

The issue of compliance

How to address malpractices in sports?

BY ARJO KLAMER¹ AND DOLF SEGAAR²

Introduction

Sports enable individuals to exercise their bodily talents. They galvanize communities, energize people, are an outlet for communal sentiments, shape national and local identities, produce shared stories, and gather people of all kinds of backgrounds for a common cause. Sports are also good for drawing attention and are increasingly a source of income, if not financial richness.

The financial factor has become a threat for sports. While young people all over the world are running across fields, wrestle, jump, skate, play, compete to enjoy themselves, we witness more and more financial malpractices, forms of abuse and exploitation, the influence of drugs, corruption, sexual abuse, and other practices that spoil the game.

The question is how to respond to such malpractices. Who should respond? Should that be governmental institutions like courts, or should sports organizations be the ones to take responsibility? And what kind of rules should those responding agencies have to issue?

When all those questions are answered, we can deal with the issue of compliance: that is, how athletes and sports clubs are held to the rules and are controlled for their adherence to, or complying with, the rules.

The situation in the sports world is far from clear right now. We observe a mixture of systems each of which has its own logic. That is why the answer to questions about compliance is far from obvious; certainly, if we compare this sports world with the world of finance, for example, or accounting.

In this article, we will try to sort out some of the confusion by providing a simple model. We will discuss a few cases to bring out the complexity of compliance issues in the sports world, and make suggestions for pursuing the matter further.

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The goals of sports

When we evaluate and judge practices, we need to know what the practices are good for. The claim that sports are about making money, and not, let's say, about playing sport, would make a difference.

When we survey the mission statements of various sports organizations, we do not encounter profit making as a goal. For example, the mission statement of FIFA is about building a better future and the development of football everywhere. Football, according to FIFA, has the power to bring people together and to break down barriers, to improve standards of education, health and sustainability and to raise living standards and quality of life across the world.

They make clear that sports are about sports, about enabling people to exercise skills, to compete with others for the sake of the game. Sports constitute a practice that people value for itself. Sports is about physical activity, often in social settings.

But sports seem to have become more than that. Local and national governments and businesses get involved, usually with financial means, because they appreciate sports for the social values. Sports bring people together, shape and strengthen community spirit, contribute to local and national identities. Accordingly, sports are good for social and sometimes even cultural values. Politicians, businesspeople and people in general may value sports, because they consider it important that people have something in common, that they share stories and memories: remember the hand of God of Maradona; or the way Usain Bolt runs with his long legs?

The danger of mission drift

But sport is also about winning. And, increasingly, it is about the financial means that are needed to win. And because of the financial means, it is increasingly about drawing attention. Because of the attention by way of brand recognition (think of the T-shirts of Manchester United, or the name recognition of a Nadal, and what those brand names are worth), more financial means are needed to generate better and more frequent brand recognition. Paris St-Germain has a reputation that draws (foreign) financiers, who subsequently contribute large financial resources to purchase another brand name (the player Neymar) to strengthen the brand name of Paris

St-Germain and, thus, to guarantee further financial resources by way of television rights, sponsor incomes, and commercial merchandise (T-shirts bearing the name of Neymar and the logo of Paris St-Germain).

Because of the increasing emphasis on the financial means, the pressure of winning increases, too. In addition, sports have been discovered by financial and commercial parties, as a means to further their commercial interests. Which leads to all kinds of excesses. We name a few:

- drug use to bolster performance (cycling, athletics, skating);
- dubious financial practices and even outright malpractices (we present some examples of the financial practices in modern football);
- exploitation and abuse of athletes (teams trading in young players for future gain, countries purchasing athletes from other (African) countries to boost their prestige to end up maltreating, underpaying, and discarding them when their performance falls short of the (usually unrealistic) expectations;
- corruption in (international) sports organizations, including favoritism and nepotism;
- the use of bribes in bids for the organization of international competitions;
- unfair competition, exclusion of others willing to compete, collusion;
- unfair financial support by local or national governments;
- oligopolies, or the formation of a few financially powerful organizations, that make it almost impossible for other organizations to compete at the same level.

When financial goals overtake the above goals of sports, as usually mentioned in mission statements, we speak of mission drift.

Where this occurs in the sports' world, the financial competition overpowers the sports competition. The experience in that world is that, if people are not strictly bound to a set of well-articulated rules, financial malpractices, extortion, and self-enrichment schemes become part of normal business. Certain segments of the sports' world appear to be dangerously close to that reality.

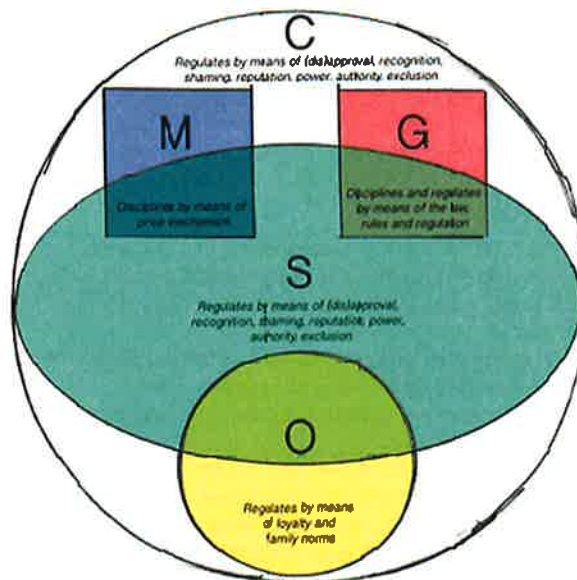
That is a reason to consider the development of disciplinary mechanisms that impede individuals and organizations to go that way. But how is that possible without undermining the characteristics that make the world of sports special?

The five-spheres model

The sports' world is complicated when it comes to the imposition of rules and compliance with those rules. The reason is that it is strongly rooted in local communities and, therefore, not always susceptible to legal rulings. Even if top sport is, to a great extent, uprooted and operates in an international context, it still is subjugated to local and national conditions. Top athletes continue to be celebrated in their hometown and they still represent their countries (more or less).

We use a five-spheres model.³ The five spheres are:

- 1 the sphere of the oikos, or home (O),
- 2 the social sphere or the society (S),
- 3 the market sphere (M),
- 4 the sphere of governance, or organizations (G), and
- 5 the cultural sphere (C), or the sphere where meanings are generated, knowledge comes about, and shared identities are formed.



Sports are firmly rooted in the social sphere (S). Kids go out of the house to play with each other. They play games and, at one point, will join a club or form a club to develop their skills and enter a competition with members or teams of other clubs.

In such a social setting, behavior is regulated and disciplined by means of a social logic. When someone plays false, others will admonish him, or even banish him from the game. In informal games, players will referee themselves. When there is a general agreement that someone committed a foul, they will correct the action. When the games become more serious or take place in the context of an organized competition, certain individuals, usually members of the clubs, will be disciplinary agents, usually called referees. When more serious faults are committed, that cannot be regarded as "rules of the game" such as more serious misconduct on the pitch, or forms of corrupt behavior, clubs will do the disciplining, usually by way of specially appointed disciplinary committees, that need to apply rules and regulations of its (national and/or international) federation.

³ Explained by Arjo Klamer in *Doing the Right Thing: A Value Based Economy* (Ubiquity Press, London 2017).

In such logic, good behavior is stimulated and enforced socially; bad behavior is disapproved of, disciplined and punished socially.

When sports become public, that is, when they become public spectacles with tribunes around the fields populated with people, who are watching the athletes doing their thing, the social logic is still at work. Supporters will express their approval and their admiration for what the athletes do. When they consider behavior inappropriate, they will express their disapproval by yelling, whistling, or by staying away. Social is also the disciplinary working of the press. A bad press can destroy the reputation of athletes, so they have to be careful not to generate a negative press. Getting caught while driving under influence can destroy an athlete's career, as also is being filmed behaving badly and posted on social media.

The oikos (O, the sphere of home, of family) is an important disciplinary force as well. In their early years, athletes find exemplars for their behavior in that of their parents. Often parents will stimulate, and coach them in the beginning. In some cultures, more than others, talented athletes will find their most important support in the circle of their family. In that logic, families are an important force in the life of athletes.

The cultural context matters, too. This is the C in the diagram. It is the cultural context that determines, for example, the public appeal of a sport, its importance for local or national identity, and at times the nearly religious connotation that the love for a club has. National identities matter. A cyclist is much more a public figure in the Belgian culture than in, for example, Kenya, or the USA for that matter. An American football player can be a hero in the USA but will be a non-entity in Europe. A southern-European culture will support a hero status more than a northern-European culture. Some cultures tolerate nepotism more than others. In some African, South-American and Asian cultures not giving the job to a family member, even if he or she is less qualified than others, would be considered a scandal, at least within one's own family. Would a Dutchman or a Swede be able to head an organization like FIFA? Probably not.

The market logic (M) kicks in when transactions are at stake. It starts locally when a business firm pays a club for having billboards around the field or its name on the shirts. Or when a club pays the coach and its top players. At this level, though, transactions are still strongly embedded in a social logic. The owner of the business club is less interested in the extra sales that the advertisements will generate than in supporting his club. And the players may accept the payment more as a gesture than payment for services rendered. All these deals are still subjugated to the social discipline in which sports work.

In top sports, the market logic does its serious work, though. It shows when people speak of commercial interests, when we witness bidding competitions for sponsorships, for example, coaches or athletes with a price as the main factor

in the negotiations. The buying and selling of players, sponsor deals, salaries of coaches, television rights and merchandise are what the logic of the market is about.

As we learn from other sectors, the M logic can work wonderfully well. It has, among other effects, a disciplinary function. Clubs that pay too much for a player are punished with a financial penalty. TV stations that are willing to pay too little – maybe because they are publicly-owned – will lose the rights to others who are willing to pay more. The logic, more or less, dictates that you, the club, the coach, the player, go for the highest bid. Sure, other considerations may weigh in, but usually the price is a decisive factor. Economists appreciate the logic, because it compels an equilibrium between supply and demand, and that without the intervention of authority.

However, as we learn in other sectors, markets can fail. This happens when oligopolies or monopolies start dominating a market, preventing fair competition. Markets can be unfair when a few benefit, and a majority is left behind. And markets cannot provide important goods, such as community, friendship, or sport for that matter. A club can compel a player to come by way of a signed contract, but it cannot order him to score lots of goals or be a team player.

Because of market imperfections, as well as limitations of the social logic the application of a governmental logic is necessary. This happens when sports federations start designing rules, or when a club professionalizes its organization. In both these cases, the governance (G) logic kicks in. It will then be more logical to refer a player, who is out of control, to the rules and the disciplinary measures than to yell at him.

Here comes the tricky part. When does the G logic in the form of laws or governmental intervention have to be enacted? And who has to take the initiative? When governments subject sports clubs and individual athletes to their rules, the clubs and athletes will have to comply with those rules and answer to legal entities, such as the police and judges, when they fail to do so. In that case, the legal entities bypass the disciplinary systems in the social sphere that the sports rely on most of the time.

Presently, governmental agencies, national and international, are increasingly keen on including top sports in their logic. They do so because of the malpractices and the various market failures and the inequities. The sports' world resists this movement because of the autonomy of sport that they want to safeguard, and governments are reluctant to be consistent and persistent in the enforcement of their rules and laws in respect of the social logics at work within sport.

We will now discuss a few cases to explore the dilemmas that both the sports' world and governmental agencies are currently facing. We begin with the agreements that European authorities reached and stated in the Treaty on the Functioning of the European Union of 2007. We will then discuss some examples of financial malpractices in modern football. The question that drives is: how about compliance?

Treaty on the Functioning of the European Union

With the Treaty on the Functioning of the European Union (TFEU), it was for the first time that the European Union included in the Treaty a paragraph relating to sport, in order to preserve the specific characteristics of sport. These specific characteristics are more specifically described in the White Paper on Sport of 2007. Sport in the European Union is based on fundamental, social, educational and cultural values, as there is integration, involvement in the life of society, tolerance, acceptance of differences and compliance with rules.

Before that time, the Treaty did not provide the EU tools to adopt legislation for regulating sport. The European Council promoted through declarations the incorporation of sport into the common policies of the European Community and affirmed the specific nature of sport, through the application of the case-law of the European Court of Justice or:

*"The European Union believes that Sport plays a vital role, not only in individual health and fitness, but in shaping our wider European society. Supporting dialogue between policy makers and sport organizers promotes healthy living and social cohesion for young people across Europe."*⁴

The European Commission and the European Court of Justice were involved in sport-related matters, since it was concluded that sport has an economic dimension and falls, for that reason, within the scope of the EU Treaty.

According to art. 165 of the TFEU the EU:

"shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function." (Note the explicit recognition of the social logic (S) at work in the world of sports.)

Paragraph 2 of art. 165 TFEU adds that action of the EU shall be aimed at:

"developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."

The TFEU therewith provides the EU with the opportunity to take action in sports' competitions and to protect minors and integrity within the context of the specific nature of sport.

The TFEU supports, through art. 165, perfectly well the five-spheres model for sports explained above and, especially, the spheres defined as Oikos, Social, Governance and Cultural.

The market sphere M in our model in sport can be found

⁴ https://ec.europa.eu/sport/policy/societal_role_en.

in case law of the European Court of Justice, starting with *Walrave and Koch v. Union Cycliste Internationale*⁵. In that decision, a distinction was introduced by the Court between rules of a purely sporting interest that have nothing to do with an economic activity ("rules of the game") and rules with economic impact. On the first, the Treaty is not applicable; on the second, it is. The question then is, what is economic impact? Does a local club have economic impact?

Since the decision in *Meca-Medina and Majcen v. the Commission*⁶, the distinction between purely rules of the game and sporting rules with economic impact has been abandoned. The European Court decided that "the mere fact that a rule is purely sporting in nature does not have the effect of removing it from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down". All sporting rules, also those that intend to refer to sport only, will, therefore, have to be assessed against the EU treaty, especially the articles relating to freedom of movement of persons, goods and services, freedom of establishment and competition.

In the *Meca-Medina* decision, the Court decided that rules of sports federations that restrict EU law may be justified when they are "limited to what is necessary to ensure the proper conduct of competitive sport".

From the above, it may be concluded that, according to the European Court of Justice the specific nature of sport⁷ provides sports federations with a certain degree of sporting autonomy. The autonomy allows them to impose on their members rules that are accepted because of the special features of sport, even when falling within the scope of EU law.

Here, too, the question arises what are legitimate sporting activities? What if sports organizations allow the use of drugs? Or how about turning a sports competition into a competition about financial means? When are financial malpractices of such a kind that they fall within the scope of the law?

Some examples of financial (mal)practices

In modern football

The revelations in 2015 through "Football Leaks" and other inquiries into football provided us with a look behind the scenes of professional football.

We have seen the rules of Financial Fair Play, adopted by UEFA in 2009, that aim "to introduce more discipline and rationality in club football finances and to decrease pressure on salaries and transfer fees and limit inflationary effect".

The rules include an obligation for clubs, over a period

⁵ Case 36/74 [194] ECR 1405.

⁶ Case C-519/04 P 18 July 2006.

⁷ See art. 165 TFEU.

of time, to comply with strict financial behavior, such as balancing their books or break-even. Under the Financial Fair Play Rules, clubs cannot repeatedly spend more than their generated revenues, and clubs will be obliged to meet all their transfer and employee payment commitments at all times.

But what about the transfer of Neymar from Barcelona to Paris Saint-Germain? UEFA recently announced that the Investigatory Chamber of the UEFA Club Financial Control Body has opened a formal investigation into Paris Saint-Germain as part of its ongoing monitoring of clubs under the Financial Fair Play Rules. The investigation will focus on the compliance of the club with the break-even requirement, particularly in the light of its recent transfer activity. The transfer of Neymar is likely to fit within the UEFA Financial Fair Play rules, but the question remains whether UEFA should accept that the individual more powerful clubs find ways around the rules and regulations that are imposed to safeguard the financial health of the business model of the entire football industry. One can hardly say that the aim of the rules to "decrease pressure on salaries and transfer fees" has been achieved in this transfer.

We have seen the Third-Party Ownership ban by FIFA of December 2014 "in order to protect the integrity of the game and the players", by adding a new article to the FIFA Regulations on the Status and Transfer of Players:

"No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation [...]"

However, the financial pressure on clubs to maintain a top position in their professional league and, thus, on winning, may lead to excesses and failures to comply with the Third-Party Ownership Rules, by using side letters that are not presented to the Football Federations and according to which an investor nevertheless has considerable say over the club's transfer policy.

In recent decisions, FIFA has fined a number of clubs because they were "found to be liable for entering into contracts that enabled a third party to influence the club in employment and transfer-related matters, failing to upload a TPO agreement into the library in TMS, breaching confidentiality rules and failing to declare mandatory information in TMS".

Exploitation of athletes

"We are treated like sporting slaves", was the heading of an article in The Guardian newspaper of 3 August 2017.⁸ The article explained how athletes were bought by rich Arab and Middle Eastern nations and had their nationality

⁸ Martha Kelner, "We are treated like sporting slaves", in: *The Guardian*, 3 August 2017, available at www.theguardian.com/sport/2017/aug/03/sporting-slaves-ethiopian-trade-athletes-lily-abdullayeva-azerbaijan (accessed 7 September 2018).

changed against the promise of a good salary, housing and the like. There are numerous examples, however, of such athletes that were "routinely mistreated, denied prize money and sometimes housed in filthy conditions". The athletics' world governing body, the IAAF, has announced that it will stop changes of nationality, since the system is open to abuse and rules were being manipulated.

The winter 2018 edition of Harvard International Review published a special on "Athletic Diplomacy: The intersection of sports and culture". An article entitled "Playing for keeps: Human trafficking under the guise of football"⁹ provides a devastating picture of how more than 15,000 young children become yearly victims of player trafficking: "by following their dreams, they end up losing everything, including their futures". The article concludes:

"Only through international intervention in West African football can we restore the integrity of local institutions and the hope of local youth."

Already long-ago, FIFA created rules relating to minors. In its activity update on Human Rights of May 2017 FIFA explains in this respect:

"Young footballers are vulnerable to potential exploitation and abuse when they are in a foreign country without proper controls. FIFA therefore works hard to protect the rights of players younger than 18 – whether male or female, amateur or professional. This is primarily done through the enforcement of regulations prohibiting the international transfer of a minor, or the first registration of a minor in a country of which he/she is not a national, except in specific and verifiable circumstances. An international transfer of a minor player cannot take place unless one of the exceptions outlined in article 19 paragraph 2 of the FIFA Regulations on the Status and Transfer of Players or the so-called "five-year rule" (cf. art. 19 paras 3 and 4 of the mentioned regulations; pg22-23) apply."

The Harvard research, however, concludes that it is clear that the above rules are not being enforced:

"FIFA's lax attitude towards and unawareness of player trafficking is particularly reprehensible."

Compliance: how then to address malpractices?

The above examples on corruption, unfair competition, football, athletics, and human rights issues make clear that there is a discrepancy between setting the rules and complying with and enforcing the rules. The same can be said about the use of doping in sport, of which we did not provide further examples, because we did not believe we needed to.

Nor the sport, nor (international) governments by themselves are capable of fighting the malpractices in sports. The current situation appears to be

⁹ Juliet Nwagwu Ume-Ezeoke, "Playing for Keeps: Human Trafficking under the Guise of Football", in: *Harvard International Review* (Winter 2018), p. 22-27.

unsustainable. How long will it take before people will lose interest in sports dominated by financial interests, bribes, abuse and unfair competitions?

How then to address malpractices and safeguard a positive outlook for sports in the future? Who should do what?

The five-spheres model highlights the different logics at work in the world of sports, and calls attention to the tensions and potential conflicts among these logics. It clarifies the circumstantial approach of the world of sports by, for example, European law makers: they stress the need for international rules and compliance, yet they acknowledge the social logic as essential for the functioning of the sports' world. It is a balancing act with a continuous weighing of the interests of sports and the criteria of equity and the rules of law. The discussions about malpractices show that this balancing act still is quite unbalanced: current rules and norms are clearly inadequate to address the forces that currently undermine the principles and purposes, the mission of sports.

The five-spheres model suggests four levels of rules and the compliance with those rules. The principle, in addressing the question of rules and compliance, is that of subsidiarity: apply rules and compliance on the lowest level possible. Only when those rules and compliance prove to be inadequate move up a level.

Compliance starts at home, the oikos in the model. Parents and families educate kids in what is proper behavior and discipline them when necessary. They set the rules and norms and enforce, preferably by setting the right example. Kids go out to the lawn with their parents to hit and kick balls, to run around, and to learn what it is to compete, to win and to lose. Parents or other family members can teach kids to endure, to practice, to hone their skills. They can encourage them and honor them for their achievements. Especially when players are young, the logic of the oikos is critical. In most societies, this logic functions well and should not be tinkered with. The oikos will remain an important level – no matter what.

The mainstay of sports is the social sphere. People play sports with each other, form clubs, volunteer as coaches, bartenders, and governors; they form societies for specific sports, and determine rules and norms, and enforce them; and do so all among each other. The rules are social and so is compliance. Also, when sports become more public and draw large numbers of spectators, the social compliance can work effectively. In that case, deviant behavior and abuse will be punished, if not within the club, then by the social environment, or a committee of the organization of all clubs.

Social compliance can stay in force also when the market logic kicks in. This happens when clubs start selling entry tickets, compete for players on the basis of price, compete for payments by television companies, start selling paraphernalia, or become financial assets themselves, available to the highest bidder. The rule here is that, as long as the sportive goals prevail, the social logic should continue to apply.

However, as soon as the market logic with its commercial values and financial goals threatens to overtake social values and sportive goals, the discussion changes. In that case, the world of sports has to acknowledge that other rules, those of markets, are at work, and its officials have to ask themselves whether they can cope on their own or need other governmental forces to enforce fairness and equity and to uphold their sportive mission.

Other sectors will call for governmental rules and laws. If they do not do so, politicians may implement them. The challenge is the right design of such laws, and the enforcement of compliance, as the latest crisis in the financial sector has made clear. Like that sector, the sports' sector calls for better laws and for better compliance. The point of departure remains that the most important rules are social and that compliance has to be that, too. Yet, with the overheated trading of players, the dominance of the market of television rights, and the danger of the winner takes it all, which undoes the competitive principle of sports, the design of better rules and laws has become critical.

Conclusion

Like the EU lawmakers, we recognize the danger of the imposition of laws on the world of sports. Such laws may undo the social fabric that gives sport its special characteristics. Even so, current practices make clear that interventions are necessary.

A good option is the creation of organizations in which (international) governments and sports organizations collaborate to address certain practices. The foundation of the international anti-doping agency, WADA, is a good example that deserves copying.

As the world of sports may be too resistant to such interventions, because of vested interests and (inter) national complications, (inter)national politicians may have to take the initiative. They can do so because sports serve purposes that exceed the purposes of those who have (only) financial interests in them.