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23 April 2012

## Good governance and ethics in sport

### Addendum to the report

Committee on Culture, Science, Education and Media

Rapporteur: Mr François ROCHEBLOINE, France, Group of the European People's Party

### 1. Proposed amendments to the draft resolution

#### Amendment A

In the draft resolution, at the end of paragraph 6.1, add the following words:

*“, authorising it, inter alia, to undertake, on its own initiative and at any point, internal investigations, including with regard to former officials, and ensuring that the arrangements for electing its members guarantee the Committee’s full independence;”*

#### Amendment B

In the draft resolution, at the end of paragraph 6.2, add the following words:

*“, and in particular the decision of 11 May 2010 which suspended the criminal proceedings initiated by the Zug prosecution service against two natural persons and FIFA;”*

#### Amendment C

In the draft resolution, replace paragraph 6.3 with the following text:

*“hold a detailed and exhaustive internal investigation in order to determine whether, and to what extent, during the latest campaign for the office of President, the elected candidate exploited his institutional position to obtain unfair advantages for himself or for potential voters.”*

### 2. Explanatory memorandum by Mr Rochebloine, rapporteur

1. On 6 March 2012, the Committee on Culture, Science, Education and Media adopted the report on “Good governance and ethics in sport”. The same day, the committee heard Mr Thomas Hildbrand, Special Public Prosecutor for the Canton of Zug (Switzerland) in connection with the ISMM/ISL case.
2. Mr Hildbrand provided a text in German comprising all his statements, a translation of which is appended to this addendum. In view of the importance of this information, the committee asked me to submit an addendum and, where appropriate and necessary, any proposed amendments to the draft resolution adopted on 6 March. This document has been written in response to that request.
3. Following the adoption of the report, on 7 March 2012 FIFA issued a statement containing a number of observations and claiming that certain facts mentioned in the report were inaccurate. I have therefore made the necessary checks. In addition, Mr Joseph S. Blatter, the President of FIFA, has made some fairly critical statements regarding our committee’s approach. I shall come back to those statements below.

4. The conclusions I have reached in the light of all the facts available to us can be summarised as follows: we are entirely right to call for greater transparency and encourage FIFA to speed up the reforms it has announced. Circumspection had led me to exercise a degree of restraint in my initial proposals; I now believe we should be more unequivocal. My proposed amendments to our draft resolution have been drafted with this in mind. The following paragraphs highlight the factors justifying my new proposals.

5. The ISMM/ISL case concerns facts going back to the period between 1989 and 2001. However, in the light of Mr Hildbrand's statements, we know that instances of financial mismanagement had begun even earlier:

*"3.3. ... One member of the management of Sports Holding AG/ISMM AG declared that the favouring of well-known personalities in sport to promote sport policy and economic objectives dated from the Seventies, when sport became an economic player. ISL had pursued such practices since its foundation. ...*

*Another member of the Group's management said that, when rights had been acquired, additional payments had had to be made over and above the actual costs of the acquisition of those rights. The payments concerned had gone to people who had helped to ensure that the contract came about.*

*ISL Properties AG as a company within the ISMM (ISL) Group **made commission payments totalling CHF 122 587 308.93**, in the aforementioned context between 1989 and 1998 ..."*

6. Furthermore, various payments had been made to several beneficiaries, whose names were not provided, between June 1999 and January 2001, amounting to a total of approximately CHF 37.4 million.

7. Mr Hildbrand also confirmed that:

*"1.8 ... the ISMM (ISL) Group, in the context of contracts to be concluded with sports organisations, paid significant sums to football officials, and that FIFA was aware of this and was involved in the composition proceedings."*

8. In addition, in the context of the financial transaction relating to the agreement of 27 February 2004, a law firm representing FIFA paid the sum of CHF 2 500 000 into the "ISMM and ISL" bankruptcy assets. The procedure showed that this amount had come from a senior FIFA official, against whom criminal proceedings were finally initiated (see sections 2.1 to 2.3 of Mr Hildebrand's statement).

9. Mr Blatter was Technical Director of FIFA from 1975 to 1981, FIFA General Secretary from 1981 to 1998 and has been its President ever since. Since FIFA was aware of significant sums paid to certain of its officials, it is difficult to imagine that Mr Blatter would not have known about this.

10. That does not mean that he was directly involved in this case of backhanders. But I believe it is extraordinary that he did nothing to make public all the information which FIFA had or has, and took no steps whether internally or via the courts to enable FIFA to obtain reparation. As Mr Hildbrand clearly explained, FIFA was accused as an undertaking under Swiss law, but it was also a victim: the money paid under-the-counter to certain unscrupulous officials should have been paid to FIFA.

11. I now come to FIFA's press release of 7 March and the statements made by Mr Blatter. FIFA wished to give clarification vis-à-vis the three requests made of it in our draft resolution; furthermore, while appreciating the fact that the report highlighted several positive developments, FIFA referred to certain inaccuracies. The clarifications given by FIFA with regard to the requests made of it are as follows:

- i. FIFA was already working on reform of its internal governance; several task forces and an Independent Governance Committee were working on proposals to be presented to the FIFA Congress on 24 and 25 May 2012.
- ii. The decision on the publication of the order suspending the criminal proceedings was for the Swiss Federal Court to take; FIFA had given its approval for its publication.
- iii. The Ethics Committee had already looked into the allegations made by Mr Mohamed bin Hammam against Mr Blatter and had dismissed all charges against the latter.

12. Concerning these comments:

- i. Our committee's report quite rightly mentions the current reform process in FIFA (see paragraph 105) and we unreservedly support it. Our request sought to encourage this process and the reflection currently taking place in FIFA on the improvements to be made to its review procedures. In this context, it is essential to strengthen significantly the powers of the Ethics Committee, which should be able to

take action on its own initiative; I would add that it is also essential that its members are elected in such a way as to ensure that the President, Executive Committee, or any other FIFA body or official cannot exert direct or indirect pressure on them. Paragraph 6.1 of the draft resolution is not sufficiently explicit in this regard, which is why I propose that it be amended.

- ii. Paragraph 6.2 of the draft resolution concerns all the judicial and other documents which FIFA has, and not merely the closing order: one only has to think of the financial transaction and the transfer of CHF 2 500 000 to FIFA's coffers or the correspondence between FIFA and its lawyers. In point of fact, the closing order was not explicitly mentioned, on the ground that we were not certain of the legal situation. Now, according to Mr Hildbrand's statement (see the appendix, section 6.2, second paragraph), "This order to discontinue proceedings is not subject to an absolute secrecy requirement". It would therefore appear that FIFA is able to publish the document in question (which it must have in its possession as party to the proceedings) without waiting for a decision from the Swiss Federal Court. For this reason, I now suggest that it be explicitly referred to in our draft resolution.
  - iii. With regard to FIFA's reaction to our third request, I asked for a copy of the full decision whereby the FIFA Ethics Committee rejected the allegations made by Mr bin Hammam against Mr Blatter and, if applicable, a document indicating the full extent of those allegations. FIFA has declined to provide us with a copy of those documents. Based on information divulged in the press, we know that the Ethics Committee dismissed all Mr bin Hammam's allegations; but it also emerges that these allegations referred exclusively to the fact that Mr Blatter had been informed beforehand of the action which Mr bin Hammam was alleged to have taken. Accordingly, there was no investigation to determine whether Mr Blatter had been able to profit unduly from his institutional position – in a manner prejudicial to FIFA – during the period prior to the presidential election. A detailed and exhaustive investigation is imperative. We have the right to know the truth, and ascertaining the truth can trouble only those who have something to hide. Since the issue regarding Mr bin Hammam seems to be closed, I now propose clarifying our request and limiting it to verification of Mr Blatter's actions, in the hope that it will at last be possible to rule out any misappropriation.
13. FIFA said in its statement that:
- i. There was no justification for the criticism of limited financial transparency and potentially dubious expenditure (section 4.2.2 of the explanatory memorandum), since FIFA's financial reporting was in accordance with IFRS international standards and were audited by the accountancy firm KPMG.
  - ii. Paragraph 97 was not accurate since KPMG had audited each financial year separately.
  - iii. With regard to paragraph 100, it was common practice not to list each individual item of expenditure.
  - iv. Concerning paragraph 101, the increase in salaries was due to the fact that they are paid in Swiss francs (CHF) and converted, for accounting reasons, to US dollars (US\$), which had depreciated in relation to the Swiss franc.
  - v. In paragraph 102 the figure of US\$ 102 million was overstated because short-term employee benefits paid to key management personnel were already included in the total amount of salaries.
14. It is our duty to remain strictly objective and not judge on the basis of inaccurate facts. I therefore carried out further verifications. Through our secretariat – at the same time as I requested the documents regarding the investigation into Mr Blatter – I asked FIFA if they could forward to us a statement from the relevant body certifying whether, and if so to what extent, the "short-term employee benefits of US\$ 32.6 million" paid to the key management personnel in 2010 (as indicated on page 104 of the 2010 FIFA financial report) were included in the total amount of "salaries" – namely US\$ 65 280 000 – as stated on page 83 of that financial report.
15. On 30 March 2012, the secretariat received the following reply: "There are no further elements to add to those contained in our press release of 7 March 2012. All matters relating to FIFA administration, at all levels, come under the responsibility of the different bodies of our organisation." This reply defies comment. Nonetheless, I would like to provide the following information.
16. Our report quite rightly refers to FIFA's compliance with IFRS standards. But that is not enough to dismiss our concerns regarding the limited transparency of FIFA accounts and our doubts regarding certain expenditure; FIFA is not an undertaking just like any other and should do more.

17. It is true that KPMG also audits the consolidated accounts each year; that was not mentioned in the report and it is only right to rectify this oversight. Nonetheless, responsibility for compiling the consolidated accounts falls to FIFA's Executive Committee, which is also responsible for choosing and applying appropriate accounting methods, as well as suitable accounting estimates. The auditors' responsibility is to "issue an opinion on the consolidated accounts" and they should carry out the audit in order to "provide reasonable assurance that the financial statements are free of significant material misstatements". This implies that the external audit issues an opinion on compliance with procedural requirements and not on the substance of the expenditure as such, and does not corroborate that such expenditure is justified.

18. It is perhaps current practice (and in accordance with IFRS standards) not to list all items of expenditure; but that hardly makes for transparency when it is a question of approximately US\$ 43 million and an indefinite proportion of US\$ 493 million. It is therefore quite legitimate to ask why the FIFA Congress does not demand further clarifications.

19. Between 31 December 2009 and 31 December 2010 the exchange rate between the dollar and the Swiss franc went from US\$ 1 = CHF 0.932093 to US\$ 1 = CHF 1.033734. The depreciation was therefore in the region of 11%; this is not negligible but cannot explain the increase in the accounts of over 31%.

20. Lastly, FIFA declined to provide a statement certified by the relevant body indicating the extent to which the "short-term employee benefits of US\$ 32.6 million" paid to the key management personnel in 2010 were included in the total amount of salaries, namely US\$ 65 280 000. It is not at all obvious that the concept of salaries should also include short-term employee benefits and there is nothing in the financial report which enables us to conclude that this is the case. Accordingly, there is no need to make a correction.

21. Before concluding, I consider it necessary to come back to the statements made by Mr Blatter, as reported by Manesh Shrestha, for CNN, on 9 March 2012.<sup>1</sup> He apparently said that we should address the problems we have in Europe not the problems we create in FIFA and that he did not understand why a political organisation in Europe or elsewhere in the world had the right to ask FIFA to enter into any activity, especially in relation to the election. Lastly, he is reported to have said: "We need, naturally, also the acceptance of the political authorities – but we don't like political authorities interfering in our internal affairs."

22. I wish to make three points in response:

- Mr Blatter is the President of FIFA, but he is not FIFA and he should not confuse what is in his own interest with what is in the interest of the organisation he is supposed to serve.
- Asking FIFA to improve its governance, the transparency of its accounts and to take steps to shed light on the scandals which tarnish its image is hardly interference; it is just common sense.
- Lastly, the independence of sport – to which we remain committed – should not become a defence for those who abuse their authority. It is wrong to have accusations without proof, but it is our duty to ask for the truth to be sought and established.

23. The money managed by FIFA is money that belongs to football and not to its officials, but in addition no sports organisation can become a place where the law does not apply and where corruption and fraud are in practice tolerated and go unpunished. What is at issue here is compliance with the rule of law.

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1. <http://edition.cnn.com/2012/03/09/sport/football/football-blatter-europe-council-brazil/index.html>.

**Appendix – Reply to the Council of Europe’s questions of 19 December 2011, from Thomas Hildbrand, Special Public Prosecutor for the Canton of Zug (Switzerland)**

*[Unofficial translation]*

**I. Introduction**

The Council of Europe has as an objective to secure respect for the fundamental values of human rights, democracy and the rule of law.

This hearing naturally needs to be based on the following premise, as self-evident as it is central:

**Justice must be public – secret justice behind closed doors has no place in a criminal procedure created by democracy and shaped by the principles of the rule of law.**

Article 6.1 of the European Convention on Human Rights and Article 14.1 of the International Covenant on Civil and Political Rights lay down the principle of public justice. The guarantors of application of this principle, one fundamental from the viewpoint of the rule of law, are the different states' judicial bodies.

It is one of the public prosecutor's office's fundamental concerns to work transparently at every stage of the procedure.

This sought-after transparency, clearly put into practice through the public nature of court proceedings, for example, nevertheless comes up against limitations within the public prosecution procedure, on the one hand because of the official secrecy required by law, and on the other because of the possible breach of that secrecy in the interests of third parties, again in order to protect privacy.

This third-party interest has to be confirmed in principle where the Council of Europe is concerned. This confirmation ties in with parallel lines of information which are the subject of both a concrete criminal procedure and the report on "Good governance and ethics in sport" by the relevant Council of Europe committee.

The public prosecutor's office, as a part of the justice system, and thus of Switzerland as a State governed by the rule of law, is minded and empowered, while respecting the aforementioned principles and considering the interests existing in a criminal procedure, to contribute to the committee's background material.

At all events, the answering of the questions is possible only because official secrecy has been formally lifted by the responsible authority.

This lifting is, however, not absolute, but is subject to conditions.

One central aspect is that the names of both of the natural persons accused in the criminal case cannot be given. This restriction does not extend to the third accused person, namely FIFA (Fédération Internationale de Football Association), which, in the proceedings concerned, is both accused and involved as an undertaking within the meaning of Swiss criminal law relating to undertakings.

The reason for this restriction is the fact that two procedures are currently pending in the Federal Court.

These procedures were a consequence of an order issued by the public prosecutor's office, which had confirmed the right of the media in the context of concrete queries to see the decision to discontinue the proceedings.

The relevant order was contested by all the accused persons, including FIFA. The Supreme Court ruling that the media had the right to see the decision was contested by both natural persons in the Federal Court.

Finally, for reasons of the protection of privacy, it is pointed out that the names of companies and foundations are not given where this is not absolutely necessary to an understanding of the deliberations.

**II. Reply to the questions of the Council of Europe**

**1. What are the main facts which justified the opening of a criminal investigation on grounds of misappropriation of funds and corruption involving ISL and FIFA?**

1.1. The prosecuting authorities of the Canton of Zug opened a criminal investigation on 08.08.2005 **against a person unknown** for criminal mismanagement to the disadvantage of FIFA. The initial suspicion which led to the opening of the procedure derived from evidence taken in the context of another criminal procedure, which was started on 29.05.2001 on the basis of a complaint by FIFA against ISMM/ISL Group management officials, and terminated on 18.03.2005 by the prosecuting authorities.

The judgments, some of which had been taken through all judicial instances, became final in 2010.

1.2. It needs to be specified from the legal perspective, because of the question raised, that **private corruption** is not an **offence prosecuted ex officio** under Swiss criminal law, and that, as the requisite application for prosecution was not made, no procedure was conducted in pursuance of Article 4.a of the Federal Law against unfair competition (UWG). Article 4.a of this Law deals with "bribery and the taking of bribes" from the angle of unfair competition.

It is of interest in this context that the bribery accusations concerning international sport organisations on which the media have focused have led to a parliamentary initiative by National Councillor Carlo Sommaruga on "FIFA: bribing of private individuals as an offence prosecuted ex officio" (Initiative No. 10.516), which was taken up in January this year by the National Council's legal affairs committee.

According to this initiative, the bribing of private individuals would become an offence prosecuted ex officio and be added to the Criminal Code with the rule on bribery of officials.

This process would correspond to the objective of the Council of Europe's Group of States against Corruption (GRECO).

1.3. The opening of the criminal investigation mentioned in the Council of Europe's question was based on the following facts:

The ISMM (ISL) Group (International Sports Media und Marketing) was, at the end of 2000, one of the leading media and marketing firms in the field of sport. Its different activities were divided between the holding company ISMM AG and its subsidiaries, and were conducted worldwide through independent media, marketing and services companies.

The group acquired from international sports federations the rights to events in the form of a general licence or on an agency basis (Rights In), developed them into integrated sport marketing concepts and "sold" them to sponsors, TV broadcasters or licensees (Rights Out).

FIFA concluded in particular the following contracts with Sports Holding AG/ISMM AG which are relevant in respect of the start of the procedure, and thus under the law of evidence. The list is not a final one, but suffices for an understanding of the initial position in respect of the procedure.

Agreement of 12.12.1997 between FIFA and ISL Marketing AG: In accordance with this agreement, FIFA transferred its marketing interests until 31.12.2006 completely to ISL Marketing AG. In addition to a set compensation fee of CHF 200 000 000, very detailed compensation arrangements were made.

Licence agreement of 26.05.1998 between FIFA and Sports Holding AG: Through this contract FIFA granted to Sports Holding AG the exclusive global right, with the exception of Europe and the USA, to use and exploit the radio and TV broadcasting rights for the 2002 and 2006 World Cups. The granting of the exclusive right to exploit these rights was paid for by Sports Holding AG at a minimum price of US\$ 650 000 000 in respect of the 2002 World Cup and of US\$ 750 000 000 in respect of the 2006 World Cup.

Sports Holding AG/ISMM AG or one of their subsidiaries, for their part, concluded, *inter alia*, the following sub-licence contract:

Agreement of 29.06.1998 between ISMM Investment AG and companies A and A: Through this contract ISMM Investment AG transferred to company A and to company A the rights to exploit the radio and TV broadcasting rights for the 2002 World Cup in a South American country. The compensation fee was US\$ 220 500 000, which was to be transferred according to a specific timetable.

1.4. It may be assumed that the ISMM (ISL) Group gave money amounting to millions to senior officials of FIFA, with the aim of being able to conclude contracts with that organisation.

In order to understand the mechanism whereby these payments were made, it is necessary to give a brief description of the relevant construct.

On 17.12.1998 institution B set up foundation C under Liechtenstein law. On the board of the foundation were, among others, members of the boards of companies of the ISMM (ISL) Group. According to its statutes, the aim of the foundation was to invest and manage the foundation's assets and to distribute the net proceeds and the foundation's assets to defined or definable beneficiaries.

As early as 01.12.1997, company D was founded in the British Virgin Islands, and this company on 08.02.1999 transferred all its shares to the foundation. From the commercial viewpoint, foundation C was a business unit of the ISMM (ISL) Group.

On the basis of a transfer from Sports Holding AG, the sum of CHF 36 130 220.05 was paid into company D's account at a Liechtenstein bank on 27.05.1999. The opening balance of company D at the date of 27.05.1999 showed the sum transferred by Sports Holding AG among the assets as "current assets" and among the liabilities as "provision for rights acquisition costs". A total of CHF 19 380 192 was shown as rights acquisition costs.

In so far as the money under this heading was used, it was "commission, fees", "finder's fees or additional acquisition payments", or benefits for personalities and decision-makers in world sport, and was an element of the acquisition or extension of global marketing rights.

Details of the money paid to various beneficiaries are shown below; the identities of those concerned cannot be given for reasons of legal protection of personal rights:

Value Date	Payee versement	Amount in CHF	Amount in USD
03.06.1999		1'550'000.00	
23.06.1999		775'750.00	500'000.00
28.06.1999		386'875.00	250'000.00
14.07.1999		1'650'000.00	
03.08.1999		3'691.55	2'461.04
22.09.1999		386'250.00	250'000.00
22.09.1999		386'250.00	250'000.00
04.11.1999		460'440.00	300'000.00
04.11.1999		460'440.00	300'000.00
08.11.1999		184'656.00	120'000.00
26.11.1999		1'000'000.00	
15.12.1999		12'147.20	
15.12.1999		100'000.00	
22.12.1999		429'246.00	270'000.00
23.12.1999		15'975.00	10'000.00
19.01.2000		1'000'000.00	
20.01.2000		799'750.00	500'000.00
20.01.2000		159'950.00	100'000.00
20.01.2000		431'865.00	270'000.00
07.02.2000		1'654'800.00	1'000'000.00
07.02.2000		364'870.00	220'000.00
23.02.2000		701.25	430.20
10.03.2000		534'400.00	320'000.00
10.03.2000		835'000.00	500'000.00
29.03.2000		125'035.00	
04.05.2000		51'675.00	30'000.00
08.05.2000		866'500.00	500'000.00
04.05.2000		868'000.00	500'000.00
15.05.2000		466'803.00	270'000.00
31.05.2000		500'000.00	
02.06.2000		422'875.00	250'000.00

Value Date	Payee versement	Amount in CHF	Amount in USD
06.06.2000		15'000'000.00	
27.06.2000		500'000.00	
05.07.2000		409'650.00	250'000.00
19.07.2000		446'040.00	270'000.00
21.07.2000		2'347.05	1'390.84
27.07.2000		3'000'000.00	
31.07.2000		33'532.00	20'200.00
27.07.2000		33'600.00	
16.10.2000		500'000.00	
28.11.2000		90'000.00	
15.01.2001		500'000.00	
	<b>Total:</b>	<b>37'399'114.05</b>	

1.5. As the media have reported, bankruptcy proceedings were ultimately opened for some of the companies of the ISMM (ISL) Group. The background to these bankruptcies was, *inter alia*, the subject of the criminal procedure already opened on 29.05.2001. Scrutiny of the evidence in this context yielded the following facts.

1.5.1. On 20.05.2003, ISMM AG in liquidation and ISL Worldwide in liquidation, both represented by a private insolvency practitioner, lodged in the Zug Cantonal Court an action for setting aside against company D and foundation C and against the shareholders of ISMM AG. The subject of this action was the cited transfer of CHF 36 130 220.05. The object of the action was repayment of the money into the bankruptcy assets.

1.5.2. Following the introduction of this civil law procedure, the plaintiffs and one of the parties against which the action was directed engaged in composition proceedings out of court.

As a result of these proceedings, the plaintiffs reached an agreement on 27.02.2004 with one of the parties against which the action was directed, whereby the latter undertook to pay the sum of CHF 2 500 000 into the "ISMM and ISL" bankruptcy assets.

The following, *inter alia*, is stated in the preamble to this agreement:

The party against which the action was directed would like the immediate and final recipients of the payments concerned, the latter in so far as they are directly or indirectly linked with the football business, not to be asked any more to repay money.

1.5.3. The settlement amount was transferred to the account of ISL Worldwide in liquidation by a well-known Swiss law firm on 17.03.2004.

1.6. Replying to a question by the prosecuting authorities, the private insolvency practitioner stated on 21.03.2005 that the law firm had indicated during the composition proceedings that it represented FIFA, and that it was in FIFA's legitimate interest not to become embroiled in unjustified speculation again because of this action.

"FIFA therefore urges foreign football officials who may have benefited from payments of commission to contribute to the composition."

1.7. These facts are based on evidence taken in the context of the aforementioned procedure against management officials of the ISSM/ISL Group.

1.8. To summarise, when the criminal procedure was started, it was clear that the ISMM (ISL) Group, in the context of contracts to be concluded with sports organisations, paid significant sums to football officials, and that FIFA was aware of this and was involved in the composition proceedings.

## 2. What evidence was considered proven and provided justification for prosecution?

2.1. In addition to the above details, it may be noted that, at the time when the procedure was opened against a person unknown:

- the settlement amount was transferred by a Swiss law firm representing FIFA;

- the background to the sums demanded in the action for setting aside was payments by company D, foundation C or Sports Holding AG, but not by FIFA;
- with payment of the sum of the settlement amount, one portion of the sums claimed in the action was paid into the “ISMM and ISL” bankruptcy assets, and
- finally, it was suspected that FIFA paid a “third party debt”, or a portion thereof.

2.2. The fact had to be taken into account that payment of the settlement amount did not necessarily have to be made by FIFA itself.

It was conceivable for a third party in a relationship in terms of debt or of responsibility with FIFA, with FIFA's approval, to pay into the bankruptcy assets because, as it said itself, it had an interest in not becoming an object of speculation in the context of the payment of bribes.

This initial suspicion was extensive in nature, and this justified the starting of a criminal procedure.

2.3. The outcome of the procedure showed that the sum of CHF 2 500 000 paid by the law firm into the bankruptcy assets came from a senior official of FIFA, against whom a criminal procedure was finally started.

### **3. If applicable, what exactly were the accusations against Mr Blatter, President of FIFA, and what evidence was there against him?**

3.1. As already explained, the criminal procedure was started against a person unknown, and not initially against natural persons. This was because the initial suspicion described remained to be clarified, and the persons concerned, and at all events to be called to account under criminal law, were not yet known.

Consequently, no criminal procedure was opened against Joseph Blatter, the President of FIFA.

3.2. In contrast, the collected evidence produced the following facts and led to the opening of criminal proceedings against two natural persons and against FIFA as an undertaking within the meaning of Swiss criminal law relating to undertakings.

3.3. The sum of CHF 36 130 220.05 transferred by Sports Holding AG to an account of company D was money provided by the ISMM (ISL) Group in order to be able to pay commission relating to rights already acquired and rights which were to be acquired in future.

One member of the management of Sports Holding AG/ISMM AG declared that the favouring of well-known personalities in sport to promote sport policy and economic objectives dated from the 1970s, when sport became an economic player. ISL had pursued such practices since its foundation. This nurturing of relations had led to commitments which still continued. The activities had been shifted to a foundation with a single endowment.

Another member of the Group's management said that, when rights had been acquired, additional payments had had to be made over and above the actual costs of the acquisition of those rights. The payments concerned had gone to people who had helped to ensure that the contract came about.

3.4. ISL Properties AG as a company within the ISMM (ISL) Group **made commission payments totalling CHF 122 587 308.93**, in the aforementioned context between 1989 and 1998, although only part of this related to those natural persons against whom criminal proceedings were started.

Even before 1989 “advance investments” totalling millions had been made. The foundation C/company D construct described was used to continue the payments made between 1989 and 1998 by ISL Properties AG.

The sum of CHF 36 130 220.05 transferred to company D's account corresponds to the remaining balance of the total volume made available by the Group for commission payments.

3.5. Among the recipients of commission were natural person E, company F and company G. Natural person H was the beneficial owner of company F. Criminal proceedings were started against both these natural persons.

According to findings which are not conclusive, both E and H had a financial stake in company G. Individual details are shown below of the payments made directly or indirectly via the companies to the two natural persons, who cannot be named for reasons of the protection of privacy, and it can be stated that both were top officials of FIFA and one still is.

Payments by ISL Properties AG:

Date	Payee	Currency	Amount	Currency	Amount
10.08.1992		USD	1 000 000.00	CHF	1 320 000.00
16.02.1993		USD	1 000 000.00	CHF	1 510 000.00
11.05.1993		USD	1 000 000.00	CHF	1 440 000.00
07.09.1993		USD	1 000 000.00	CHF	1 460 000.00
04.02.1994		USD	500 000.00	CHF	720 000.00
31.05.1994		USD	500 000.00	CHF	700 000.00
04.11.1994		USD	500 000.00	CHF	625 000.00
31.01.1995		USD	250 000.00	CHF	330 000.00
31.01.1995		USD	250 000.00	CHF	330 000.00
31.05.1995		USD	500 000.00	CHF	590 000.00
31.05.1995		USD	500 000.00	CHF	590 000.00
29.08.1995		USD	500 000.00	CHF	575 000.00
31.01.1996		USD	250 000.00	CHF	287 500.00
31.01.1996		USD	250 000.00	CHF	287 500.00
03.07.1996		USD	250 000.00	CHF	312 500.00
03.07.1996		USD	250 000.00	CHF	312 500.00
06.11.1996		USD	500 000.00	CHF	630 000.00
03.03.1997				CHF	1 500 000.00
30.05.1997		USD	250 000.00	CHF	367 500.00
30.05.1997		USD	250 000.00	CHF	367 500.00
12.11.1997		USD	250 000.00	CHF	352 500.00
12.11.1997		USD	250 000.00	CHF	352 500.00
18.03.1998		USD	2 000 000.00	CHF	2 920 000.00
18.03.1998		USD	500 000.00	CHF	730 000.00
24.09.1998		USD	500 000.00	CHF	745 000.00
04.02.1999		USD	500 000.00	CHF	705 000.00
18.06.1997	Cancelled	USD	250 000.00	CHF	-367 500.00
28.11.1997	Cancelled	USD	250 000.00	CHF	-352 500.00
	<b>Subtotal</b>				<b>19 340 000.00</b>

Payments via the foundation C/company D construct:

Date	Payee	Currency	Amount	Currency	Amount
	Carried over				19 340 000.00
23.06.1999		USD	500 000.00	CHF	775 750.00
04.11.1999		USD	300 000.00	CHF	460 440.00
04.11.1999		USD	300 000.00	CHF	460 440.00
04.05.2000		USD	500 000.00	CHF	868 000.00
	<b>Total</b>				<b>21 904 630.00</b>

3.6. The agreement of 27 February 2004 already mentioned, which was a decisive element in respect of the starting of the proceedings, came about with significant co-operation by FIFA or its legal representative.

The sum transferred by FIFA's representative via a bank to the bankruptcy assets of ISSM AG and ISL Worldwide AG first reached his account in two tranches via an Andorran bank. The client for both transfers was company I, which is domiciled in Andorra, the beneficial owner of which is an Andorran citizen, who did the banking business through the account in the company's name on a trustee basis. According to him he made the transfers on behalf of H. That sum had previously been transferred from an account in H's name to an account of company I at the same bank. The account at the Andorran bank in H's name also received funds before this transfer from, *inter alia*, various accounts at a Swiss bank.

The sums received were subsequently taken out in cash by the Andorran citizen and paid into accounts of H and his son at the same bank in cash. Three of the four accounts at the Swiss bank were in the names of children of H.

Two of the accounts were opened with cash deposits by H, in each case of US\$ 300,000, and the others with a US\$ 300 000 securities deposit and with a US\$ 1 000 000 transfer from an American bank. The cash payments into the Swiss bank were preceded on 29 June 1998 by a cash payment of US\$ 600 000 from an account of company F.

Finally, to summarise, the following accusations were made against natural persons E and H and against FIFA:

#### **3.6.1. Natural person H**

Accused person H, as a member of the Executive Committee and other committees of FIFA, received transfers between 10.08.1992 and 12.11.1997 via company F of CHF 12 740 000, and between 18.03.1998 and 04.05.2000 via company G of an amount which is known, but not finally attributable.

The payments were made via ISL Properties AG, which was a subsidiary of Sports Holding AG, which concluded not only licensing contracts with FIFA for the use/exploitation of radio and TV broadcasting rights to World Cups and marketing contracts at specific fixed prices, but also, via one of its subsidiary companies, ISMM Investment AG, sub-licensing contracts with company A and with company A relating to the rights for the use of radio and TV broadcasting rights for the 2002 World Cup in a South American country.

These commission payments, which were made to accused person H because of his position in FIFA, he kept for himself and omitted to disclose them to FIFA and to pass them on to it.

The payments made over a period of years were intended to make use of his influence within FIFA so that contractual relations came about between FIFA and Sports Holding AG, so as to ensure that he subsequently influenced the conclusion of sub-licensing contracts, as President of the Football Association of a South American country.

Accused person H enriched himself by the amount of the commission payments accepted and not passed on as he had a duty to do, while FIFA was damaged by the same amount.

#### **3.6.2. Natural person E**

Accused person E, as a senior official of FIFA, received transfers of at least CHF 1 500 000 on 03.03.1997 and, via company G, of an amount which is known, but not conclusively attributable to him, between 18.03.1998 and 04.05.2000.

The payments were made via ISL Properties AG, which was a subsidiary of Sports Holding AG, which concluded not only licensing contracts with FIFA for the use/exploitation of radio and TV broadcasting rights to World Cups and marketing contracts at specific fixed prices, but also, via one of its subsidiary companies, ISMM Investment AG, sub-licensing contracts with company A and with company A relating to the rights for the use of radio and TV broadcasting rights for the 2002 World Cup in a South American country.

These commission payments, which were made to accused person E because of his position in FIFA, he kept for himself and omitted to disclose them to FIFA and to pass them on to it.

The payments were made in order to use his influence at FIFA in respect of the contracts of 12.12.1997 and 26.05.1998 ultimately concluded by FIFA with Sports Holding AG ("ISL") and signed by the accused.

Accused person E enriched himself by the amount of the commission payments accepted and not passed on as he had a duty to do, while FIFA was damaged by the same amount.

#### **3.6.3. FIFA as an undertaking**

3.6.3.1. In order to understand the criminal law accusation against FIFA, a short explanation is needed of Swiss criminal law relating to undertakings.

If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking, and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour shall be attributed to the undertaking.

Undertakings in accordance with Article 102.4 of the Criminal Code (StGB) include all legal entities under private law, which in principle include associations in accordance with Articles 60 ff of the Civil Code (ZGB). The fact that FIFA, despite its orientation in principle as a non-profit-making organisation, is a commercial undertaking within the meaning of the law was already clear on the basis of the 2003-2006 estimates, according to which the total return was expected to be CHF 2 041.8 million, total expenditure CHF 1 871.9 million and operating profit CHF 169.9 million.

Where the subsidiary liability of the undertaking is concerned, the undertaking is not accused of the qualifying offence, but of defective organisation. The impossibility of attributing the qualifying offence is a condition for the undertaking's criminal liability, but is not the basis for a penalty, for this lies in the inadequate organisation of the undertaking, which makes attribution impossible.

3.6.3.2. Account being taken of these parameters, FIFA was accused of inadequate organisation of its undertaking. The accusation was that it had failed to provide strict internal regulation so as to guarantee the disclosure of payments beyond proper compensation for its organs and employees and a proper internal procedure for this circumstance.

Through this failure it prevented not only the creation of the basis on which the use of such money is subject to a decision by an internal body, but also the determination of those persons who should have borne responsibility for the qualifying offence described.

The qualifying offence consisted of failure, in the knowledge of commission payments to organs and/or representatives and/or employees of FIFA, to ensure that these were passed to the association, or to enforce their claim for them to be passed on by accused persons E and H, who were, on the grounds of their positions, under an obligation to pass the money to FIFA.

FIFA thereby suffered damage to the amount of this failure to perform their duty, while accused persons E and H enriched themselves by the same amount.

#### **4. What exactly are the circumstances and legal basis of the closure of the case without a criminal trial?**

4.1. Firstly, the essential legal reasons for which it was possible for the proceedings to be discontinued need to be discussed.

In accordance with Article 1bis, paragraph 1, of the Code of Criminal Procedure (StPO) in force in the Canton of Zug at the time of discontinuance of the proceedings (11.05.2010), there shall be no referral to a court if the requirements of Articles 52-54 of the Criminal Code are met.

These requirements are to be examined *ex officio* by the public prosecutor's office. In this specific case Article 53 of the Criminal Code was the subject of this examination.

4.2. Article 53 of the Criminal Code deals with exemption from punishment in the event of reparation. If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if the requirements for a suspended sentence (Article 42 of the Criminal Code) are fulfilled (letter a) and the interests of the general public and of the persons harmed in prosecution are negligible (letter b).

If the statutory requirements are met, the proceedings are to be discontinued by the public prosecutor's office, which is what happened in the present case.

4.3. Reparation was made for the loss, damage or injury to the extent that it lent itself to an evaluation taking account of very diverse legal aspects, or all three accused persons made every reasonable effort to right the wrong caused.

4.3.1. **In the case of accused person H**, accessible payments to company F of CHF 4 305 000 with effect from 31.5.1995 had to be assessed. Despite the uncertainties about company G, there was sufficient legal certainty to assume that the amount of the offence was CHF 5 000 000.

Taking account of the circumstance that accused person H had already paid into the bankruptcy assets CHF 2 500 000, the setting of CHF 2 500 000 as the amount to be qualified as reparation was considered to be justifiable.

4.3.2. In the case of accused person E, the payment of CHF 1 500 000 on 03.03.1997 was able to be definitely attributed to him, although it was not absolutely certain whether the transfer of CHF 1 000 000 described by witnesses was to be added to this sum.

Taking into account this circumstance, and also the reservations about the payments to company G, the advanced age of the accused and the fact that his income possibilities were therefore reduced to the proceeds of his assets and possible pensions, the public prosecutor's office considered the set amount of CHF 500 000 to be appropriate.

4.3.3. In the case of FIFA, the failures dating from before October 2003 were not to be taken into account, because of the prohibition of retrospective effect (the criminal law relating to undertakings only came into force at that time). The determination of the sum of CHF 2 500 000 to be qualified as reparation corresponded to the sum paid into the bankruptcy assets by accused person H.

4.4. The preconditions for a suspended sentence existed in respect of all three accused; it would be outside the framework of this report to go into details on this subject. It also has to be taken into account that this aspect is an absolutely typically matter falling within the private sphere.

4.5. On the subject of the negligible interest in prosecution of both the public and the damaged party, it can be expected that FIFA as the damaged party, for reasons of a paradox not to be discussed in greater detail here, was at the same time also an accused party, making consideration of the interest of prosecution seem obsolete.

In respect of the other two accused persons, the following needs to be explained for the sake of an understanding of the negligible public interest in prosecution mentioned in the law.

4.6. Where the requirement for negligible public interest in prosecution in accordance with Article 53 of the Criminal Code is concerned, the need for punishment is less because the wrong that was caused has been righted, and the following factors need to be taken into account:

4.6.1. The public interest in prosecution declines to the same extent that reparation has led to reconciliation between those affected and to the restoration of public peace.

When criminal acts are against individual interests and the situation is that the injured party accepts the reparation effort made, the public interest in prosecution lapses, as in the present case.

Public interest in prosecution also wanes as time goes by since the act was committed.

4.6.2. In addition, where this specific case is concerned, the following needs to be considered. When criminal mismanagement occurs, the actual acts or omissions are defined according to the law as a general causing of financial loss.

The righting of a wrong caused by criminal acts to an individual is thus achieved in material terms.

Thus when material reparation has been made, the public interest in prosecution is at least reduced.

4.6.3. Another fact which had to be taken into account is that the time which has elapsed since an infringement of the law has an effect on the extent of the public interest in prosecution. If reparation has taken place, if in addition the offences were financial, and if the infringements of the law took place years ago, the need for criminal law reactions clearly diminishes.

The commission payments in some cases date back to a period no longer within the 15-year limitation period, and the qualifying offence to be judged in connection with the accusation of inadequate organisation would already be subject to limitation in 2011 on the basis of the definition of the offence, and this would have excluded criminal prosecution.

4.6.4. As already stated, reparation is also supposed to help to restore public peace.

One component inherent to this aspect goes beyond what is generally discussed in terms of legal philosophy in relation to the rule-of-law foundations of a functioning society.

In so far as society derives material benefit when proceedings are settled in accordance with Article 53 of the Criminal Code, this circumstance may make a substantial contribution to the restoration of public peace. This happened in the present case.

The circumstance of this procedure, with FIFA on the one hand having suffered damage, while being blamed for inadequate organisation and therefore simultaneously accused – albeit one which the legislator intended – leads to a Gordian knot.

This was resolved when the reparation money was used for projects of public interest, and the money was allocated by the public prosecutor's office.

4.7. After the public prosecutor's office had, during an extensive criminal investigation, produced a basis of evidence in order to take the formal decision on the subsequent stages of the proceedings, a procedure was started on 14.07.2009 in order to clarify whether the parties to the proceedings would declare their willingness, on the basis of the evidence presented, to make good the damage caused, and whether they would agree to discontinuance of the proceedings on the basis of Article 53 of the Criminal Code.

4.7.1. The public prosecutor's office noted in the context of these proceedings its opinion that the objective facts of criminal mismanagement within the meaning of Article 158 of the Criminal Code were present, and made discontinuance of the proceedings dependent on full reparation for the loss, damage or injury, on payment for the damage in the amount of CHF 2 500 000, on the meeting of the procedural costs by FIFA, and on a reparation payment – in so far as FIFA was concerned – being made to an institution of public interest.

4.7.2. Where the other accused persons were concerned, discontinuance was made dependent on payment of reparation by accused person H to the amount of CHF 2 500 000 and by accused person E to the amount of CHF 500 000.

4.7.3. After these conditions had been fulfilled, the proceedings were discontinued against all three accused persons.

Discontinuance was approved by the chief public prosecutor's office, was not contested by the parties and is legally binding.

## **5. Does this mean that all the persons involved have been absolved of all suspicion?**

The answer to this question is no.

Proceedings on the basis of Article 53 of the Criminal Code may be discontinued only if sufficiently clear incriminating facts exist, which cause the prosecuting authorities to take action.

## **6. A secret agreement exists mentioning top officials of FIFA involved in this corruption case; FIFA still refuses to publish this. Is there under Swiss law a means whereby FIFA can be obliged to publish this agreement, or is it possible within your judicial remit to publish the agreement, and in what conditions?**

6.1. It is not possible to identify from what the Council of Europe says which specific document is meant.

It can be said, however, in so far as an opinion exists that the public prosecutor's office is party to such an agreement, that, taking this premise into account, no secret agreement relating to the corruption case mentioned by the Council of Europe exists.

The public prosecutor's office is not authorised to conclude secret agreements.

This statement is based on the duty of the public prosecutor's office to document every stage of proceedings, thereby making them transparent for the parties to the proceedings and for the authorities responsible for evaluation

6.2. The order to discontinue proceedings, the 41 pages of which set out the course followed by the proceedings, the evidence, the facts relevant to the decision and the legal basis for the chosen disposal of the proceedings, is not an agreement, but a formal decision.

This order to discontinue proceedings is not subject to an absolute secrecy requirement, but may be shown to third parties who can claim a legitimate interest in the information. One such interest according to decisions of the highest courts stems from the monitoring function of the media.

As stated in the introduction, relevant requests by the media have been approved by the public prosecutor's office, but have been challenged in appeals by the parties. The relevant decision of the Federal Court is still awaited.

The Council of Europe is therefore at liberty to submit a reasoned request to the Zug public prosecutor's office to see the order to discontinue proceedings.

6.3. Supplementing the above information, it should be said that the public prosecutor's office, during its investigations, seized the aforementioned agreement of 27.02.2004 in which ISMM AG in liquidation and ISL Worldwide in liquidation, both represented by a private insolvency practitioner, concluded an agreement with one of the accused whereby he undertook to pay the sum of CHF 2 500 000 into the "ISMM and ISL" bankruptcy assets.

This agreement contained a confidentiality provision and, *inter alia*, a provision whereby the private insolvency practitioner would take no steps on its own initiative which would lead to an extension of the criminal proceedings to the recipients of payments according to the action for setting aside.

Public prosecutor's office, Canton of Zug

Department II

4 March 2012

Thomas Hildbrand

Special public prosecutor