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Duty to cooperate in disciplinary proceedings and its limitations deriving from standard rights in criminal proceedings – A review under Swiss law

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I. Introduction

Disciplinary bodies of sport organisations do not bear the same powers as those of a law enforcement authority¹. The latter holds the public power and is exclusively entitled to exercise coercive measures. The disciplinary bodies may not search houses, monitor telephone conversations or freeze bank accounts. However, as an entity based on private law, they do enjoy a tremendous efficient fact-finding tool that is the duty to cooperate that they impose on their members or officials under their jurisdiction. To the contrary, criminal justice authorities do not benefit from such power, and the right not to cooperate may beat a fatal strike at a criminal investigation.

From an investigation point of view, the best situation would be to benefit from both the coercive measures of a prosecutor and the cooperation due to a disciplinary body. The fundamental rights of the person under (criminal) investigation, namely his or her right to remain silent, will draw the limit: where he or she faces coercive measures, he or she may not collaborate (right to remain silent).

The individual under a disciplinary proceeding may usually not remain silent. If he or she does, a sanction may be imposed, depending upon the relevant sport organisation's regulation². If he or she speaks out (or otherwise cooperates by handing over

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¹ The present contribution is limited to analyzing the situation where a criminal investigation is carried by Swiss law enforcement authorities. The terms “law enforcement authorities”, “criminal justice authorities” and “prosecution authorities” are used

indifferently in this contribution and have equal meaning.

² See Björn Hessert, Cooperation and reporting obligations in sports investigations, *The International Sports Law Journal*, Springer, Published online 3 June 2020, § 2.

documents), that statement will appear on a protocol and this document will be outside his sphere of influence.

As a private entity, a sport organisation remains subject to the coercive powers of a criminal justice authority. Consequently, the statements (or documents) received from that person under investigation in the course of a disciplinary proceeding may be the target of such coercive powers. The sport organisation is also free, within the limitations of the procedural rules applying to criminal prosecution, to file a criminal complaint against anyone that has been under its disciplinary jurisdiction and attach all documents gathered through the duty to collaborate. In both situations, the right to remain silent may be put at jeopardy even before that person is heard by a law enforcement authority.

This contribution analyses to what extent, under Swiss law applicable when the Swiss Federal Tribunal (“SFT”) reviews awards rendered by the Court of Arbitration for Sport (“CAS”), the right to remain silent (or the right against self-incrimination, said as *nemo tenetur se ipsum accusare*) shall mediate the ambivalent powers of the disciplinary bodies and those of criminal justice authorities. Both the individual’s fundamental right protected by international covenants and the fact-finding mission of the sport organisation deserve specific promotion.

II. The right not to incriminate oneself does not apply in disciplinary proceedings

A. The CAS Panel findings in the *J. V. vs. FIFA* case

A publicly well-known case, the *J. V. vs. FIFA* case (“the *V. case*”) related to various corruption and conflicts of interest violations in the position of a senior FIFA official.

In March 2015, the Office of the Attorney General of Switzerland (“OAG”) opened criminal proceedings on suspicion of criminal mismanagement and of money laundering in connection with the awarding of the 2018 and 2022 FIFA World Cups. The U.S. Department of Justice (“DOJ”) and the U.S. Attorney’s Office for the Eastern District of New York carried out a similar investigation. In September 2015, the FIFA Investigatory Chamber started a disciplinary proceeding against Mr. V. based on the violation of the FIFA Code of Ethics (“FCE”) related to facts of conflicts of interest and corruption in the selling of World Cup tickets and use of a FIFA airplane. The FIFA Investigatory Chamber summoned him for an interview and requested him to provide documentation, based on his duty to cooperate under then Article 41 FCE. Mr. V. refused to attend the interview and grant the documents. He considered that the confidentiality of the FIFA internal proceedings could not prevent the record of the interview and other documents produced in the internal proceedings from ending up in the hands of the DOJ and of the OAG. To his appreciation, this would jeopardize the right to remain silent that he bears before these authorities. Based on its internal investigations, FIFA filed a criminal complaint against Mr. V. with the OAG. As per the disciplinary proceeding, Mr. V. was eventually found guilty of various breaches of the FCE in light of the facts of corruption and conflict of interest and sanctioned him with a six-year ban as well as breaches of his duties to disclose and cooperate with an additional four-year ban³.

The appeal filed before CAS by Mr. V. was dismissed. More specifically, the CAS Panel found that the right not to self-incriminate proved inapplicable in the context of a disciplinary proceeding governed by Swiss private law. The CAS Panel held that sport organisations do not otherwise have the investigatory means of state authorities and that the individual subject to such disciplinary

³ CAS 2017/A/5003 *J.V. vs. FIFA*, 27 July 2018, § 76-94.

proceeding has deliberately chosen to accept those ethics rules while entering into the context of the association⁴.

The appeal filed with the SFT was rejected on 7 May 2019⁵. On the specific ground of the right to remain silent allegedly put at jeopardy by the duty to cooperate, the SFT dismissed it swiftly as explained here-below.

B. A door left open in case of a concurrent criminal proceeding

Both the CAS and SFT decisions left an open question, which is the topic of this contribution.

Mr. V. alleged that he could not comply with his duty to cooperate according Article 41 FCE in the context of the DOJ and OAG criminal investigations. According Mr. V., such compliance would have (and eventually has) resulted in this documentation being made available to criminal justice authorities, putting at jeopardy the exercise of his right against self-incrimination⁶. Before the SFT, Mr. V. claimed that, in the present case, his right against self-incrimination in a criminal proceeding would be moot in violation of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”⁷) and 14 of the International Covenant on Political and Civil Rights. Such would amount to a violation of Swiss procedural public policy (“*ordre public*”) according Article 190 (2) (e) of the Swiss Private International Law Act (PILA)⁸. It shall here be recalled that, according SFT case law, procedural public policy is violated when fundamental and generally recognized principles are disregarded, thus leading to an intolerable contradiction to justice, so that the decision appears inconsistent with the

values acknowledged in a state governed by laws⁹.

Neither CAS nor the SFT analyzed this argument, considering that it was unclear what were the object and the target of the investigations carried by the criminal justice authorities. The CAS Panel noted that there was no clear and imminent danger that the privilege against self-incrimination (applicable before public authorities) would be circumvented in that case. However, should the information passed by the sport organisation to the criminal justice authorities which have opened proceedings against the same individual be on the same matter, there was, according the CAS Panel, “a real danger that the sport organisation will be (mis-)used by public authorities to collect information that they could be otherwise unable to obtain”. In such case, there may be a valid claim to invoke the right against self-incrimination in a disciplinary proceeding¹⁰. In the view of the SFT, this allegation, which could not be reviewed on the merit, “raises particularly interesting issues linked to the application and scope of the *nemo tenetur se ipsum accusare* principle in a disciplinary proceeding within an association governed by private law while a criminal investigation on the same facts is pending or considered”¹¹.

Hence, there is a door left open for consideration of the argument, which we offer to analyze in the present contribution.

III. *Nemo Tenetur* principle in the criminal proceeding concurrent to a disciplinary proceeding

Whether the rights of an individual during the disciplinary proceeding are under an “intolerable contradiction to justice” shall be reviewed through the broad spectrum of the

⁴ CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 265-266.

⁵ SFT 4A_540/2019 J.V. vs. FIFA, 7 May 2019.

⁶ CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 112.

⁷ “ECHR” also refers to “European Court of Human Rights”.

⁸ SFT 4A_540/2019 J.V. vs. FIFA, 7 May 2019, § 3.1.

⁹ See SFT 136 III 345, 31 August 2009, § 2.1

¹⁰ CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.

¹¹ SFT 4A_540/2019, 7 May 2019, § 3.2.

subsequent stages of a criminal proceeding that would eventually be concurrently carried out.

The *nemo tenetur* principle only applies in relations between an individual and the State¹². Hence, it is of no direct application in a disciplinary proceeding. However, should documents delivered to the disciplinary body or the protocol of a hearing before that body be brought to the attention of a prosecution authority, their admissibility deserves to be considered in light of the *nemo tenetur* principle (A). In this process, the remedies that individuals may seek in order to challenge their admissibility show interesting evolution in recent Swiss case law (B).

A. Inadmissibility of evidence gathered in violation of the right no to incriminate oneself

The principle of non-self-incrimination encompasses the right to remain silent. This guarantee is enshrined in Article 14 (3) (g) of the International Covenant on Civil and Political Rights and Article 6 (1) ECHR¹³. These provisions forbid any kind of “improper coercion” from the prosecuting authority on the individuals subject to its investigation¹⁴. It is contemplated under Article 113 (1) of the Swiss Criminal Procedure Code (“SCPC”) according which “the indicted person may not be compelled to incriminate him or herself”.

1. Inadmissibility of evidence gathered under threat by a criminal justice authority

According Article 140 (1) SCPC, *the use of coercion, violence, threats, promises, deception and*

methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence. This prohibits taking advantage of physical or psychological circumstances that may harm the freedom of will or the ability to think¹⁵. The prohibition relates not only to coercion methods that the criminal justice authorities would use on purpose, but also coercive situations that already exist, such as the situation of an individual under alcohol, drugs or who lacks sleep at the beginning of his or her deposition¹⁶. This follows the lines of ECHR case law, according which an *improper coercion* may also arise where an indicted individual is compelled to testify under threat of sanctions and testifies in consequence or where the authorities use subterfuge to elicit information that they were unable to obtain during questioning¹⁷.

Hence, the *coercion* to speak imposed by a criminal justice authority on an individual that bears the right to remain silent would amount to an inadmissible evidence in a criminal proceeding¹⁸. To the contrary, there are admissible evidence that may be taken against the will of the indicted person, since they are independent therefrom, such as DNA analysis or documents seized during a house search¹⁹ or, generally speaking, that exist before the coercion of the prosecuting authority is exercised²⁰.

In order to fully exercise his or her right, the indicted person must be given the information on his or her right against self-incrimination prior his or her first hearing by the police or the criminal justice authority. In case this information is not given, the protocol of the hearing is not admissible²¹. It

¹² SFT 131 IV 36, 22 December 2004, § 3.3.1.

¹³ See ECHR case 31827/96, 3 May 2001, *JB vs. Switzerland*, § 64.

¹⁴ ECHR, 19187/91, 17 December 1996, *Saunders vs. UK*, § 68.

¹⁵ Niklaus Schmid, Daniel Jositsch: Schweizerische Strafprozessordnung, Praxiskommentar, Zurich/St-Gallen, 2018, ad Article 140, n° 2.

¹⁶ Wolfgang Wohlers in Donatsch/Hansjakob/Lieber: Kommentar zur

Schweizerischen Strafprozessordnung (StPO), Zurich/Basel/Geneva, 2014, ad Article 140, n° 4.

¹⁷ ECHR, 50541/08, 50571/08, 50573/08 and 40351/09, *Ibrahim and others vs UK*, 13 September 2016, § 267.

¹⁸ Article 141 (1) SCPC.

¹⁹ SFT 140 II 384, 27 May 2014, § 3.3.2.

²⁰ SFT 142 II 207, 30 May 2016, § 8.3.2.

²¹ Article 158 (1) (b) and (2) SCPC. ECHR case law is in line with this and adds that this is all the more true when the indicted individual did not benefit from

shall here be noted that, under Swiss Criminal Procedure law, there are various scales of inadmissible evidence. However, in the case where the information on the right to remain silent (if applicable) lacks, the prohibition is absolute. Hence, the protocol is inadmissible, regardless of the importance of the evidence gathered in securing a conviction for a serious offence²².

2. Gathering of evidence in administrative proceeding and its admissibility in criminal proceedings

An individual may not only be put under threat to speak by the criminal justice authority that carries out the investigation. The ECHR contemplates the possibility to also invoke the *nemo tenetur* principle when the threat did not originate directly from the prosecuting authority but from a prior administrative proceeding.

In *Saunders vs. UK*, the ECHR was confronted with a case of fraud where an individual first made statements, under threat of sanction, to an administrative authority, the Department of Trade and Industry. Those statements were later passed on to criminal investigators and used against him during his criminal trial. The ECHR found that the public interest could not, even in highly complex crimes, be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation, e.g. administrative investigation, to incriminate the accused during the trial proceedings²³. For such reason, the ECHR ruled that the evidence was inadmissible. Similar situation arose in *H. and J. against Netherlands*: two asylum seekers in the Netherlands made statements before the

Dutch Immigration and Naturalisation Service, which were later used against them in a criminal proceeding for alleged acts of torture. Those statements were eventually found admissible in the criminal proceeding as neither indicted individual had admitted a confession. However, the ECHR confirmed that the use of evidence gathered prior to the criminal proceeding without due consideration to the guarantees of the *nemo tenetur* principle may be inadmissible²⁴.

The SFT, based on ECHR case law, has set a series of parameters to be taken into consideration in the assessment of the admissibility, in the criminal proceeding, of the evidence gathered during a prior administrative proceeding²⁵, such as whether:

- the right against self-incrimination competes to a legal or a natural person²⁶;
- the statements are made on facts or imply a recognition of guilt and whether such guilt derives from other evidence²⁷;
- the nature and degree of the sanction for non-cooperation;
- the defense possibilities; as well as
- the use made of the evidence²⁸.

Recent Swiss case law predominantly relies on the criterion of the nature of the sanction: in a very short fashion, where the sanction for non-cooperation is not of a criminal nature, the threat does not amount to “improper coercion” and the evidence gathered in this context is not inadmissible.

This echoes specifically in Switzerland’s financial legal landscape²⁹. Private entities (e.g.

legal aid, ECHR, 25303/08, *Stojkovic vs. France*, 27 October 2011, § 54.

²² Article 141 (1) and (2) SCPC; Jean-Marc Verniory, in Kuhn/Jeanerret: Commentaire Romand, CPP, Basel 2011, ad art. 158, n° 26.

²³ ECHR, 19187/91, *Saunders vs. UK*, 17 December 1996, § 74; ECHR, 34720/97, *Heaney and McGuinness vs. Ireland*, 21 December 2000, § 57.

²⁴ ECHR, 978/09 and 992/09, *H. and J. against the Netherlands*, 13 November 2014, § 80.

²⁵ SFT 140 II 384, 27 May 2014, § 3.3.3 and 3.3.5, which was criticized by scholars as referenced in SFT 142 II 207, 30 May 2016, § 8.4.

²⁶ See SFT 142 II 207, 30 May 2016, § 8.4.

²⁷ See ECHR, 978/09 and 992/09, *H. and J. against the Netherlands*, 13 November 2014, § 80.

²⁸ See ECHR, 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, *Ibrahim and others vs UK*, § 269.

²⁹ A similar situation occurs in the field of supervision of casinos (SFT 140 II 384, 27 May 2014,

banks) benefit from a license to perform financial activities. In view of anti-money laundering objectives, such entities are bound by a **public law-rooted duty to cooperate** with their supervisory administrative body. Such duty may contradict a right not to incriminate oneself in case a criminal proceeding is eventually started on the charges of money laundering. In a recent landmark case ruling on this issue, the SFT found that the duty to collaborate was not threatened through a sanction of criminal nature given the fact that those entities were bound by a duty to produce, keep and make documentation available to state supervisory authority. In this context, such entities could not invoke the right against self-incrimination. Statements made or documents forced to be produced to their supervisory (administrative) authority could be lawfully seized and used by criminal law enforcement authorities. Consequently, the *nemo tenetur* principle could not prevent criminal prosecution authorities from accessing such documentation³⁰.

This case shows that, among the various listed criteria to appreciate whether an “improper coercion” was imposed while collecting evidence, the SFT seems to consider the absence of threat of a sanction of criminal nature as a compelling factor to rule out the inadmissibility of the evidence³¹.

It shall be recorded that, according ECHR 6 (1) jurisprudence, a sanction is considered of criminal nature on the basis of three criteria. It shall first be reviewed how that sanction classifies under domestic law (whether

criminal or otherwise), then the nature of the offence and finally the severity of the penalty faced by the person concerned³². Under ECHR case law, a temporary prohibition to exercise a profession does not amount to a criminal sanction³³. In case of a fine imposed as a disciplinary sanction, the ECHR does not consider it of a criminal nature so long as the non-payment of the fine cannot result in an imprisonment³⁴. Same occurs if the “fine” actually equaled the amount of the profit made by the individual that committed the disciplinary violation, giving to the fine the nature of a compensation³⁵.

Even if the nature of the threatened sanction seems to be the most relevant parameter to take into consideration in the assessment of the admissibility of the evidence taken, the various criteria to be considered express the idea that the right against self-incrimination is not absolute and deserves review in each specific case³⁶.

The limitations of the use of evidence exposed in this jurisprudence apply in cases where the evidence was gathered in a public (administrative) proceeding. The author is not aware of a similar jurisprudence rendered in cases where the evidence would have been collected by a private entity, and later remitted to a criminal prosecution authority.

3. Gathering of evidence by private entities and its admissibility in criminal proceedings

The issue now lies whether specific limitations apply when the evidence is

§ 3.3); of medical doctors (SFT 2C_1011/2014, 18 June 2015, § 3.2); or of civil aviation (Swiss Federal Criminal Tribunal (SFCT) TPF 2018 50, 15 March 2018, § 5-6).

³⁰ SFT 142 II 207, 30 May 2016, § 8.3.2, 8.18.1, 8.18.3. See also SFCT SK.2017.22, 14 June 2018, § 5.8.2.8

³¹ On whether a similar appreciation derives from ECHR case law, see: ECHR, 15809/02 and 25624/02, *O'Halloran and Francis vs UK*, 29 June 2007, § 56-58; ECHR, 34720/97, *Heaney and McGuinness vs Ireland*, 21 December 2000, § 54-55.

³² ECHR, *Engel vs the Netherlands*, 5100/71; 5101/71; 5102/71; 5354/21; 5370/72, 8 June 1976, § 82.

³³ ECHR, *Müller-Hartburg vs. Austria*, 47195/06, 19 February 2013, § 48. See also *a contrario* the civil nature of such sanction : ECHR, *Pechstein and Mutu vs. Switzerland*, 40575/10 and 67474/10, 2 October 2018, § 58. See : SFT 142 II 243, 25 April 2016, § 3.4.

³⁴ ECHR, *Müller-Hartburg vs. Austria*, 47195/06, 19 February 2013, § 47.

³⁵ ECHR, *Brown vs UK*, 38644/97, 24 November 1998, § 1.

³⁶ ECHR 18731/91, *John Murray vs UK*, 8 February 1996, § 46-47.

gathered by private entities such as a Swiss-based association.

The Swiss Criminal Procedure Code does not have a specific regulation on evidence gathered by the parties themselves. A party is free to bring (or hand over if ordered to) all kind of lawful evidence that it holds. In recent years, courts dealt with the issues of reports prepared by private investigation agencies on behalf of private entities, specifically insurance companies seeking confirmation of the severity of the incapacity to work of their clients. The SFT found that “coercive measures may in principle only be ordered by a prosecutor, a court and, in the cases provided for by law, by the police. The few cases in which private individuals may exceptionally use actual coercive measures and interfere with the fundamental rights of individuals are expressly regulated in the SCPC”³⁷.

The SFT has constantly affirmed its jurisprudence on this matter. Specific cases related, again, to the admissibility of a private investigation agency’s report or to unauthorized recorded phone calls were reviewed under the admissibility criteria of Article 141 SCPC. Constant case law finds that evidence unlawfully obtained by private individuals can only be used provided that it could have been lawfully obtained by the law enforcement authorities and if, cumulatively, a balance of interests speaks in favor of its use³⁸.

It is also worth taking a view at the situation in internal investigations in the field of labour

law. In fact, the gathering of evidence during disciplinary proceedings shows similarities with that process followed in the course of internal investigations conducted by employers according labour law regulation. Similarities amount (1) to the legal *nexus* rooted in private law, (2) to the fact-finding goal of the proceeding as well as (3) the duty to cooperate of the person under investigation. One dissemblance is that the duty to cooperate under labour law derives not only from the labour contract but also from Swiss statutory law of Articles 321a and 321b of the Swiss Obligation Code³⁹. To the contrary, the duty to cooperate under association law derives solely from the association’s regulation which an individual subject to that jurisdiction has accepted, but has no explicit statutory basis. This being said, some scholars accept that statements made by employees gathered by private entities under coercion shall be inadmissible in a criminal investigation⁴⁰. As examples, these opinions rely on a decision rendered by the Swiss Federal Criminal Tribunal (SFCT) which considered as inadmissible statements made during (among other inquiries) an internal inquiry where the indicted person had not been made aware of his or her right against self-incrimination⁴¹. It is also advocated that the lack of protection of that person’s right against self-incrimination in a criminal investigation may terminate the duty to cooperate of the employee in the internal labour law investigation⁴². The SFT stressed that internal inquiries should include “guarantees equivalent to those of a criminal investigation”, such as the opportunity to prepare a defense, to be assisted by legal

³⁷ See: SFT 143 IV 387, 16 August 2017, §. 4.2.

³⁸ See: SFT 6B_1241/2016, 17 July 2017, § 1.2.2 ; SFT 6B_786/2015, 8 February 2016, § 1.2.

³⁹ See : David Raedler: Les enquêtes internes dans un contexte suisse et américain. Instruction de l’entreprise ou Cheval de Troie de l’autorité?, Lausanne 2018, p. 178.

⁴⁰ See : David Raedler, *op. cit.*, p. 185 ; Damian Graf, Strafprozessuale Verwertbarkeit von Befragungsprotokollen interner Untersuchungen, forumpoenale 1/2016, Bern 2016, p. 42-44 ; Viktor Lieber , *op. cit.*, ad Article 113, § 3; Andreas Länzlinger, Rechtliche Rahmenbedingungen und

praktische Erfahrungen im Zusammenhang mit Mitarbeiterbefragungen, Zurich 2015, p. 125; Niklaus Ruckstuhl, in Niggli/Heer/Wiprächtiger, Basler-Kommentar, Schweizerische Strafprozessordnung, Basel 2011, ad Article 158, n° 36. Similar debate may occur in a civil procedure: Ernst Schmid in Spühler, Tenchio, Infanger (ed.), Basler-Kommentar-ZPO, Basel 2010, ad Article 163, § 6.

⁴¹ SFCT SK.2010.7, 16 June 2010 § 3.1; Damian Graf, *op. cit.*, p. 41.

⁴² Andreas Länzlinger, *op. cit.*, p. 136; David Raedler, *op. cit.*, p. 194.

counsel and to have evidence taken⁴³. This finding is not self-applicable in a disciplinary proceeding, but these specific rights are usually recognized by disciplinary regulations. This being said, save in cases advocated in the literature and mentioned here-above, the right to remain silent would not enter into consideration in an internal investigation regarding an employee, as this would collide with his or her statutory duty to cooperate.

In a very recent decision dated 26 May 2020, the SFT had to appreciate the admissibility, in a criminal proceeding, of the minutes of the interview of an employee during an internal enquiry. In that decision, the SFT confirmed that the employee in such a situation is not under coercion by the mere fact that his position in the labor contract might be affected if he or she refused to collaborate. Hence, the interview was a piece of evidence deemed admissible in a parallel criminal proceeding. We shall note that the decision does not mention the gravity of the sanction that the employee could face in case he or she had refused to collaborate in the specific case⁴⁴.

Hence, further criteria might prove of relevant guidance when assessing the admissibility of evidence gathered by private individuals for the benefit of a criminal proceeding, namely that:

- Coercive measures may only be imposed by private individuals where contemplated by the Swiss Code of Criminal Procedure;
- The use of coercive measures by private individuals shall be exceptional;
- The criminal justice authorities would have been in a position to lawfully gather that evidence;
- The use of this evidence shall follow a balance of interest taking into

consideration the seriousness of the offence.

In order to fully appreciate the admissibility of such evidence, it must be recalled the possible ways for the criminal justice authorities to get into possession of such evidence and the possible remedies for the person under investigation to protect his or her right against self-incrimination.

B. Enforcement of the right against self-incrimination

1. Ways of transmission of information to the prosecuting authority

The information transmitted from a sport organisation to a criminal justice authority follows different routes depending on whether it is voluntarily transmitted or upon a judicial order. We will not review in the present contribution the situation where the information provided for by an individual during a disciplinary proceeding is voluntarily reported by that sport organisation to criminal justice authorities. This transmission of information is mainly limited by the provisions on false accusation⁴⁵ as well as by general civil provisions on protection of personality⁴⁶.

Should a criminal justice authority be legitimately interested in reviewing facts under investigation in a disciplinary proceeding, it may issue an order to the sport organisation to hand over documents in view of seizing them⁴⁷. The sport organisation has to comply with such an order and remit the documentation to the criminal justice authority. Such an order may not be appealed⁴⁸ and may be enforced either under threat of criminal sanctions⁴⁹ or through search of premises⁵⁰.

An order to hand over documents is addressed to the entity which holds those

⁴³ SFT 4A_694/2015, 4 May 2016, § 2.4.

⁴⁴ SFT 6B_47/2020, 26 May 2020, § 5.3.

⁴⁵ Article 303 of the Swiss Criminal Code.

⁴⁶ Article 28 of the Swiss Civil Code.

⁴⁷ Article 263 and 265 SCPC.

⁴⁸ SFT 1B_477/2012, 13 February 2013, § 2.2.

⁴⁹ Article 265 (3) SCPC.

⁵⁰ Article 265 (4) and 244 SCPC.

documents. The indicted individual cannot be summoned similarly⁵¹, as this would amount to a violation of his or her right against self-incrimination.

The trial judge will eventually appreciate the admissibility of the evidence. However, a special process is put in place to protect special interests at an earlier stage of the proceeding.

2. Sealing of documents

The holder of documents that opposes the order to hand documents may immediately seek the sealing of evidence based on Articles 248 and 264 (3) SCPC. Specifically, the sealings have to be put on the evidence gathered if the right to remain silent or to refuse to testify is invoked⁵².

Hence, the holder of documents (*i.e.* the sport organisation) may invoke the *nemo tenetur* principle to seal the documents⁵³. The prosecuting authority then has to file a request, within 20 days, to the Compulsory Measures Court in view of lifting the sealing. During this proceeding, the prosecuting authority will have to establish, among other conditions, that the evidence is not covered by a specifically protected legal interest⁵⁴.

As a general rule, only the (natural or legal) person that was subject to the order would participate to the proceeding regarding the lifting of the sealing. However, recent jurisprudence has extended the standing to participate to such proceeding and to seek specific reliefs. It was first confirmed that not only those persons that hold the documents to be seized may seek their sealing, but also

those that have a legally protected interest, including the indicted individual⁵⁵. This means that, should the indicted individual have a specifically legally protected interest, he or she may seek the documents to be sealed even if those documents were not in his or her possession when the criminal justice authority ordered its seizure⁵⁶. In a very recent decision, the SFT explicitly confirmed that the indicted person could challenge the admissibility of the evidence on the basis of the violation of his or her right against self-incrimination even when that evidence was gathered from other entities. Consequently, he or she was legitimate to seek sealings be imposed on evidence that was seized or obtained from a third party⁵⁷.

In that very case, the evidence had been gathered from another state authority (on the basis of legal assistance, and not on the basis of an order). The SFT however held that it was not relevant that the evidence was gathered by the prosecutor's office through an order within the criminal proceeding or following a request for assistance between authorities⁵⁸. The gathering of evidence must respect fundamental rights no matter how the prosecutor's office came into possession of the evidence⁵⁹.

Despite his or her participation to the criminal procedure⁶⁰, the indicted individual might not be aware that documents have been seized on which he or she may raise reliefs for protection of specific rights such as the *nemo tenetur* principle. The prosecution office has therefore the duty to inform him or her thereof *ex officio* and offer the possibility to seek that sealings be imposed on the documents⁶¹. However, should the

⁵¹ Article 265 (2) (a) SCPC.

⁵² Article 248 (1) and 264 (3) SCPC.

⁵³ See: SFT 1B_459/2019, 16 December 2019, § 2.3-2.5.

⁵⁴ SFT 1B_477/2012, 13 February 2013, § 2.1.

⁵⁵ SFT 140 IV 28, 25 November 2013, § 4.3.4 - § 4.3.6, § 4.3.8

⁵⁶ SFT 1B_487/2018, 6 February 2019, § 2.3; SFT 1B_91/2019, 11 June 2019, § 2.2 and 2.4.

⁵⁷ SFT 1B_268/2019, 25 November 2019, § 2.1 and 2.3.

⁵⁸ SFT 1B_268/2019, 25 November 2019, § 2.1; see also: SFT 1B_26/2016, 29 November 2016, § 4.2.

⁵⁹ SFT 140 IV 28, 25 November 2013, § 3.4; SFT 1B_26/2016, 29 November 2016, § 4.2. A similar consideration was observed in SFCT, TPF 2018 50, 15 March 2018, § 5.1.

⁶⁰ Article 107 (1) (b) SCPC.

⁶¹ SFT 140 IV 28, 25 November 2013, § 4.3.4; SFT 1B_268/2019, 25 November 2019, § 2.1 and 2.3; SFT 1B_91/2019, 11 June 2019, § 2.2; SFT 1B_487/2018, 6 February 2019, § 2.3.

indicted individual be aware that such documents were seized, he or she must spontaneously and immediately extend his request for sealings to the prosecutor's office⁶².

Finally, it must be mentioned that, as the indicted person must give reasons to his or her relief for sealings, he or she may not always have to make a formal claim to the prosecuting authority. Under certain circumstances, it may be sufficient to understand that that person intends to oppose the seizure of documents based on his or her legally protected right⁶³. In an already mentioned case, the SFT found that a request for sealings was valid, even if it had been made before the administrative authority before which the statement was made, for the case that the protocol containing such statements would eventually be shared with a prosecuting authority⁶⁴.

3. Judicial review of the admissibility of the evidence

Regardless of the immediate ruling of the Compulsory Measures Court, the admissibility of the evidence gathered may be referred to the trial judge of the criminal case, which will make the distinction between lawful and unlawful evidence and base his or her assessment on the merit of the case accordingly. The grounds upheld by the judge of first instance may then be challenged on appeal and, as a last resort, the indicted person may challenge the judgement before the SFT⁶⁵. In such a situation the SFT will have a full power of review as whether the evidence is admissible or not⁶⁶.

IV. Procedural public policy limitation on the admissibility of evidence

Swiss law on the admissibility of evidence in case of parallel proceedings is evolving. It gives a (yet not entirely defined but) valuable

set of rules as regards the CAS Panel in the V. case assessment of the "real danger that the sport organisation will be (mis-)used by public authorities to collect information that they could be otherwise unable to obtain"⁶⁷.

As stated in introduction, it shall be reviewed whether this danger could lead to an "intolerable contradiction to justice" in the meaning of Article 190 (2) (e) PILA.

A set of arguments speaks against a contradiction amounting to a breach of public policy.

First, both ECHR and Swiss jurisprudence have drawn limitations and set criteria to the use, in a criminal proceeding, of evidence gathered in an administrative proceeding based on the duty to collaborate in order not to circumvent the right to remain silent. The situation is more blurred as regards evidence collected by private entities. However, the *rationale* of this jurisprudence lies in the finding that the *nemo tenetur* principle cannot be circumvented because the entity that took the evidence was administrative and not criminal. A similar approach should fully apply to a situation where the evidence is gathered by an entity based on private law. In both situations, the criminal justice authority shall not benefit from the possible *improper coercion* exercised by the (either administrative or private) fact-finding body that collects the evidence and that is entitled to enforce a duty to collaborate. The careful consideration of all parameters may then lead the criminal justice authority to consider that the evidence may or may not be admitted.

We will not extensively review each criterion and their global assessment, but this may include whether the statements are made on facts or imply a recognition of guilt, whether this recognition of guilt is or is not the only incriminating evidence and whether the admissibility of the evidence may be

⁶² SFT 1B_487/2018, 6 February 2019, § 2.4.

⁶³ SFT, 1B_522/2019, 4 February 2020, § 2.1.

⁶⁴ SFT, 1B_268/2019, 25 November 2019, § 2.3.

⁶⁵ SFT 141 IV 284, 12 May 2015, § 2.2.

⁶⁶ Article 95 (a) of the Swiss Federal Tribunal Act.

⁶⁷ CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.

challenged in court. Recent case law has put a heavy weight on the criterion of the nature of the sanction: absent a sanction of a criminal nature (such as those imposed by disciplinary bodies and despite their harshness), there may be no room left to consider an “improper coercion” that renders the evidence inadmissible. In the very recent decision rendered under 6B_49/2020, the SFT rejected that an *improper coercion* be imposed by a private entity. However, the gravity of the sanction faced by the individual under internal investigation in that specific case is unknown⁶⁸. The admissibility of the evidence gathered in a case where that individual would face, e.g., a life-ban remains untested. The consideration that any sanction imposed by a private entity is, *per se*, not an *improper coercion* may not be satisfactory and may have to be scrutinized under ECHR case law⁶⁹. A lighter threshold as that of a “sanction of a criminal nature” might be preferable, such as e.g. a “serious personal or economic disadvantage”⁷⁰.

In this review, it shall be taken consideration that evidence gathered through coercive measures by private individuals shall only be admissible where criminal justice authorities would have been lawfully authorized to collect them, should they have been in the place of that private entity. Obviously, the protocol of a hearing or documents gathered on the basis of the duty to cooperate in a disciplinary proceeding could not have been collected by a criminal justice authority. That criminal justice authority should, under the risk of absolute inadmissibility, inform the individual under investigation that he or she had a right to remain silent⁷¹.

Furthermore, according ECHR case law reviewed in this contribution, the “improper coercion” may not only result from threats

but may also occur where the authorities use subterfuge to elicit information that they were unable to obtain during questioning⁷². Criminal justice authorities are bound by the Swiss Constitution to act in good faith⁷³. A “subterfuge” such as the “[misuse of a sport organisation] by public authorities to collect information that they would be otherwise unable to obtain”⁷⁴ may contradict this requirement and, hence, render the evidence inadmissible.

As it appears from this set of criteria, there is no one and only answer to the question whether a piece of evidence gathered during a disciplinary proceeding is admissible in a criminal proceeding. This is however not the purpose of this contribution. The main point of interest lies in the fact that a trial judge in a criminal court will best be in a position to appreciate these various conditions in each specific case, and rule on the admissibility of the evidence. This decision will be appealable to the competent upper court and then to the SFT (acting as an authority in criminal justice) with a full power of review. The ECHR may then be called to review whether or not this admissibility is justified.

Consequently, in the second place, the mere fact that an individual under criminal investigation has the possibility to challenge the admissibility of the evidence is a strong mitigating factor to any eventual “intolerable contradiction to justice” in the sense of the jurisprudence on *ordre public* derived from Article 190 (2)(e) PILA. According this provision, the SFT (acting as a judicial authority in international arbitration) will analyze the admissibility of the evidence gathered and review whether it may amount to a possible breach of procedural public policy. It will do so by appreciating the balance of interests between the discovery of

⁶⁸ SFT 6B_49/2020, 26 May 2020, § 5.3.

⁶⁹ In favor: Björn Hessert, Cooperation and reporting obligations in sports investigations, *The International Sports Law Journal*, Springer, Published online 3 June 2020, § 3.2.

⁷⁰ See: Viktor Lieber, *op. cit.*, ad Article 113, § 3. See also: Damian Graf, *op. cit.*, p. 42; David Raedler, *op. cit.*, p. 197.

⁷¹ Article 158 (1) (b) SCPC.

⁷² ECHR, 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, *Ibrahim and others vs UK*, § 267 and case law referred to.

⁷³ Article 5 (3) of the Swiss Constitution.

⁷⁴ CAS 2017/A/5003 J.V. vs. FIFA, 27 July 2018, § 266.

the search and the protection of the legal interest harmed by the collection of the evidence. This was *e.g.* the situation where incriminating videos had been illegally recorded and used in a disciplinary proceeding related to a match-fixing case. Upon appeal against the CAS award, the SFT found that there was no violation of public policy at least because the concerned individual had the possibility to dispute the authenticity of the video and challenge its admissibility in the arbitral proceeding, which he did not do eventually⁷⁵. Hence, the SFT seems to be of the view that there is no room for a violation of public policy wherever the individual has a possibility to challenge, before the trial (arbitral) judge, the admissibility of the evidence gathered.

As described in the present contribution, the individual under investigation has a first possibility of defense by seeking the sealing of the documents gathered by the disciplinary body based on a duty to collaborate. If rejected, he or she has a second opportunity to seek final exclusion of such evidence before the trial judge, with a final review by the SFT.

One may not review here the assessment that would be made by criminal court on the admissibility of the evidence gathered by a sport organisation's disciplinary body. It shall be a case-by-case assessment. However, it appears that the mere possibility to have a judge review such admissibility seems, *per se*, sufficient not to contradict the limited concept of procedural *ordre public* of Article 190 (2) (e) PILA, without reviewing in detail whether the evidence is admissible or not. We should here keep in consideration that the judge in the criminal proceeding, and in last resort the SFT in this same proceeding, will enjoy a full power of review on the admissibility of the evidence, where the SFT in the international arbitration proceeding can only review it under the narrow scope of *ordre public*.

⁷⁵ SFT, 4A_448/2013 and 4A_362/2013, 27 March 2014, § 3.2.2.

Finally, the above-described set of criteria as well as the case law cited in this contribution do not refer to whether or not there is a “clear and imminent danger” of the evidence gathered in the disciplinary proceeding being used in a criminal proceeding, as it was described by the CAS Panel in *J.V. vs FIFA*⁷⁶. We doubt that this criterion is necessary. A criminal proceeding is triggered upon the existence of a suspicion of a criminal offence, which may well arise from the situation known to the disciplinary body, but may also appear years later. In this context, it may result very difficult to determine what is an imminent danger of facing a criminal proceeding in a multi-jurisdictional environment.

V. Conclusion

At first, the *J.V. vs FIFA* case appears as a confrontation between the right not to self-incriminate vs the duty to cooperate, and a fierce opposition between those that benefit therefrom, *i.e.* the individual under investigation respectively the disciplinary body conducting it.

The analysis of the later stages of the process, namely those of the criminal proceeding, offer a distinctive picture. The right to remain silent is not aimed against the sport organisation's legitimate willingness to find the truth, but contradicts the coercive means of a criminal justice authority. On the same token, the duty to cooperate is not meant to jeopardize the *nemo tenetur* principle, which may be invoked before the judge that must duly consider it, namely the criminal court judge.

The individual under both disciplinary and criminal investigations (actual or potential) faces a complex situation as he or she must prepare him- or herself to content both his or her duty to cooperate and preserve his or her right to be heard. This can be done mainly by seeking, before the criminal justice authority, the sealing of the protocol of the hearing

⁷⁶ CAS 2017/A/5003 *J.V. vs. FIFA*, 27 July 2018, § 266.

before the disciplinary body in case it is forwarded, voluntarily or otherwise, to a criminal justice authority. In any case, this individual shall seek that evidence be deemed inadmissible.

As per the sport organisation, its aim to find the truth will not be jeopardized by informing that individual of the possibility to seek such sealings before the criminal justice authority. Should the individual under disciplinary proceeding express the willingness to request those sealings be put on documents or on the protocol of his or her testimony, the sport organisation may then forward this information to the criminal justice authority if and when the documents are handed over. This would appear as an adequate way to preserve the right to remain silent before the criminal justice authority, amounting to guarantees “equivalent to those of a criminal proceeding” in internal investigation⁷⁷ and as far as this concept should apply in case of a

disciplinary proceeding carried out in parallel to a criminal investigation. Such process would enable the debate over the exercise of the right not to incriminate oneself to be conducted in the correct *forum*, namely that of a criminal proceeding and not during a disciplinary proceeding.

It therefore appears that, even though closely linked when disciplinary and criminal proceedings arise or are susceptible to arise, the right to remain silent and the duty to collaborate serve different purposes, impact different bodies and deserve distinctive legal regimes. The duty to collaborate and the *nemo tenetur* principle can actually coexist and properly serve the purposes which they are each designed for without harming either the sport organisation’s right to establish the facts nor the right of the person under its jurisdiction to have his right to remain silent respected.

⁷⁷ SFT 4A_694/2015, 4 May 2016, § 2.4.