

# Self-regulation of sport: arguments for and against

Sport is increasingly coming into conflict with legislation, but argues that it has the autonomy to set its own rules outside of national and international law. Simon Thorp and Adam Leadercramer, of Onside Law, examine the effectiveness of self-regulation and the increasing distillation of the concept that sport can self-regulate, as well as reviews that have taken place into the effectiveness of this self-regulation and the changes in sports governance that this has effected.

Following the England football team's disappointing performance in the FIFA World Cup 2010, questions are again being asked in some quarters of the competence of governing bodies to properly regulate their sports.

Sports and Olympics Minister, Hugh Robertson, has instructed the English Football Association (FA) to take "a long, cold, hard, unemotional look" at "why a country that has the best professional league in the world woefully underperforms at World Cups" and has spoken of the need for the Football Association (FA) to "get its house in order".

Whilst Robertson has emphasised that it is incumbent on the governing body to regulate itself (indeed he has been quoted as saying that he was not going to allow himself to be "sucked into an energy-sapping wrangle with football"), it is also clear that he will be monitoring the effectiveness of this self-regulation.

This somewhat uneasy arrangement has been described by some commentators as granting sporting governing bodies (SGBs) 'supervised autonomy'. This article looks at how such supervised autonomy has manifested itself and the effectiveness - or otherwise

- of the current *status quo*.

## The role of SGBs

### General

Traditionally, the main function of SGBs was to 'draw up rules for the sport, to develop and promote it, to widen its popularity and to represent the sport and those involved in it'.

However, as sport has become increasingly commercialised, governing bodies have found themselves operating under a wider remit, including acting as a disciplinary authority, a dispute resolution body and an exploiter of commercial rights. These three functions, along with their original *raison d'être* of the making of the rules that serve to define the parameters of participation in a particular sport, are those which are now the subject to the most scrutiny by external forces.

This scrutiny focuses on whether SGBs operate within legal and commercial norms. However, the fundamental aspect of their role is not challenged and the Nice Declaration, which states that 'federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy' still holds true.

### Basis of self-regulation

The basis of a sporting governing body's authority and, consequently, its effectiveness as a regulator, is in the membership 'contract' it enters into with its members. It is commonly understood that if members wish to participate in a game, league or event sanctioned by the sporting governing body, they need to abide by its rules and accept its jurisdiction.

The legitimacy of this 'contractual' nexus has been supported by the traditional non-interventionist role played by

government in relation to sport. Certainly in the UK, the government has been keen to promote self-regulation as a means of securing sporting integrity. Whilst the government has imposed a measure of control over some SGBs through restrictions placed on funding and the imposition of specific, targeted legislation, for the most part this historical lack of interference has meant that the jurisdiction enjoyed by SGBs over its members has rarely been challenged.

However, in recent years, the ability of the sporting governing body to regulate its members unhindered has been eroded. This erosion served to clarify the role of the sporting governing body by regulating those activities that are typically deemed to be ancillary to its core purpose.

### Forces for change

Whilst the specificity of sport continues to be acknowledged by the UK government (and by notable European legislation), the European Court of Justice in *Meca-Medina* made clear that purely sporting rules would not exempt from the scope of the Treaty on the Functioning of the European Union those engaging in that sporting activity or the governing body of that sport. The consequence of this being that any rule created by a sporting governing body must be compliant with EU law and if it is not, that non-compliance must be justified on the basis that the rule is inherent in the pursuit of a legitimate objective and is proportionate to it.

The effect of this approach is that SGBs do not have an unfettered right to self-regulate. This was shown in a number of instances prior to *Meca-Medina* and - as is demonstrated by the analysis of various rules in the White Paper on

Sport (and its accompanying working document) - will continue to be the case in the future.

Moreover, whilst 'self-regulation' will be permitted in respect of 'rules of the game', this is likely to be a very narrow category involving purely sporting rules that have no or little direct economic impact. Consequently, this significantly distils those elements of a sporting governing body's role that are truly 'self-regulatory'.

Another force for change for SGBs has been the burgeoning influence of 'super clubs' with enormous global followings and significant financial clout. Again, this has manifested itself primarily in football (with the now-disbanded G-14 group of 18 clubs, who networked to provide a powerful collective voice leading to the formation of the European Club Association), but can also be seen in other sports. SGBs face the difficult task of having to appease these powerful stakeholders (for fear that they will form breakaway leagues totally beyond their jurisdiction) whilst remaining cognisant of general public disapproval of too much power ending up in the hands of too few, and uncompetitive tournaments.

It should be noted, however, that not all governmental interference into the sporting world is resisted by SGBs. For example, the implementation of the World Anti-Doping Code was funded 50:50 by SGBs and governments, and its effectiveness is/was dependent on governments agreeing to its terms so that athletes were unable to use national courts to argue restraint of trade or human rights infringements.

#### Reviews of governance structures

A combination of the above factors has led to a number of reviews and analyses into the role that should

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be undertaken by SGBs and how SGBs should discharge their regulatory and other obligations. It is interesting that many of these investigations were at the behest of the government (for example the Burns Review) or run in conjunction with a government agency (for example UK Sport/Deloitte's Investing in Change document), rather than through a realisation from within the sporting governing body itself that it needed to reform.

It is also noteworthy that these reviews confirm the specificity of sport in so far as it applies to corporate governance - i.e. an acknowledgment that the governance structures of SGBs will necessarily be different to the governance of 'normal' corporate entities.

Reviews into the role of SGBs in the United Kingdom have focussed on modernising the internal structure of those entities to make them more in step with the corporate world in which they increasingly operate. In the Burns Review, for example, Lord Burns concentrated on how to make the FA a more efficient and dynamic entity by streamlining its organisational structures. Similarly, Investing in Change focused on the ideal composition of the board of SGBs and how they should interact with their members.

The difficulty is that these recommendations are just that, and lack the force of legislation or court judgments. This has been starkly illustrated in the case of the Burns Review, where implementation within the FA was a protracted and difficult process<sup>17</sup> and even then, the review was not implemented as originally envisaged by Lord Burns<sup>18</sup>.

When one contrasts this to the consequences of European Union intervention in the FIA dispute<sup>19</sup>, where the objections of the

European Commission led to the FIA agreeing to separate its regulatory function from its function as commercial rights holder, it is difficult to escape the conclusion that if limits are to be placed on self-regulation by SGBs, it would need to be by more prohibitive means than reviews and recommendations.

Ultimately, though, it must be in the best interests of SGBs that their governance structures are robust, fair and not irrational. This is because it is a fundamental condition of their ability to continue to self-regulate that they show themselves to be 'fit for purpose'. This is made abundantly clear by the Nice Declaration, which states: '[The European Council] recognises that...on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports'.

The clear implication is that to the extent SGBs show themselves to be effective self-regulators, the specificity of sport will continue to be acknowledged. But if that self-regulatory process is shown to be undemocratic, opaque, unlawful or otherwise ineffective, SGBs should expect interference in their decision making-processes.

#### The effectiveness of self-regulation by SGBs

##### Perceived failings

One criticism consistently levelled at SGBs is that they suffer from protracted decision making processes and are therefore unable to respond quickly to situations that require swift resolution. Typically, the principle difference for SGBs is the number of 'reserved' matters that require the approval by a majority of their members and/or another body higher up in their governance structure. This approach must be

analysed against the requirement of the European Council and other legislators for an SGB's structure to be both transparent and democratic (as exemplified in the Nice Declaration). SGBs would argue that their governance structure could be neither of these two things if due process was not followed.

Another frequently levelled criticism is that SGBs are monuments to the self-interest of their executives and members, and self-regulation is a convenient means of maintaining this *status quo*. The fact that the Football Association has failed thus far to replace Lord Triesman with another independent Chairman could be taken as evidence of this failing. As Burns tellingly noted in the Burns Review: 'Others may be reluctant to give support [to the proposals] because of what they perceive to be a threat to various interests, of which football has a great many.'

Finally, the fact that a sporting governing body's authority over its members is controlled by its 'contract' with that member means that it does not have any jurisdiction over non-members whom the public might still expect to be bound by its rules (for example, a parent watching their child's football match and engaging in offensive behaviour). Some SGBs, such as the Jockey Club, have stretched this principle to the limit, by purporting to have the power to 'warn off' from premises that they control any person whom they suspect of race fixing, but in general a sporting governing body will have no authority over non-members. The consequence of this is that external regulation (through specific legislation, case law or the involvement of a government agency) is required where the limit of a sporting governing body's authority is reached but a solution

to a problem is needed. In this scenario it is impossible for the sporting governing body to 'self regulate' and it necessarily needs to rely on external regulation for assistance.

#### Perceived successes

One area where self-regulation succeeds is in its ability, where a particular regulation is propagated by a world governing body, to impose standards on a worldwide basis. This is something that simply could not be achieved through legislation given its territorial limits and, when used correctly, can have an extremely positive effect (for example, FIFA creating worldwide standards on child protection).

Self-regulation is most successful where a sporting governing body amends a true 'rule of the game' in order to remedy a deficiency in its sport. For example, the relatively recent introductions in football of the 'backpass rule' and 'golden goal', and in cricket of '20:20' have arguably been excellent innovations that have furthered the development of both sports.

SGBs are on less steady ground, however, when they are required to regulate areas outside of this core competency or that touch upon sensitive legal topics. FIFA's '6+5' rule is a good example of the latter, with the international football federation opting to explore other options following the European Union voicing its concerns about the rule's compatibility with EU freedom of movement legislation. The issue of the financial well being of football clubs, on the other hand, is arguably a good example of the former, with Her Majesty's Revenue & Customs currently challenging the 'football creditor' rules. It is certainly arguable that it is inappropriate for a governing body to define such provisions resulting in insolvency rules and governance requirements

that differ from those in the 'corporate' world.

#### Conclusion

SGBs should be the primary 'regulators' of their sports. They have the most knowledge of the specifics of their sport, the infrastructure to monitor developments and implement regulatory change and (in some cases) the worldwide reach to ensure the universal application of appropriate regulations. However, this self-regulatory privilege must not be exercised injudiciously and must always be consistent with prevailing European and national law (unless non-compliance is inherent in the pursuit of a legitimate objective and proportionate to it). Moreover, where a sporting governing body is required to operate in an area outside of its core competency - for example in relation to setting a financial and regulatory framework within which its member clubs must function - it is likely to be appropriate for an external regulator to assist with and/or take ownership of, that process. It will also be interesting to see whether other governing bodies will follow (or be forced to follow) the example of FIA and split their regulatory functions from those of commercial rights holder in the future.

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