the betting office that sustains the loss are located outside of Estonia, e.g. in Asia. This means that if the parties are unavailable or the victim lacks interest, it is essentially impossible to prosecute the persons operating in Estonia, e.g. players or coaches, on the basis of the necessary elements of fraud.

Execution and participation. Even if the necessary elements, i.e. fraud and asset disposal, can be identified, based on the necessary elements of fraud, the athletes, coaches or referees themselves cannot be the perpetrators. They can only be prosecuted for aiding and abetting, because they, in some sense, did not directly participate in the commission of the fraud.²²

3. The need for changes in the law and the possible changes

3.1 Maintaining the status quo

As the first option, it should be considered whether it would be possible to continue successfully dealing with cases of sports manipulation without establishing new necessary elements of an offence or altering the existing ones.

Among the reference countries, Austria and Finland have followed the path of using the established provisions, i.e. the ones already existing in the penal codes. The former is known to have processed cases of match-fixing (including those resulting in conviction) based on the necessary elements of fraud according to the Austrian Penal Code.²³ Similarly to Estonian practice, the act of fraud is defined as placing a bet by confirming by default that the bet was made impartially.²⁴ It is typical of Finnish practice that once the victim has been identified, the case is generally processed as fraud, but without a victim, a bribery. Cases have been successfully prosecuted on the basis of both of these cases.²⁵

²¹ Second interim report, p 79.

²² Second interim report, p 80.

²³ Austria Supreme Court 28.01.2016 decision no. 12 Os 77/15p. (Oberster Gerichtshof. Beschluss 12 Os 77/15p). Veebisättesaadav: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20160128_OGH0002_0120OS00077_15P0000_000/JJT_20160128_OGH0002_0120OS00077_15P0000_000.pdf

²⁴ First interim report, p 32.

²⁵ First interim report, p 54.

Fraud, Penal Code §209. For the successful implementation of fraud provisions, it is important that the victim, and therefore the damage, can be defined more broadly compared to the current judicial practice, i.e. based not only on the misuse of a betting office and its activities, but, for example, based on the damages caused to the bettors. However, if we take into account how many individual bettors are usually customers of betting offices, it would be ineffective to consider them all victims. Also, the issue of determining the sizes of the damages as described above, would probably create an even bigger problem (see 2.2 above), i.e. it is impossible to determine whether, and to what extent, the bettors would have got their money back without the match-fixing.

Private sector bribery, Penal Code §402³ and §402⁴.

In order to determine the necessary elements of private sector bribery, it would be important to more clearly determine the subject related to the necessary elements, i.e. the competent person acting on behalf of a private person. However, if it turns out that, for example, the player of a sports club does not qualify as a competent person, it will be clear that the criminal liability of the players participating in the match-fixing cannot be analysed on the basis of the necessary elements of bribery. In such cases, the prosecution of those paying the bribes is also not possible. In the event that a person offering a bribe mistakenly believes that the athlete is a person who is competent in the (club's) economic activities, the person can only be punished for an impossible attempt to give a bribe based on § 26 of the Penal Code.²⁶

Necessary elements of misdemeanour, Gambling Act §100. There are no direct obstacles to the application of the provision concerning the necessary elements of misdemeanour with regard to violating the ban on playing toto. However, the necessary elements cannot be considered an effective way of combatting match-fixing, as a maximum fine of only €80 can be imposed for it.²⁷ In addition, the necessary elements of misdemeanour are not enough to fulfil the criminalisation obligation assumed by Estonia under the Macolin Convention.

²⁶ Penal Code. Comments. p 906, para 3.

²⁷ First interim report, p 23.

3.2 Derivatives of fraud

Since an important element of a basic fraud case (Penal Code §209) is property damage and thereby, also the existence of a victim, special elements of fraud should be established to resolve sports manipulation cases, in which the cause of damages as a consequence would be excluded from the mandatory elements, as it would eliminate the need to identify the victim.

Currently, in addition to the basic elements of fraud, special elements, §210–213 already exist. In a similar way, it would also be possible to establish the necessary elements of sports or betting fraud. The existing derivatives can be justified by various international legislation, for example, the necessary elements of benefit fraud are required according to Directive 2017/1371²⁸. Since it is possible to commit benefit fraud in connection with subsidies provided by the EU, these fraudulent actions damage the Union's financial interests within the meaning of Article 3 of the Directive.

Most of the time, when relying on the necessary elements of fraud in cases of game manipulation, the problem is that the victims who have been damaged cannot be identified, and therefore, damages should be excluded from the necessary elements. The necessary elements of benefit fraud, as defined in §210 of the Penal Code, rely on the same principle, i.e. it is necessary to get the benefit, but no one should be harmed as a result. Such elements would enable the individuals who actually make the bets to be prosecuted as the perpetrators, and the players and coaches who carry out the match-fixing to be charged as accomplices, as is the case with the basic elements of fraud (see also case 1-13-10768).

Examples of reference countries. Germany is the only reference country for the analysis of match-fixing to have established a special authority to deal with sports betting fraud. The first part of the necessary elements places the responsibility on the athletes, coaches and other persons who actually carry out the match-fixing, while the second part deals with the responsibility of the organisers of the fraudulent bets, which is more comparable to bribery, and is fraud in name only.

(1) 265c. Sports betting fraud.

An athlete or coach, who demands, accepts or agrees to accept a bribe for oneself or a third party in exchange for influencing the course or result of an organised sports competition to favour the opponent, whereby an illegal benefit is obtained from the public sports betting that is organised in connection with the competition, is punishable by a monetary fine or up to three years of imprisonment.

²⁸ European Parliament and Council directive (EU) 2017/1371, 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. Available online: <https://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:32017L1371>

(2) Providing, promising or agreeing to provide a benefit to an athlete or a coach for oneself or a third party in exchange for influencing the course or result of an organised sports competition in favour of the opponent, as a result of which unlawful benefits are received from the public sports betting organised in relation to this competition is punishable by a financial penalty or up to three years of imprisonment.

Estonia's possible elements. In order for the new Estonian special elements to be considered as derivatives of fraud, they should be based on a system that differs from the German elements, and instead, is more in line with the existing Estonian elements of fraud, and uses the same wording for the sake of clarity:

Betting on sports competitions with the participation of professional athletes and knowingly creating an incorrect perception of the actual circumstances for the purpose of financial gain is punishable by a financial penalty or up to five years of imprisonment.

Legal benefits. According to the comments to the German sports fraud elements, the property and customers of betting offices are legal benefits, which require special protection due to their specific nature.²⁹ Apparently, in the case of Estonia, it would also be expedient to establish the property of a betting office as a protected legal benefit. However, in the case of the office's customers, it may not be expedient to protect their properties as legal benefits. Firstly, the large number of victims defined by the damages to such legal benefits would cause practical problems, and secondly, it would probably be difficult to define the size of this property.

Objective elements

Act – deceit, i.e. creating a false perception of the actual circumstances. Basically, it is defined similarly to the necessary elements of fraud.³⁰ In addition, it must be related to sports betting.

Subject – a person who makes a fraudulent bet.

Goal – financial gain.

Subjective element. Since a fraudulent act cannot be committed through negligence, an implied intent related to all facts of the objective elements is a minimum requirement, just like with other elements of fraud.³¹

²⁹ First interim report p. 50.

³⁰ Penal Code. Comments. p. 690.

³¹ Penal Code. Comments. p. 697

The scope of criminalisation. When establishing special elements, the levels at which the criminalisation of sports manipulation is considered necessary should be determined, whether at a professional level or more broadly. Of course, thereafter, it is also necessary to stipulate how a professional athlete is more precisely defined in the context of the provision.

New concepts. When establishing these types of elements, it is also important to take all the concepts that have not been previously included in the Penal Code into consideration, in order to avoid any problems with the application of the elements at an early stage.

Professional – for example, after the establishment of the elements of Lithuanian sports manipulation, a situation relatively quickly developed wherein it was understood that the term “professional athlete” should be more clearly defined since, at the time, it caused confusion in the administration of justice.³² In regard to the special elements in the German sports betting law (StGB §265c)³³, it was not considered important that the provision only refer to professional athletes. However, the constitutive act must be related to “organised sports competition” and “public betting”. However, another special German provision regarding the manipulation of professional sports competitions, has been created to cover only professional sports (StGB §265d)³⁴. Based on the relevant comments, a professional competition is basically defined by the organiser of the competition, the applicable rules and the athletes and their incomes.

- Firstly, a national competition must be organised by either a national sports federation or by an organisation recognised by it.
- Secondly, rules must have been adopted by a national or international sports federation that are binding on the parties.
- Thirdly, the athletes must earn a significant portion of their income by competing. It is also important that the majority (i.e. more than 50%) of the participants earn a significant part of their income from this sport. This should include athletes/players who actually compete, and not, for example, reserve players. One-time donations or prize money do not constitute a significant part of the athlete's income. The general economic situation also does not impact the economic situation of “noteworthy” athletes, but their income is derived directly or indirectly from sports, which includes prize money and sponsorship income. In addition, any form of payment must clearly exceed the athlete's own costs (transport, time, etc.).³⁵

³² First interim report, p. 41.

³³ See also first interim report, p. 48.

³⁴ German Criminal Code. Available online: https://www.gesetze-im-internet.de/englisch_stgb/index.html

³⁵ Schreiner. Münchener Kommentar zum Strafgesetzbuch. 4. Auflage 2022, §265d, pp. 17–18.

Punishment. When defining the sanctions, it would be expedient to observe the example of other derivatives of fraud, including Penal Code §210–212, which provide for a relatively wide range for punishment, from financial penalties to five years of imprisonment.

Competition. It is essential to decide whether betting fraud would comprise special elements, i.e. whether it would apply to betting in any case, even if the basic elements of fraud are fulfilled, or whether the phrase “if the necessary elements under Penal Code §209 are not fulfilled” should be added to the provision. The other derivatives of fraud, in Penal Code §210–213, are considered to be special elements, i.e. based on the principle of *lex specialis*, they are always applied before the basic elements of fraud,³⁶ and therefore, it would probably be expedient to establish betting fraud as having special elements.

3.3 Special elements of sports manipulation

Such elements should mainly be seen as the elements of private sector bribery, as well as a substitute for fraud, since the structure would be the most similar to bribery, i.e. the main content of the elements is a wrongful agreement, and the two sides also mirror one another.

Examples of reference countries. Special elements of sports manipulation have been established by Italy, Lithuania, Latvia and Germany.

Italy – *Special Law 401/1989. Article 1. Cheating in Sports Competitions.*

1. *Anyone who offers or promises money or other benefits or inducements to any participant in a sports competition organised by any association recognised by Italian National Olympic Committee (CONI), the Italian Horse Breeding Union (UNIRE) or any State-recognised sports body and its member associations in order to achieve a result that is different from that resulting from fair and proper competition or commits other frauds for the same purpose, shall be punished with imprisonment of two to six years and a fine of €1,000–4,000.*
2. *The same penalties apply to participants in competitions who accept money or other benefits or advantages or accept promises.*
3. *If the result of the competition impacts the regularly organised prediction and betting competitions, the imprisonment specified in paragraphs 1 and 2 will be increased by up to 50% and the fine from €10,000 to €100,000.*

Lithuania – *Criminal Code Article 182¹. Manipulation of Sports Competitions*

1. *A person who unlawfully influences the fair conduct or result of professional sports competitions shall be punished by community service or by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to four years.*

³⁶ See, e.g. decision of the Criminal Chamber 3-1-1-105-13, p 16.1.

2. A person who commits the offence referred to in paragraph one shall be absolved of responsibility if he or she, before the allegations are filed against him or her, voluntarily admits that he or she participated in the offence to the law enforcement authority and actively cooperates in identifying the circumstances of the offence.

3. Legal entities shall also be held liable for the acts provided for in paragraphs 1 and 2 of this Article.³⁷

Latvia – Criminal Code article 212¹. Manipulation of Sports Competitions

(1) For persons who commit an act whereby a sports competition organised by a sports organisation is manipulated, the appropriate punishment is imprisonment for up to one year or a temporary restriction of movement or conditional imprisonment or community service or a fine.

(2) For a person who commits an act referred to in the first paragraph of this article, whereby material property, benefits or other forms of enjoyment have been received, transferred or offered, the appropriate punishment is imprisonment for up to three years, or a temporary restriction of movement or conditional imprisonment or community service or a fine.

(3) For a person who commits a crime referred to in article 2, if it was committed on a large scale or as part of a criminal association, the appropriate punishment is imprisonment for up to five years, or a temporary restriction of movement or conditional imprisonment or community service or a fine.

Germany – Criminal Code Section 265d. Manipulation of professional sports competitions.

(1) Whoever, in the capacity as an athlete or coach, demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for influencing the course or result of a professional sports competition in an anticompetitive manner for the benefit of the opponent incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Whoever offers, promises or grants an athlete or coach a benefit for themselves or a third party in return for influencing the course or result of a professional sports competition in an anticompetitive manner for the benefit of the opponent incurs a penalty of imprisonment for a term not exceeding three years or a fine.

³⁷ The translation into Estonian has been made by the analysis team based on the wording of the English provision

The disadvantages of the Lithuanian and Latvian elements are that they apparently try to criminalise game behaviour itself, since influencing the fairness of a sports competition is probably also related to playing badly on purpose, e.g. losing on purpose. However, this is almost impossible to prove in practice, and it would also be inappropriate to criminalise the actions of the athletes on the field. In general, there is a risk that, when establishing elements similar to the Lithuanian and Latvian ones, it will be difficult to adhere to the principle of definiteness of purpose. Neither of the aforementioned countries has any case law that would prove the opposite. Therefore, following the example of Lithuania and Latvia when considering the creation of new provisions is probably not justified. More information is available in the Italian and German examples.

Establishing elements similar to the Italian ones would probably be possible in Estonia, if it can be decided that the crime, as defined by the Estonian Penal Code, also specifies that the acquisition of some benefit has been agreed upon. The German provision is also almost identical to the Estonian private sector bribery elements, but instead of a competent person, the subject is persons that deal with sports.

Possible Estonian wording

The punishment for agreeing to influence the result of a professional sports competition in an illegal/unsportsmanlike manner, or making an offer to that effect, for an athlete, coach, referee or other person who can influence the course of the competition, in order to obtain a financial benefit for himself or herself or a third party, shall be a financial penalty or up to five years of imprisonment.

VERSION II: The punishment for an athlete, coach, referee or other person who is able to influence the course of a sports competition, agreeing to allow himself or herself or a third party to receive or accepting property or other benefit in return for influencing the result of a professional sports competition in an illegal/unsportsmanlike act shall be a financial penalty or up to five years of imprisonment.

The punishment for making an offer to influence the result of a professional sports competition in an illegal or unsportsmanlike manner or agreeing to that effect, for an athlete, coach, referee or other person who is able to influence the course of a sports competition, in order to obtain a financial benefit, shall be a financial penalty or up to five years of imprisonment.

Legal benefit. Problems may develop in defining the legal benefit. For example, German commentaries have cited cases where the legal benefit that the legislators wanted to protect with the provision could not be identified.³⁸ The German legislators sought to have the provision protect the dignity of sport as a general legal benefit, and also protect pecuniary benefits as individual benefits. However, the protection of pecuniary benefits cannot be affirmed, as this provision does not require that illegal pecuniary gains through betting be part of the wrongful agreement, and therefore, the interests of booking offices are not protected.

³⁸ First interim report, p 51.

The pecuniary benefits of the athletes and clubs remain, which the legislator has indicated. However, it has not been possible to precisely determine them, and this damage, like the decrease in viewability resulting from of the manipulations, can is be viewed as secondary, indirect damage.

The dignity of sport is also not a suitable legal benefit, because due to the *ultima ratio* nature of criminal law, it is incorrect to criminalise behaviour that is clearly based on moral values and which is already stipulated in the guidelines of the sports associations and clubs themselves.³⁹

The legal benefits protected under Article 1 of Italian special law 401/89 are loyalty and the correctness/lawfulness of conducting sports competitions.⁴⁰

In part, it may be possible to use the example of the existing Estonian provisions on bribery when creating a new provision. The collective legal benefit protected by private sector bribery provisions is honest and corruption-free economic activity in the private sector and economic development and free competition.⁴¹ As an individual benefit, the relationship of being loyal and honest between a private person and a person who is competent to act in the private person's interest, are also protected.⁴²

³⁹ Schreiner. Münchener Kommentar zum Strafgesetzbuch. 4. Auflage 2022, § 265d, 4

⁴⁰ First interim report, p 36.

³⁹ Schreiner. Münchener Kommentar zum Strafgesetzbuch. 4. Auflage 2022, § 265d, 4

⁴⁰ First interim report, p 36.

⁴¹ Penal Code. Comments. § 402³, p 1.1.

⁴² Decision of the Criminal Chamber 18.06.2018 no. 1-16-10888, p 41.

Objective elements

Act – concluding a wrongful agreement, i.e. agreeing to influence the course and/or result of the competition or making a proposal to that effect. Similar to a bribe, the elements of an act should be fulfilled even if the other party does not agree to the proposal.⁴³ If the act is comprised only of concluding an agreement involving influence, there could be problems with the definition, i.e. is it enough that the athlete agrees to, for example, “put less effort in this game” or does he have to specifically agree to doing something against the rules, etc. Therefore, it is reasonable to retain the requirement of promising/accepting the payment in the provision, as is stipulated in the necessary elements of bribery.

Unlawful agreement – the content of the agreement that is being concluded should violate the rules of sports competitions or involve unsportsmanlike lobbying. When relying on the latter concept, it should also be immediately defined. As in bribery cases generally, it is not important whether the agreement is actually implemented.

The content of the influence. According to the comments of the elements described by the Germans, it is important that the influence “in favour of the opponent” occurs as an element of the case, because it is not possible to influence the game in favour of yourself or your team. After all, influencing the competition to benefit one’s own team would be exactly what an athlete’s work entails. However, it should be kept in mind that situations often occur where bets are placed on events occurring that don’t directly favour either party. Therefore, at first glance, it seems that it would be expedient to exclude this requirement from the new elements, so as not to narrow its scope unnecessarily. However, in this case, it would theoretically possible that the elements would also cover situations in which an athlete agrees to receive a reward for doing their best to influence the course of the game in favour of their own team.

In addition, it is important to make sure that the content of the necessary elements is not influence itself, i.e. punishment cannot be imposed, for example, for intentionally losing. The punishable act is the wrongful agreement regarding influence. Nevertheless, it is important to define the content of the influence in order to determine which agreements are prohibited in connection with sports competitions.

Subject – the special subjects of the first part of the necessary elements are the people directly related to the sports event, who can influence the course of the competition, i.e. the athletes, coaches and referees. In practice, situations would probably develop where the circumstances regarding certain persons, for instance, those associated with the sports club in ways other than those already mentioned, are unclear.

⁴³ Penal Code. Comments. § 298, p 4.4.

Subjective elements. Since a manipulative act or consent to it cannot be committed through negligence, there should be at least an implied intent with respect to all the circumstances of the objective elements.

Since during the competition it is almost impossible to determine whether an athlete, coach or referee is manipulating the course of the game, the central element of the manipulation clause should be a wrongful agreement regarding a manipulation, and not the manipulation itself. This also makes the provision similar to the elements related to private sector bribery (Penal Code § 402³, § 402⁴). However, the main difference would be that the player need not receive, or even be promised, any benefit in order for the necessary elements of sports manipulation to be fulfilled by a non-athlete. As one option, the hierarchy of the elements could also be such that if the match manipulation agreement is accompanied by some kind of benefit, the necessary elements of bribery are fulfilled, and if not, the case is processed as sports manipulation.

Professionalism. When establishing a special provision, it should be decided whether it is intended to cover only professional sports or sports in general. In this case, professional sports or professional athletes should also be defined (also see p 3.2 above). It would probably be more expedient in practice, and also more in line with the principle of *ultima ratio*, if manipulation agreements were only punishable in the case of professional athletes.

A criminal offence or misdemeanour. When establishing special elements of sports manipulation, the case does not necessarily need to be a criminal offence. The case could also be processed as the necessary elements of misdemeanour, for example, within the framework of the Sports Act. The fact that a clear understanding of whether sports-related acts should be criminalised has yet to develop speaks in favour of them being classified as a misdemeanour. The necessary elements of misdemeanour are fulfilled when it is decided that the legal benefit to be protected is not sufficiently important or the offence is not serious enough. At the same time, fines of up to €400,000 can theoretically be imposed in case of misdemeanours, i.e. a sufficiently large fine could also have a preventive effect on sports manipulation, without the need to impose criminal punishments on the perpetrators.

It would certainly not be practical to introduce a misdemeanour offence if it were known that Estonia still plans to ratify the Macolin Convention in the near future, i.e. that Estonia would be obligated to criminalise acts of sports manipulation in any case and that it would be determined that the current provisions do not sufficiently criminalise the manipulations (see one possible approach above, Chapter 1).

Competition. Another main problem could be the competition between the provisions, as happened in case no. 1-13-10786 – since it was found that a misdemeanour involves special elements in relation to fraud, its provisions should have been used in the proceedings instead. First of all, the given case was problematic because of the faster statute of limitations for misdemeanours, and therefore, it was not possible to convict the perpetrators. Even more negatively, a misdemeanour as special elements can create a situation wherein the necessary elements of a criminal offence, e.g. a case of fraud, are fulfilled but due to the principle of *lex specialis*, the perpetrator is charged with a misdemeanour and is given a lighter sentence compared to the injustice he actually caused.

When establishing new elements, it is important to keep track of how the elements relate to the previously valid necessary elements of an offence. It must be decided whether the elements of manipulation would completely replace bribery in the field of sports or be processed as additional elements. The first option would be that the elements of sports manipulation would apply to the non-athlete party, regardless of whether a benefit has resulted from the agreement or whether the perpetrator is a competent person in regard to the economic activities of the private person. Another option would be that the elements of sports manipulation would apply in the cases where the elements of private bribery were not fulfilled. A third option that should be discussed is that both elements would apply simultaneously if it was decided that the sports manipulation and the bribery elements would protect different legal benefits.

If sports manipulation were to be introduced as involving the elements of a misdemeanour, it would be unreasonable to define it as having special elements as this would lead to a situation similar to the one that occurred in case no. 1-13-10786 (see also above).

3.4 Designating the ESTCIS as an investigative institution

When establishing the special elements of sports manipulation, it should also be considered whether the right to process the acts related to sports manipulation or fraud related to betting should be assigned to the Estonian Centre for Integrity in Sports (ESTCIS). This would create a situation wherein sports fraud cases would be handled by professionals in the field who are both more competent and motivated to deal with the problem.

According to the Code of Criminal Procedure, the investigative body is the body conducting proceedings⁴⁴, who performs the procedural acts in a criminal case independently, unless additional requirements have been submitted for obtaining permission for the act. Based on §31 of the Code of Criminal Procedure, currently, the investigative bodies, within their areas of competence, are the Police and Border Guard Board, the Security Police Board, the Tax and Customs Board, the Competition Board, the Military Police, the Estonian Environmental Board, and the Department of Prisons and the Prisons Department of the Ministry of Justice and the prison.

⁴⁴ Code of Criminal Procedure §16

The bodies do not include the Data Protection Inspectorate and the Financial Supervision Authority, indicating that the list of the bodies is very limited. The last time a new body was added to the list was in 2011, when the Environmental Inspectorate was added (the current Environmental Board). The investigative jurisdiction of the latter includes offences aimed at the environment, which form a separate chapter in the Penal Code. Also, the investigative jurisdictions of all other bodies include several different elements. However, considering all of the circumstances, it is unlikely that granting the ESTCIS the investigative authority would be consistent with the current legislative approach.

However, the above does not rule out the possibility of giving ESTCIS the status of a body conducting proceedings in sports-related rules. Thereby, the body could potentially be assigned additional rights for data collection, so that potential cases of game manipulation could be effectively investigated and the ESTCIS would also retain the competence to impose sport-related punishments, e.g. playing and occupational bans.