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POLICY BRIEF

The Transnational Governance of Sports

Highlights

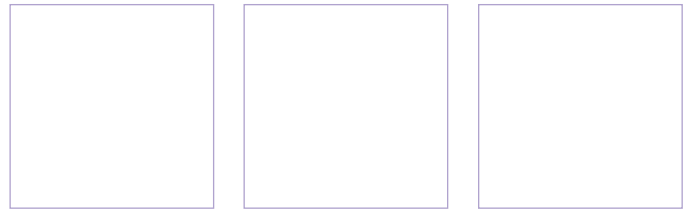
This High-Level Policy Dialogue, organised by the School of Transnational Governance of the European University Institute, brought together policy experts, leading academics and journalists in the fields of sports and transnational governance, to debate the topic of 'Sports Governance'. During the discussion, the participants agreed that there are several crucial challenges in the field of sports governance. Discussions centred around issues how to guarantee integrity in sports and the need for better mechanisms of checks and balances in its governance bodies. The discussions also focused on the public oversight of sports governance and on the weaknesses and strengths of different institutional alternatives (i.e. national, supranational, international) in exerting discipline over the autonomy of sports governing bodies. Participants stressed the expanding nature of sports business and discussed a variety of good governance principles that must be employed on several aspects of sports regulation and management. To this end, many highlighted that the European Union (EU) can be an agent of change toward the synthesis of a good governance framework in sports.

This Policy Brief highlights the main challenges and issues on sports governance and puts forward alternative recommendations to address them in the future:

1. The Love for Sports and the Business of Sports.
2. Challenges and Issues of Sports Governance: Concentration of Power and the Role of Independence and Checks and Balances in Sports Governance.
3. Public Oversight of Sports Governance: EU Law as a Tool to regulate Sports Governing Bodies.
4. Good Governance in World Sports.
5. Who are the Agents of Change in Sports?

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The opinions of the authors represent personal opinions and do not represent the position or opinion of the European University Institute



Key Issues and Proposals

1. The Love for Sports and the Business of Sports

Sports bring people together for different reasons and in one way or another we have all experienced it. It may be that we passionately support our national team in the football World Cup, that we watch the winter Olympics every four years or even that we work in the sports sector. Whatever may be the case, the fact is that sports, at some point, have been part of everyone's lives. As one of the most significant leisure activities in the world, sports have a great impact in the economic and social dimensions of our society.

The business of sports has expanded over the years to a multi-billion industry. According to recent statistics, sports activities have created a market of approximately 90 billion dollars; the World Cup 2014 tournament in Brazil alone made approximately \$5 billion for FIFA. Given that sports are very popular in society and encompass diverse stakeholders in their sphere (e.g. players, clubs, associations, multiple corporations, etc.), they have transformed to a very profitable commercial activity. Nowadays, an interrelated business network of diverse companies is activated within the sports industry with the scope to share the profitable pie of the world of sports. Both public and private corporations of marketing development, technological innovation, clothing, food and health production, media and telecommunications, to name but a few, invest in sports development and implementation. Multiple sponsors back, reinforce and promote their activities.

If one takes into account all upstream and downstream activities linked to sport, its impact on the economy is substantial. Evidence by the European Commission has indicated that sports industries corresponded to more than 2% of EU's GDP¹. Sports are now a multi-million Euro business activity. However, their governance model and dominant stakeholders have hardly changed since the time of amateur sports. This mismatch between the business development of sports and their development in governance helps explain many of the integrity scandals that have dominated sports in recent years.

Currently, due to the mobility of capital and the new market opportunities in Asia, indications of financial flows suggest that the sports industry has been moved

eastwards. Big companies have established their sponsoring activities in China, India and other Asian countries in order to benefit from the unexplored market opportunities and develop new products and actions for the needs of the Asian sport athletic cultures. Moreover, new markets remain to be fully explored, with many in places where the governance structures are even weaker.

This market expansion in the world of sports has further fuelled a furious competition among the potential actors who are striving to benefit from this market. Despite the large amounts of money which are circulated in the sports industry, these are not unlimited and a struggle for domination is unavoidable. Phenomena of corruption, gambling, doping, and money laundering are often associated with activities in the sports industry and the governance bodies of sports. Indeed, the repetitive scandals in football (the largest sports industry in the world) including its main organising agency, FIFA, remind us that the world of sports is full of these problematic incidents.

II. Challenges and Issues of Sports Governance: Concentration of Power and the Role of Independence and Checks and Balances in Sports Governance

Sports matters are, for the most part, governed by private sports associations, teams, companies and players' agents. At the top are the private sports transnational associations that define who, and under which conditions, has access to these activities and, therefore, entry into the respective business markets. These private bodies claim autonomy over their legal regulation. However, not every issue at stake in sports governance is solely of private interest; indeed, most have important public consequences and play a role in the public sphere. Consequently, they demand public scrutiny.

The combination of public interest and private governance that dominates sports results in different challenges, of high public relevance, for the governance of sports. Among the various challenges and issues highlighted in the high-level policy dialogue were:

- Corruption (in particular, in relation to electoral procedures and campaign rules, match fixing, and the award of business contracts on matters such as broadcasting or marketing rights);
- Financial and sports integrity (in particular linked to the lack of transparency and conflicts of interests on



a large number of issues, including contracts, clubs ownership or players transfers);

- Human rights issues (for instance, players, supporters and workers rights);
- Gender concerns (issues of gender discrimination, including problems with the representation of women in sports);
- Political intervention in sports.

Part of the governance problems can be linked to the electoral and selection systems. The usual claim of a bottom-up representative nature made by sports associations often conflicts with the limited representation (small number of electors and not diverse, with woman almost fully excluded) and the very low turnover in leadership positions. This is further reinforced by common claims of voting fraud or the existence of voting syndicates.

This reality cannot be detached from the usual concentration of power. An assessment made by almost all participants was that sports organisations are often too presidentialist, leading to an excessive concentration of power.

Certainly, this further underlines the importance of the need of appropriate and effective forms of checks and balances, in particular the lack of genuinely independent bodies to control the powers exercised by the governing bodies of sports, in addressing many of the challenges highlighted.

Throughout the discussion, the debate over the notion of independence and its implications was central in understanding the main problems that sports governance is currently facing. Several participants indicated the lack of genuine independent bodies to enforce the rules in sports associations, guarantee good governance and integrity and control the powers of the political bodies. Disciplinary, ethical and quasi-judicial bodies are often dependent on the political bodies they are supposed to control creating a structural conflict of interest. Their members' independence is often also not guaranteed at the level of selection and working procedures.

In addition, the autonomous judicial system developed for sports, centred on the Court of Arbitration for Sport (CAS) that decides most sports conflicts in last instance, continues to be the object of an intense debate regarding several perceived flaws on the issue of judicial independence and access to justice. There were several challenging aspects of its structures and procedures that were questioned. The uncertainty as to the substance of the

law (some argued that CAS as a governing body of sports that, de facto, rewrites the rules could itself violate the rule of law), and the problematic rules for the selection of and operation of its members (from the origin of the arbitrators and who selects them to renewable terms) were pointed out as major problems that needed to be addressed in spite of recent, but insufficient, reforms. The fact that CAS does not publish all its jurisprudence nor offer any clear and public criteria on its selective publication, in addition to the questionable transparency of its decisions (including at the level of their reasoning and justification), was strongly criticised (see, for instance, Table 1 which depicts the numbers of appeals submitted to CAS and appeals awards published online on the CAS official website).²

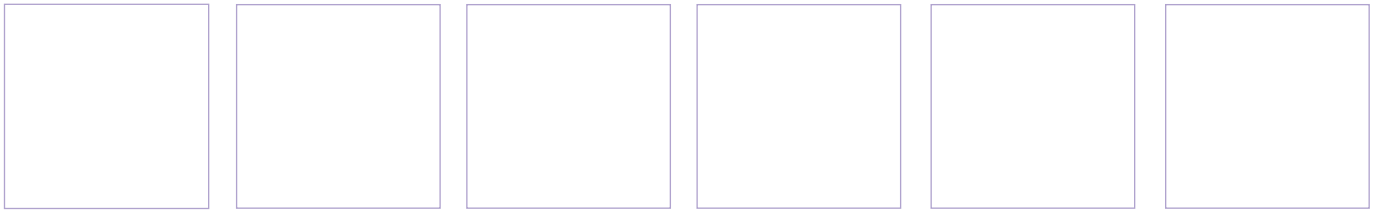
These were also issues raised by several participants as revealing the need to further the guarantees of independence and transparency in the regulation of sports. Others stressed, however, the importance of protecting the autonomous jurisdiction of the sports legal system.

Table 1 – Numbers of appeals submitted to CAS and appeals awards published on the CAS website

Year	Appeals submitted to CAS	Appeal awards published on the CAS website	Percentage
1995	8	4	50%
1996	10	6	60%
1997	11	4	36.3%
1998	33	15	45.4%
1999	24	4	16.6%
2000	55	16	29%
2001	32	14	43.7%
2002	66	21	31.8%
2003	46	6	13%
2004	252	36	14%
2005	185	39	21%
2006	175	41	23.4%
2007	230	65	28%
2008	276	92	33%
2009	245	41	16.7%
2010	244	41	16.8%
2011	294	45	15%
2012	301	61	20%
2013	347	66	19%

Source: Asser International Sports Law Blog³

Finally, some proposals were discussed on how to improve, de facto, the independence of the ethical, disciplinary and quasi-judicial bodies of the sports associations. Such independence could be improved in a number of ways:



- By addressing the rules for original qualification of members in order to avoid conflict of interests with stakeholders;
- By guaranteeing independence on the conduct of sports governing bodies' members and arbitrators (for example, by operating independently – including at staff level – from the associations other bodies);
- By guaranteeing the independence of the members while in office (for example, by tackling issues like immovability and renewal of mandates).

III. Public Oversight of Sports Governance: EU Law as a Tool to regulate Sports Governing Bodies

Despite the autonomy from legal regulation that sports governing bodies inherently enjoy, and that the system based on the CAS has successfully achieved a certain degree of it, no legal order would ever grant them autonomy in absolute terms. Yet, it is hard for national legal systems to exercise control over the sports organisations effectively. The latter, even at national level, depends on transnational associations that may easily exclude a team from a particular State from their competitions. This places the public authorities of this State in a weak bargaining and enforcing position as to those transnational sports bodies. It is not uncommon for sports transnational bodies to use such a threat whenever faced with regulatory attempts at national level.

Instead, EU Law has been the most effective legal system in dealing with these transnational sports organisations. The reason is simple: they cannot, de facto, exclude all European States, and their teams, from their competitions. Therefore, the bargaining power is reversed. EU Law could, for this reason, be a useful, albeit not the perfect, model to rethink the public scrutiny and oversight of sports governing bodies. In this regard, the main challenges to the potential role of the EU in exerting discipline on sports governing bodies would be:

- The specific focus on the protection of the internal market;
- The still limited geographical scope of its application given that sports is a transnational system;
- The lack of a procedure or a body that can look systematically at violations within sports governance⁴.

However, there also are some benefits to be gained from using EU Law as a tool to regulate the autonomy of sports governing bodies, namely:

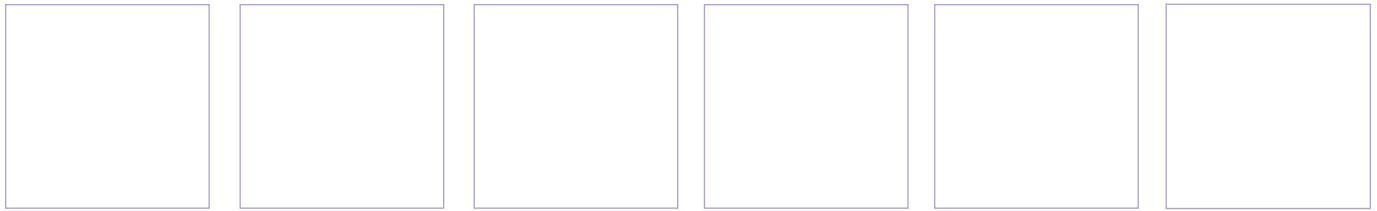
- The EU has already a good record of mediating the existing tension between public interests and sports rules (in this case EU rules and sports governing bodies rules)⁵;
- The EU may be the only supranational body with an effective power to scrutinise the actions of sports transnational bodies and to enforce sanctions;
- The fact that, in the absence of such external public supervision at supranational level, it is extremely unlikely to emerge at national level or at the level of the sports organisations themselves.

During the discussion, it was agreed that there should be some degree of external public scrutiny over the autonomy of sports governing bodies, but that it is hard to find a model that would satisfactorily fit the sports governance system. However, certain areas were identified as important to draw inspiration from to include the creation of an independent transnational or EU sports integrity agency, and a stronger use of competition or criminal law to impose systemic remedies on the sports organisations.

Nevertheless, a central question remains to be answered: if there is this imperative need for external oversight, who, in the absence of internal incentives for effective reform within sports organisations, can and ought to promote such reforms and external oversight?

IV. Good Governance in World Sports

The spectrum of sports covers all athletic, outdoor and leisure activities; in this respect, sports play a key-role as a social activity that enhances and promotes the active engagement of citizens in society. Despite their popularity and beneficial consequences for society, sports are barely equipped with jurisdictions, rules, and appropriate governance structures. It is therefore not surprising to watch the multiplication of corruption and integrity problems. When substantial amounts of money are at play in an activity that is subject to poor governance structures and minimal public oversight, it is surprising that so few cases arise that can be explained by the extent that transnational governance structures of sports are not under the effective control of any single State. In addition, corruption is an extreme example of one of the



many problems that may arise within any activity that is subject to a largely unregulated monopoly. This does not ignore the fact that sports transnational organisations are often legally subject to the authority of the State where they have their seat. However, the choice of seat is often determined by the State that provides them with more favourable treatment, to include the broad autonomy it grants to these sports organisations. In this regard, the State has little incentive to exercise a very strong scrutiny over such organisations and, in the case it tries to do so, the most likely outcome is for them to choose a different jurisdiction.

Good governance is, first and foremost, related to the regulation and management of money flows. Although enormous amounts of money are traded off in sports, these are not plentiful enough to satisfy the appetites of diverse stakeholders engaged in the sports industry. Therefore, the struggle for money competition creates the need for money regulation and a fairer distribution of financial resources to existing and prospective actors of sports, including consumers.

To ensure the good governance of sports, four principles ought to be present:

1. Rule of law;
2. Representation;
3. Accountability;
4. Financial transparency.

However, although participants agreed that the good governance rules to administer sports organisations are evident, the issue is the implementation of those rules. In this respect, reform proposals typically focus on the adoption of good governance rules but crucially lack the necessary institutions to ensure compliance with those rules. Hence, it is necessary to ask who the agents of change would and should be.

V. Who are the Agents of Change in Sports?

So far, attempts at promoting the dissemination of governance principles have been driven either by pressure from media and sponsors, following recent scandals, or have focused on soft law instruments linked to the monitoring role of new sports non-governmental organisations (such as rating systems). Many believe, however, that these are insufficient and that no substantial changes have been achieved so far.

One possible path would be to develop an international sports governance agency, similar to the independent World Doping Agency. Nevertheless, it seems unlikely that, even in the case it were considered the best model, that it would be possible to gather the necessary international cooperation to implement it.

In this context, the European Union may be the most well-equipped organisation to bring some form of public oversight and scrutiny over the world of sports. A series of judgments of the European Court of Justice and competition decisions by the European Commission have rendered clear not only the powers of the EU on sports governance matters but also that the EU is in a unique position to reinstate some public oversight over these associations. It is not possible, for example, for UEFA, FIFA, IOC, and other international sports organisations to deal with the EU (with its 28 Member States) as it does with an individual State. This does empower the European Union but, given that it is arguably the most well-placed organisation to reinstate public oversight over this activity and these markets, this also adds an additional level of responsibility.

In the high-level policy dialogue, two possible paths were discussed. The more ambitious would involve the setting up by the EU of an independent agency to oversee the governance of sports bodies. This agency would not regulate sports but “simply” control the compliance of transnational sports organisations with good governance principles. The activities of these organisations and the recognition of their autonomous jurisdiction would be subject in the EU to compliance to those principles overseen by the agency. Such a proposal has been endorsed in a report by Anne Brasseur and the subsequent Resolution of the Parliamentary Assembly of the Council of Europe.

A weaker, but easier to implement, alternative would be for the EU to use its powers under competition law to try to impose such systemic changes in sports organisations. The Commission could use its competition law authority to issue a communication whereby the deference showed to those organisations on competition matters would be subject to the implementation and compliance with certain governance reforms.

Some participants also highlighted that a similar alternative could be available in the United States (US) criminal law. The latter allows for the imposition of systemic remedies on collective bodies charged with criminal action. This would require, however, for the US criminal authorities to determine that the cases of sports corruption that they have investigated are a product of the organisation itself and that they have jurisdiction over such an organisation (a step that US authorities have so far not taken, particularly in the light of the limits on their jurisdiction).

The creation of an independent observatory for sports governance could also be an interesting first step towards the efficient implementation of good governance principles in sports. This is also proposed in a report by the Council of Europe⁶.

How far can we go as agents of change? Given that the current culture in sports organisations is problematic, the driving force has to come from external actors and the stakeholders that are not currently represented in such organisations.

Sports are a wonderful and passionate thing and can illustrate the best from humankind. Most of those involved in sports, do it out of that passion. However, their huge social and economic relevance require that it be subject to good governance principles and structures. It appears we are yet to find how to do that successfully.

Endnotes

- 1 Look at ‘Sport as a growth engine for EU economy’, MEMO, Brussels, 19 June 2014, European Commission and ‘White Paper on Sport’,
- 2 Look at the Code of Sports-related Arbitration for more on the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes: https://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL__en_.pdf
- 3 Look at: <https://www.asser.nl/SportsLaw/Blog/post/transparency-at-the-court-of-arbitration-for-sport-by-saverio-spera>
- 4 See, in comparison, Article 7 TEU Procedure and the Polish violation of the Rule of Law through the amendment of the rules that regulate its judiciary.
- 5 Look at the Case C-415/93, Bosman, (1995), EU:C:1995:463.
- 6 Look at Anne Brasseur, ‘Good Football Governance’, Report, Parliamentary Assembly, Council of Europe, DOC. 14452, 15 December 2017 and the subsequent Resolution ‘Good Football Governance’, Resolution 2200 (2018), Parliamentary Assembly, Council of Europe.

The School of Transnational Governance

The European University Institute’s School of Transnational Governance (STG) brings the worlds of academia and policy-making together in an effort to navigate a context, both inside and outside Europe, where the challenges of governance extend beyond the state.

The STG policy brief series, published by the School of Transnational Governance at the European University Institute, provides topical perspectives on thematic issues of relevance to transnational governance. The contributions result from the proceedings of events hosted or sponsored by the STG. The briefs are policy-oriented and diverse in terms of the disciplines represented. They are authored by STG staff or guest authors invited to contribute on particular issues.

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