

**DON'T TAKE AWAY MY BREAK-AWAY: BALANCING REGULATORY AND
COMMERCIAL INTERESTS IN SPORT**

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INTRODUCTION

The ability of sports governing bodies to control their respective sports is one that has come under growing pressure in recent years. As sport has become increasingly globalised and the commercial value of elite sport has swelled exponentially – particularly in respect of media rights – new challenges to the regulatory capacity of sports governing bodies have become manifest.

The nature of the growth of modern sport – principally on a self-regulatory, private basis, separate from state intervention – means that sports governing bodies may have *de facto* regulatory monopoly over their particular sport, but that they have no formal *de jure* right to regulatory oversight and control. This leaves these bodies, and the sports they regulate, vulnerable to external threats to their regulatory autonomy, particularly from those who wish to exploit sport's commercial potential.

This article explains and assesses the various means by which the regulatory authority of sports governing bodies may fall subject to challenge, before moving to consider the legal approaches to such challenges and to the monopoly position held by sports bodies. The article further considers

the protections available to sports regulators under a variety of intellectual property provisions before concluding with proposals for a new approach which balances demands for the regulation of sports in a manner consistent with the public interest, while adequately protecting sports governing bodies from having control of their sport – either partial or total – wrested from them.

SETTING THE SCENE: COMPETITION FOR CONTROL OF SPORTS AND EVENTS

For the most part, the organisations which regulate sports grew up organically, initially as a means of facilitating participation and competition and, latterly, as providers of more sophisticated regulatory authority and frameworks.¹ Generally speaking there has been little competition from would-be alternative regulators, with most challenges to regulatory authority coming through objections to the substance of regulation and practice by those subject to the regime. Most typically these challenges have come from athletes,² clubs³ and other stakeholders – such as competition organisers⁴ – with, usually, economic interests in the sport.

For the bulk of the modern era of sports regulation, sports governing bodies – both domestically and globally – have been able to utilise their positions of dominance to achieve universal control over their sport. The threat of exclusion from participation has usually been sufficient to deter any threat of breakaway and to maintain a regulatory monopoly in a given sport. For much of this period there has been limited threat from would-be alternative regulatory bodies largely due to the lack of any real incentive, and the risks inherent in any failure. Until relatively recently, even with the early advent of television, the economic value of sport has been insufficient to provoke many attempts at a ‘takeover’.

This is not to say that there are no examples of successful regulatory takeover or breakaways: the association football and rugby football codes are examples of early splits – predominantly based on differences as to how the sport should be played – and the existence of rugby league is owed to a schism in a once unified sport with the creation of the ‘Northern Union’ in 1913. The league/union split, however, came about as a dispute over professionalism and the payment of players; as such it can be seen as an example of players asserting their economic rights, rather than an attempt to wrest control of the game from the established authorities. In any case the football/rugby and league/union splits can be reasonably categorised as formative parts of the process of individual sports emerging from folk practice and from numerous early disparate, though similar, codified versions. There are very few examples of mainstream sports or sports regulators which have emerged outside of this period of codification and regularisation.⁵

Latterly, however, there exists a growing threat to the continuing monopolistic authority of sports governing bodies, principally driven by the substantial economic value of the media rights associated with them. By way of example, in the most recent round of television rights sales, the English Premier League was able to elicit £5.136bn for domestic rights and a further £3bn from overseas markets for the period 2016-19. Similarly, global broadcasting revenues for the Indian Premier League (IPL) cricket tournament ran to US\$1.026bn over ten years from 2008. The importance of sports media rights, in particular football, is exemplified by their description by Rupert Murdoch as the “battering ram” with which he would enter and establish BSkyB in the pay-television market. BT Sport has pursued a vigorous strategy in acquiring sports rights in its efforts to establish itself as a serious competitor to Sky. The ferocity with which media outlets have challenged each other for such rights, both through the bidding process and through litigation, is a further indication of their importance.⁶ A parallel marker is the seriousness with

which the sale of media rights to major sporting events and competitions has been treated by competition authorities, in particular the European Commission.⁷

The sums involved have acted as a driver for existing and would be stakeholders to seek a greater share of the pot. In respect of athletes this has principally been through seeking to enforce their economic and labour rights – such as through the *Bosman* litigation and the recent complaint to the European Commission by FIFPro, seeking to challenge the basis on which professional players are employed.⁸ In team sports, where professional clubs are key stakeholders, they have often sought to act together to take control – either partial or total – of the regulation of the sport as a whole, or to act to a significant degree independently of the regulator in operating their own competitions.

Challenges to the regulatory autonomy of established sports governing bodies can manifest themselves in many different ways dependent upon the nature of the sport, its organisational structures, the relative strength of the various stakeholder groups within it, and its economic attractiveness to broadcasters and other commercial concerns. These can be characterised under four broad headings.

'Hard' break-away

One means by which the supremacy of traditional sports governing bodies has been challenged is through the creation of rival organisations and or competitions. The most obvious example of this is in the world of professional boxing, where there currently exist a number of parallel 'world' federations. Boxing is perhaps slightly anomalous given that there has never been an outright

global regulator, but a number of competing ‘regulators’ vying for position over a period of time.⁹

However, professional darts provides a good example with the creation in 1993 of the World Darts Council (WDC) as a competitor regulator to the established World Darts Federation (WDF). The ‘break-away’ WDC was supported by a group of professionals, including most or all of the best known and most successful, and by a television deal with Sky Sports. The dispute was ultimately settled by an agreement that the WDC would recognise the WDF as the international governing body and rename itself as the Professional Darts Council (PDC). The result has been that there exist separate groups of players and largely separate tournaments, with two distinct World Professional Darts Championship competitions.

Perhaps the most prominent example of the creation of a rival regulator or competition is that of World Series Cricket. In May 1977 World Series Cricket (WSC), a company managed by the Australian entrepreneur Kerry Packer, announced that it had secretly signed up thirty four of the world’s foremost cricketers to play in a series of ‘Super Tests’ in Australia. Packer’s decision to create a rival organisation to the traditional organisers of world cricket was borne of a decision by the Australian Cricket Board (now Cricket Australia) to award broadcasting rights for the Australia Test team’s matches to the Australian Broadcasting Corporation (ABC), rather than Packer’s commercial Channel 9 broadcasting company. This was despite Channel 9 having made a higher value bid for the rights. In July 1977 the International Cricket Council (ICC) – the world governing body of cricket – seeking to protect its monopoly control of cricket at international level, altered its rules so that players taking part or making themselves available to play in a match previously disapproved of by the ICC, after October 1 1977, would be disqualified from

taking part in test cricket without the express consent of the ICC. At the same time the ICC issued a resolution specifically disapproving of any match organised by WSC. The ICC also recommended that national governing bodies take similar action in respect of their domestic game. The English Test and County Cricket Board (TCCB – now reformed as the England and Wales Cricket Board (ECB)) then resolved to alter its rules so that any player who was subject to the test match ban would also be disqualified from taking part in first class county cricket. The litigation which followed (discussed below) ultimately meant that WSC ran for only two seasons until 1979, when Packer and the ACB came to a rapprochement, with Packer and Channel 9 becoming a key partner for the ACB.

'Soft' break-away

A further means by which established regulatory regimes can be challenged is by 'soft' break-away. In such circumstances it is generally the case that a small number of leading participants – either athletes or clubs, dependent upon the nature of the sport – seek to set up a new competition which although, on the face of it, appears to be a straightforward reorganisation of existing structures, amounts to a significant reapportionment of power and resources. A prime example of this is the 'break-away' of top division clubs in English football, with the creation of the Premier League in 1992. On its face this appeared to be a replacement of the existing Division One of the Football League on a like-for-like basis. The reality is that the new configuration amounted to a 'land-grab' by the top clubs – supported by the overall regulator, the Football Association, but opposed by the traditional organiser of the league competition, the Football League – as a means of securing the bulk of the television revenues available from the newly emerged commercial, satellite broadcasters. The result was that, although the league arrangements looked broadly

similar to the previous arrangements – four divisions with promotion and relegation between them – the revenues created by televising the top division were no longer shared with those below. Instead, the Football League was largely left to fend for itself. A similar position developed in Scotland, though a subsequent re-amalgamation has now occurred.

Regulatory Capture

An alternate, sometimes parallel, means by which regulators can experience challenge to their regulatory monopoly is by way of regulatory capture, where a stakeholder or group of stakeholders deploy a position of strength in order to exercise a degree of control over the regulator. As well as being a ‘soft’ break-away, the Premier League has been identified as holding such a position of strength over the regulator of English football, the Football Association. The Premier League has been criticised by a Parliamentary Select Committee as holding too great an influence on the governance of the sport in England, at the expense of the “National Game”.¹⁰

Similarly, UEFA – European football’s governing body – has within it the European Club Association (ECA). This group, representing the major European club sides, was created as part of a deal with a previously independent group of clubs known as the G14, an association of the highest profile European clubs. Under the arrangement the G14 dissolved and was effectively absorbed into UEFA. This was part of a package of measures aimed at alleviating and addressing the concerns of these clubs – resulting in a much greater degree of influence in the regulatory body.

Collaboration

Control of particular sports has also shifted by way of negotiation or collaboration, usually with media partners. Rugby League is a principle example of this, with the professional game at the highest level having been repackaged and re-branded in order to create a product attractive to television viewers. The creation of Superleague and the move to summer, rather than the traditional winter season, was predicated on an agreement with Rupert Murdoch's News Corporation. In the United Kingdom the regulator and broadcaster worked together to refashion the league competition. Though some early proposals to merge some existing club sides were met with fierce resistance by clubs and fans, the collaboration ultimately involved a smooth transition from the 'old' to the 'new'. This was in stark contrast to the position in Australia and New Zealand where a fierce battle was fought for control involving rival broadcasters and the regulator.¹¹ This led to two competitor leagues being played during the 1997 season, before a settlement was reached and a single competition embedded.

LEGAL RESPONSES TO BREAK-AWAY

The position as set out above raises serious concerns as to the sustainability of credibility of sport's regulatory structures. The capacity of regulators to effectively 'steward' their sport is undermined by the threat of challenge and of being stripped of control of some, if not all, of the sport under their control.

The importance of the stability of these regulators has been emphasised a number of times by the English courts. In *McInnes v Onslow-Fane* McGarry V-C highlighted that, "[b]odies such as

the [British Boxing Board of Control] which promote a public interest by seeking to maintain high standards in a field of activity which might otherwise become degraded and corrupt ought not to be hampered in their work without good cause.”¹² The importance of this stability is further emphasised by the judicial creation of a special private law supervisory jurisdiction under which courts will scrutinise the activities of sports governing bodies;¹³ this is in no small part due to judicial desire to avoid overburdening bodies and frustrating their important public interest role.

As is suggested above, many instances of attempted breakaway or to otherwise effect a shift in control result in litigation. The case of *Greig v Insole*, the facts of which are related above, is an important example of this, as it provides an indication of judicial attitudes.

In *Greig* Slade J. decided that both the ICC and TCCB had legitimate interests which they were entitled to protect. The ICC argued that it was acting reasonably in introducing rules which would effectively protect it from the competition provided by WSC. Test Match cricket provided a large proportion of the money through which the game at lower levels was financed. Thus, the ICC argued, it was acting reasonably in aiming to prevent players from taking part in a competition which could threaten the existence of Test Match cricket, and result in cricket suffering at all levels. Slade J. did accept that WSC posed at least a short term threat, but that this was not particularly serious and indeed that the profile of cricket could be raised. However, the long term threat, Slade J. decided, could be adequately met by the imposition of a *prospective* ban on players playing in unsanctioned games. Though such bans would not necessarily be valid they could be more easily justified than the *retrospective* action taken in the case of the claimants. Notably then, the Court recognised the importance of a single regulatory body which operated not

just for the benefit of the ‘elite’, commercially attractive element of the game, but which also had a significant role in overseeing and promoting grass-roots activity. Slade J acknowledged that the game of cricket should be taken in its entirety and that the regulation of the whole of the sport was sufficiently important to permit limits on competing organisations such as World Series Cricket.

PUBLIC INTEREST MONOPOLY VS ABUSE OF POWER

Greig, though ultimately a success for the regulator, also highlights a tension between monopoly control by sports governing bodies – with attendant risks of abuse and problems of a lack of competition – and the public interest in sport’s effective regulation. This issue has been considered in detail by the Court of Justice of the European Union in the case of *Motosykleistiki Omospondia Ellados Npid v Elliniko Dimosio (MOTOE)*.¹⁴

In *MOTOE* Greek legislation empowered the domestic body nominated by the International Motorcycling Federation (FIM) to authorise sporting competitions for motorcycles. The organisation appointed by the FIM was Elliniki Leshki Aftokinitoy kai Periigiseon (ELPA) which, as a consequence, had the right of veto over all races within the Greece. Would-be event organisers were required to submit a request for authorisation to ELPA, giving details of the venue or route and the safety measures. The new event could not clash with existing arrangements and the organisers were required to have their sponsors approved by ELPA. Consequently ELPA had a potential advantage in the organisation of motorcycle events where it acted in a commercial capacity, because of its regulatory monopoly over their approval and regulation. *MOTOE* applied to ELPA for a licence, but received no response. After a number of

months, MOTOE brought a challenge to ELPA in the Greek courts, on the basis that the combination of ELPA's regulatory and commercial functions gave it a monopoly position which was open to abuse, contrary to EU competition provisions. The Greek court made a reference to the Court of Justice of the European Union seeking, amongst other things, clarification of the compatibility with European Union competition law of ELPA's combination of regulatory monopoly and commercial activities.

In applying Article 82 EC (now Article 102 TFEU) the Court acknowledged that ELPA was operating in two separate markets, first in the organisation of motorcycle events and, second, the commercial exploitation of those events through sponsorship, advertising and insurance activities. The Court identified the possession of special or exclusive powers as permitting ELPA to determine the extent of other undertakings' access to the market, and that this could put ELPA in a dominant position:

“51. A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount *de facto* to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors. Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted

by the fact, confirmed at the hearing before the Court, that, when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grant it the required authorisation.

52. Furthermore, such a rule, which gives a legal person such as ELPA the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates.”

This emphasises the problems which may arise as a consequence of the monopoly position of a sports governing body. Though the Court of Justice was somewhat reluctant to provide specific guidance as to when abuse might arise in this context – the matter was raised by way of preliminary reference meaning the Court was not required to determine the outcome of the case – it does make clear in its judgment that such power must be carefully exercised.¹⁵

The *MOTOE* litigation is not the only example of this sort of scenario which has come under scrutiny from the law. In *FIA & Formula One* the European Commission investigated the governing body of world motorsport.¹⁶ The Commission reviewed the FIA’s regulations and commercial agreements relating to the FIA Formula One Championship in the light of requests for clearance from European competition rules. The Commission raised objections, arguing that FIA had abused its power by restricting promoters, circuit owners, vehicle manufacturers and drivers in ways that went beyond that necessary to protect its legitimate interests. The Commission accepted the necessity for sports governing bodies to exercise effective control over sports, sporting rules and competitions, but determined nonetheless that the notable commercial

interests tied into Formula One required conformity with the demands of European Union competition law. Following discussions with the Commission the FIA agreed to change its regulations, agreeing to: limit its role to that of a sports regulator, with no commercial conflicts of interest; to exercise its licensing powers in such a way as to impose limitations on new competitions only on grounds related to the safe, fair or orderly conduct of motor sport; and to strengthen both internal and external appeals processes. As a result, the FIA leased for a period of 100 years its rights in the FIA Formula One World Championship and agreed to allow the creation of competing races and series.

A complete severing of regulatory and commercial functions is not necessarily a rigid requirement, Advocate-General Kokott noted in *MOTOE*:

“89. [...] If the behaviour of an undertaking in a dominant position can be objectively justified, it is not abuse. In fact, in a case such as this, there may be objective reasons why an association such as ELPA refuses to give its consent to the authorisation of a motorcycling event.

90. The existence of such an objective reason is particularly evident where, at a planned motorcycling event, the safety of the racers and spectators would not be guaranteed because the organiser did not take the appropriate precautions.

91. However, in addition to the purely technical safety requirements, there may be other objective reasons for refusing consent which relate to the particular characteristics of the sport. In a case such as this, it is worth bearing in mind the following considerations.

92. Firstly, it is in the interests of the sportspersons concerned, but also of the spectators and the public in general, that, for each sport, rules that are as uniform as possible apply

and are observed so as to ensure that competitions are conducted in a regulated and fair manner. This applies not only to the frequently discussed anti-doping rules, but also to the ordinary rules of sport. If rules varied greatly from one organiser to another, it would be more difficult for sportspersons to participate in competitions and to compare their respective performances; the public's interest in and recognition of the sport in question might also suffer.

93. Consequently, the fact that an organisation such as ELPA makes the grant of its consent to the authorisation of a motorcycling event subject to compliance with certain internationally recognised rules cannot automatically be regarded as abuse. [...]

94. Secondly, it is in the interests of the sportspersons participating in the event, but also of the spectators and the public in general, that the individual competitions in a particular sport are incorporated into an overarching framework so that, for example, a specific timetable can be followed. It may make sense to prevent clashes between competitions so that both sportspersons and spectators can participate in as many such events as possible.

95. Consequently, the fact that an organisation such as ELPA makes the grant of consent to the authorisation of a motorcycling event subject to the requirement that the event must not clash with other events that have already been planned and authorised cannot automatically be regarded as an abuse. However, it goes without saying in this regard that, when establishing a national Greek annual programme for motorcycling events, ELPA must not give preference to the events (co-)organised or marketed by it over those of other, independent organisers.

96. The pyramid structure that has developed in most sports helps to ensure that the special requirements of sport, such as uniform rules and a uniform timetable for competitions, are taken into account. An organisation such as ELPA, which is the official

representative of the FIM in Greece, is part of that pyramid structure. Under its right of co-decision in the authorisation by a public body of motorcycling events, it may legitimately assert the interests of sport and, if necessary, refuse to give its consent. However, a refusal to grant consent becomes an abuse where it has no objective justification in the interests of sport, but is used arbitrarily to promote the organisation's own economic interests, to the detriment of other service providers that would like to organise, and above all market, motorcycling events on their own responsibility.”

This approach is consistent with that adopted by the High Court in *Hendry v World Professional Billiards and Snooker Association* where the combination of regulatory and commercial functions was not seen as objectionable *per se*.¹⁷ In *Hendry* a group of professional snooker players brought a challenge against the World Professional Billiards and Snooker Association (WPBSA) – the governing body of the sport – claiming that a rule limiting participation WPBSA approved tournaments amounted to an abuse of a dominant position. Notably, the players in the *Hendry* litigation were joined as claimants by 110 Sports – a company involved in the commercial aspects of professional snooker. This, in particular, emphasises that the range of potential stakeholders is much wider than those – such as players and clubs – more usually associated with challenges of this kind.

INTELLECTUAL PROPERTY RIGHTS AND CONTROL OF SPORTS

One potential alternative approach to the protection of sports events is through the imaginative application of intellectual property rights.¹⁸ Given that there has historically been limited necessity for such an approach, this is a relatively untried area of law. There is however, settled

law on the existence of an intellectual property right, as such, in a sporting event. In *Victoria Park Racing v Taylor* it was established that a platform erected on land adjoining a racecourse, from which radio commentary was relayed, was not unlawful as there was no cause of action upon which the claimants could found an action.¹⁹ There was, it seems, no intellectual property right in a sporting event – the law had nothing upon which it could bite. This approach has, in broad terms, been followed since. In *BBC v Talksport* the BBC was unable to protect its exclusive rights to broadcast live radio commentary of the Euro2000 football tournament against commentary on television pictures broadcast “as live”.²⁰ Similarly in *Murphy v Media Protection Services* the Court of Justice of the European Union acknowledged the lack of any right in a sport itself.²¹ There have been some successes for event owners preventing ambush marketing through association with a competition or sport, primarily through the application of passing-off. Such litigation has generally been in respect of advertising and product promotions that draw links with a sport or event, rather than an organisation wishing to set up a rival organisation or competition.

Passing-off could arguably afford some protection to sports governing bodies; it is certainly possible to suggest that governing bodies, through their good regulation of the game, could build up ‘goodwill’ in their product. Whether the claim to be operating a particular sport could be an actionable misrepresentation is not clear. Further, whether the consumer would recognise the governing body of a particular sport as creating the goodwill in their product is doubtful; in *Rugby Football Union Ltd v Cotton Traders*, the High Court judged that consumers of replica team shirts of the England Rugby Union side made their associations with the team and players, rather than with the RFU as an organisation.²² This may serve as a significant limitation – in any

case, the law of passing-off is limited to England and Wales; on this basis it would have little application in the context of global sport.

The potentially most useful approach to using intellectual property rights in protecting sports as a whole is that of the protection of formats. This has provided the foundation for significant commercial exploitation of, in particular, television shows. The leading case in this respect – *Green v New Zealand Broadcasting Corp* – demonstrates both the potential and the limitations for the application of this approach.²³ In *Green* the case concerned the alleged infringement of the format rights in the popular talent show, *Opportunity Knocks*, in a show broadcast by the NZBC. The claim, based on infringement of copyright, was ultimately unsuccessful. This was on the basis that there were too few common elements as between the ‘original’ product and the allegedly infringing show. The court held that the key characteristics of the rights holder’s show were not sufficiently faithfully replicated to evidence infringement. How, then, could this assist sports governing bodies in protecting their sports against ‘free-riders’? The key element of sports in this respect are the rules that govern the game – though these have evolved, in many cases over a century or more – it is certainly arguable that the governing body of a sport has intellectual property rights in the format of the sport. It could equally be argued that even if such a right were to exist, it would, by now, have expired. However, more modern incarnations of particular sports, most obviously the example of Twenty20 Cricket, outlined above, must have potential to secure this type of protection. The new take on the game of cricket, which was fashioned by Stuart Robertson, then an employee of the England and Wales Cricket Board (ECB), has proven immensely popular in both domestic and international cricket. It has become to be perceived as the commercial ‘powerhouse’ on which many other, wider facets of the game of cricket can be founded. There do not seem to have been any claims made as to ‘ownership’ of the format as

against other competitions – and perhaps, within the context of cricket’s established regulatory structures, this is consistent with the idea of ‘ownership’ being attributed to those charged with stewardship of the game. It is surprising, particularly in the context of an environment where certain national regulators have been vociferous in their protection of their competitions, that litigation has not been launched on this basis.

CONCLUSIONS AND PROPOSALS: BALANCING REGULATORY STABILITY AND REGULATORY FAIRNESS

Sport needs unified and consistent regulation by its very nature; meaningful competition necessarily means playing by a uniform set of rules. The application of such a set of rules does not, of necessity, require that all competitions fall under the ‘ownership’ of the regulator, but it would certainly seem appropriate that, where the adoption of a sport by an ‘unofficial’ operator occurs, the regulator have some capacity to limit such activity in as much as it is damaging to the ‘greater good’ of the game. The tension between the public interest in the effective administration of sport and the economic interests of the various stakeholders in sport is manifest, but the law offers only piecemeal responses to the management of the problem. This, arguably, breeds uncertainty and conflict which, ultimately go against the best interests of sport and those involved with it.

How, then, can the law effect appropriate levels of protection for sports governing bodies – as ‘stewards’ of their sports – whilst preventing abuse of that position? The answer, I argue, is for the development of a *sui generis* intellectual property right in each sport, to be granted to recognised governing bodies, both at international and domestic level. This right would provide

legal recognition and protection for sports governing bodies as ‘custodians’ of their respective sports. As such, an enforceable intellectual property right would prevent would-be challengers to sports regulators from breaking-away or, where external parties are involved, ‘cherry-picking’ the most commercially attractive parts of a given sport.

This proposal clearly reinforces the existing monopoly position of sports governing bodies, and with it the attendant possibilities of abuse. However, the granting of such a right would have attached to it responsibilities, in particular the equitable and fair treatment of those parties wishing to operate their own competitions under the auspices of the rights holder. In particular this could reflect the Opinion of Advocate-General Kokott in *MOTOE* on the appropriate balance between legitimate regulatory constraint and unreasonable commercial restriction. It might even extend to a requirement that sports governing bodies are limited to regulatory-only functions and that they do not engage in potentially conflicting commercial activities. Further it might reasonably compel a sports governing body to license at least some competitions, similar to provisions already existing in mainstream intellectual property law provisions.²⁴

The potential for such a scheme to be rolled out is clearly evidenced by the successful development and deployment of the World Anti-Doping Code (WADC). Almost all major, mainstream sports have been brought under the umbrella of the WADC – indeed this is a condition of a sport’s inclusion in the Olympic Games²⁵ – and it has proven effective as a quasi-constitutional code, overriding conflicting rules and decisions of individual sports governing bodies.

²⁶ Notably the WADC and its parent organisation, the World Anti-Doping Agency, are both supported and endorsed by nation states and by UNESCO, through the International Convention against Doping in Sport.

Arguably such an approach can provide certainty for sports regulators, while also ensuring that their conduct is not restrictive. Taken together this can be seen as providing stability, protecting the public interest in the regulation of sport, while permitting economic interests to be pursued. In particular this can be seen as elevating sporting interests above the commercial, not least by removing the fate of sports from the vagaries of the market.

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¹ D Birley, *Sport and the Making of Britain* (Manchester University Press 1993) 10; R Holt, *Sport and the British: A Modern History* (Oxford Clarendon Press 1989) 30.

² *Eastham v Newcastle United Football Club Ltd* [1964] 1 Ch 413; Case C-415/93 *Union Royale des Sociétés de Football ASBL v Jean-Marc Bosman* [1995] ECR I-4192

³ *Stevenage Borough Football club v Football League Ltd* (1996) *The Times*, 1 August

⁴ *Hendry v World Professional Billiards and Snooker Association* [2002] ECC 8

⁵ A significant exception to this is the sport of Cricket, which developed a unified regulatory code and scheme much earlier than the football sports (J Hargreaves, *Sport, Power and Culture* (Polity Press 1986) 17).. At the other extreme Mixed Martial Arts (MMA) and Quidditch are examples of sports more recently emerged.

⁶ See, for example, *Re an Agreement between the FA Premier League and BSkyB* [2000] EMLR 78

⁷ See, for example, COMP/38.173 *The Football Association Premier League*

⁸ FIFPro, 'FIFPro's EU competition law complaint - executive summary' (*FIFPro*, 15 September 2015)

<<https://www.fifpro.org/attachments/article/6156/FIFPro%20Complaint%20Executive%20Summary.pdf>> last accessed 30 March 2016

⁹ At the time of writing there are no fewer than ten organisations claiming regulation of men's professional boxing at a global level.

¹⁰ House of Commons Culture, Media and Sport Committee (2012-13) *Football Governance Follow-Up: Volume 1*. HC 509, p.26

¹¹ *News Limited & ors v Australian Rugby Football League Ltd & ors; Brisbane Broncos Rugby League Football Club Ltd & ors v Australian Rugby Football League Ltd & ors; Cowboys Rugby League Ltd v the Australian Rugby Football Club Ltd & ors* [1996] FCA 870

¹² [1978] 1 WLR 1520, 1535.

¹³ *Bradley v Jockey Club* [2005] EWCA Civ 1056, [2006] ISLR, SLR-1

¹⁴ Case C-49/07, *Motosykleistiki Omospondia Ellados Npid v Elliniko Dimosio (MOTOE)* [2008] ECR I-4863

¹⁵ See generally, Weatherill, S ‘Article 82 EC and Sporting “Conflict of Interest”: the Judgment in *MOTOE*’ [2009]1-2 ISLJ 3; Miettinen, S ‘Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the *MOTOE* Case’ [2008] 3-4 ISLJ 13

¹⁶ Case COMP/36.638, see ‘Commission closes its investigation into Formula One and other four-wheel motor sports’ IP/01/1523 Date: 30/10/2001

¹⁷ [2002] ECC 8

¹⁸ See for a more wide ranging analysis, T Margoni, ‘The Protection of Sports Events in the EU: Property, Intellectual Property, Unfair Competition and Special Forms of Protection’ (August 29, 2015). Available at SSRN: <http://ssrn.com/abstract=2652991>

¹⁹ (1937) 58 CLR 479

²⁰ (2001) FSR 53

²¹ Joined Cases C-403/08 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083

²² [2002] EWHC 467

²³ [1989] 2 All ER 1056

²⁴ See e.g. s.48 Patents Act 1977, s.46 Trade Marks Act 1994

²⁵ Article 40, Olympic Charter

²⁶ CAS 2011/O/2422 *United States Olympic Committee v International Olympic Committee*, award of 4 October 2011; CAS 2011/A/2658 *British Olympic Association v World Anti-Doping Agency*, award of 30 April 2012