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NEW SWISS DECISIONS IN THE FIFA CORRUPTION GATE

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Background information on the FIFA Gate

It will be recalled that in 2015, several senior FIFA officials were arrested in Zurich by the Zurich Police at the request of the US Department of Justice, which was suspected them of having accepted bribes during the awarding process of the Football World Cups, for Russia in 2018 and Qatar in 2022.

Proceedings have been opened in three countries: the United States, France and Switzerland. To date, only the United States has brought charges.

As part of the investigation, the Swiss justice, through the Office of the Attorney General Switzerland (hereinafter: "**OAG**"), has opened no fewer than 25 proceedings, involving 15 countries and hundreds of documents.

To help it in this huge task, the OAG set up in 2015 a working group (the so called "**FIFA Task Force**").

Several criminal proceedings initiated by the OAG between 2015 and 2018 are currently pending. FIFA has also filed a civil claim for damages in all these proceedings.

Two individual defendants and former FIFA officials targeted by these proceedings were informed by medias in November 2018 that the OAG met informally several times with FIFA President Gianni Infantino (in office from 2016 to 2018 and reelected

in June 2019) to discuss about "coordination" with the FIFA, which is an admitted complaining party into the Swiss criminal proceedings. No transcript or records were made of these discussions, which did not take place at the premises of the OAG but in restaurants and hotels.

Recusal Requests against the Attorney General and the FIFA Task Force

The two accused requested the OAG to recuse any person exercising or having exercised a function within the FIFA Task Force set up by the OAG Article 56(f) of Swiss Criminal Procedure Code what the OAG refused.

The accused filed an appeal to the Federal Penal Tribunal and reiterated their requests, which has very recently been admitted by the Court which declared that the Attorney General, the former Chief Federal Prosecutor and one of the Federal Prosecutor in charge of the matter had adopted a partial behavior contrary to the requirements of a fair trial.

The recusal requests have been rejected concerning the other members of the Task Force. The two decisions are not subject to appeal and are consequently final.

Disqualification of the Attorney General of Switzerland

For the defendants, the circumstances surrounding the Prosecutor's informal meetings with FIFA President Infantino - the place where they took place, the late communication to the media and the absence of notes summarizing the discussions, respectively of minutes of hearing – were representing strong evidence of in inequality of treatment to the detriment of the parties who were unable to participate to these discussions.

The Attorney General of Switzerland acknowledged that he participated in "coordination meetings" with FIFA but explained that by participating in these meetings, he was only exercising his legal task as Chief of the OAG, a posture that was not incompatible with an independent procedure.

According to the Federal Penal Tribunal however, the explanations given did not make it possible to understand why his presence at those meetings would have been essential to the proper conduct of investigations concerning FIFA. Rather, it appeared that the discussions could have been conducted by other members of the OAG. It must

therefore be admitted that the Attorney General of Switzerland has been personally involved at the operational level in the proceedings under consideration and has gone beyond his task of leading the OAG.

The Attorney General of Switzerland acknowledged that the meetings were not the subject of any case notes. This approach has been considered by the Federal Penal Tribunal as contrary to the provisions of article 77 of the Swiss Criminal Procedure Code (minutes of proceedings) and has the effect of removing from any control the content of the discussions held on these occasions, in particular those of the other parties to the proceedings. This indicated a clear lack of transparency towards the latter, especially since the facts suggest that if the existence of the disputed meetings - otherwise in unusual places (restaurants and hotels) - between the representatives of the OAG and FIFA had not been revealed by the media, they would never have been brought to the attention of the other parties.

In conclusion, the Attorney General of Switzerland's conduct has been held incompatible with the requirements of Art. 3(2)(c) of the Swiss Criminal Procedure Code, according to which all persons affected by criminal proceedings are guaranteed fair treatment and the right to be heard.

All the circumstances of the case in hand are objectively such as to make the Attorney General of Switzerland, the former Chief Federal Prosecutor in charge and one additional Federal Prosecutor suspects of partiality.

Consequences

None of the recused OAG prosecutors can involve in any manner into these proceedings, what is rather embarrassing and will significantly slow down the conduct of these proceedings

What is worse, the investigative acts in which the three Prosecutors participated will have to be annulled and repeated. It is still unclear under Swiss case law and amongst scholars as to whether all investigative acts will have to be repeated from the outset, i.e. from March 2015, or only since the examining magistrates have been declared partial.

The OAG reported on his side to have taken note of the decisions of Court in the football-related business complex and that a first series of measures had been taken accordingly, without saying which ones.



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