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Handschin, Lukas

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GOOD GOVERNANCE: LESSONS FOR SPORTS ORGANIZATIONS?

Prof. Lukas Handschin, University of Basel

A. THE APPLICABILITY OF CORPORATE GOVERNANCE PRINCIPLES TO SPORTS ASSOCIATIONS

1. Basics

In recent years, detailed corporate governance principles have risen to prominence in commercial companies, as well as in sport associations.¹ This development applies mainly to internal decision making processes of enterprises. New rules were introduced, including regulations on conflict of interest, on the composition of the executive board and on how to ensure that the shareholders' rights are respected.²

Furthermore, anti-corruption compliance structures have been developed and introduced over the last few years trying to ensure that commercial companies do not bribe to pursue their business interests.³ Criminal law has abetted this development mainly

¹ HEINI/PORTMANN/SEEMANN, *Grundriss des Vereinsrechts* (Basel, Helbing Lichtenhahn Verlag, 2009), 109; see, eg the Code of Best Practice for Corporate Governance (in force since mid 2002).

² DRUEY/GLANZMANN, *Gesellschafts- und Handelsrecht* (Zurich, Schulthess, 2010), 203–5; MEIER-HAYOZ/FORSTMOSER, *Schweizerisches Gesellschaftsrecht* (Bern, Stämpfli Verlag AG, 11th edn, 2012), 320 et seqq.

³ DRUEY/GLANZMANN, *supra* n 2, 384–85; MEIER-HAYOZ/FORSTMOSER, *supra* n 2, 564; PIETH, *Anti-Korruptions-Compliance* (Zurich/St. Gallen, Dike Verlag AG, 2011), 2 et seqq.

with regulations declaring companies and their executive board as chargeable, in case a third party is bribed by the company.

Sports associations can be economic enterprises⁴, which may realize turnovers and operative profits that can be compared to corporations. Given their economic situation, it appears reasonable to apply the corporate governance and the compliance principles also on sports organizations. This is basically correct: However, two differences between sports associations and commercial companies have to be considered. Firstly, commercial companies are based on ineffective shareholders, whereas democratic structures are used in association law. Secondly, the association's 'down to top' structure differs from the 'top to down' structures which apply to corporations. Because of these distinctions, corporate governance-principles for commercial enterprises cannot be adopted on a one-to-one basis for sports organizations.

2. Democratic structures vs. ineffective shareholders

Most large listed commercial companies have a fragmented body of shareholders, with no dominant shareholder. The 'parity-rule' of the Swiss code of obligations assigns all strategic and operative management functions mandatory to the board of directors and the management.⁵ The assembly of shareholders has practically no means to influence the strategic and management behavior of the company. In particular, the assembly cannot make any strategic decisions, nor can it comment on fundamental business decisions. The voting-out of board members is the general assembly's primary instrument to 'influence' business decisions.⁶

⁴ HEINI/PORTMANN/SEEMANN, *supra* n 1, 10.

⁵ Switzerland: OR Art. 716a; DRUEY/GLANZMANN, *supra* 2, 173–74; DUBS/TRUFFER, in HONSELL/VOGT/WATTER (eds.), *Basler Kommentar, Obligationenrecht II*, Art. 530–964 OR, Art. 1–6 SchlT AG, Art. 1–11 Übest GmbH (Basel, Helbing Lichtenhahn, 4th edn, 2012), Art. 698 N 8; MEIER-HAYOZ/FORSTMOSER, *supra* n 2, 519, 535–36; WATTER/ROTH PELLANDA, in HONSELL/VOGT/WATTER (eds.), *Basler Kommentar, Obligationenrecht II*, Art. 530–964 OR, Art. 1–6 SchlT AG, Art. 1–11 Übest GmbH (Basel, Helbing Lichtenhahn, 4th edn, 2012), Art. 716a N 4 et seqq.

⁶ Switzerland: OR Art. 705; ZGB Art. 65; BÖCKLI, *Schweizer Aktienrecht* (Zurich, Schulthess, 4th edn., 2009), 1342, 1564; HEINI/SCHERRER, in HONSELL/VOGT/GEISER (eds.), *Basler Kommentar*,

Further, it has to be noted that the management may want to influence the nomination procedure for future board members by electing board members deemed to be loyal to the management who helped to choose them. This may impair the ability of the board to control the management. For this reason corporate governance principles require the inclusion of specific audit and nomination committees, the inclusion of outside members, and the disclosure of their remuneration.⁷

The risk of the management controlling the board is much smaller in sports associations than in commercial companies. The member associations of a sports association, which control the general assembly, have more power than the shareholders of a commercial company. The parity rule does not apply for associations⁸, thus enabling the general assembly to exert significantly more influence on the strategy and even on the management of the association.⁹ In theory, the general assembly has the power to attract all competences from the board, whether directly or through a modification of the bylaws¹⁰. Therefore, nomination, compensation and audit committees, traditionally recommended for commercial enterprises, are often not needed if members of sports associations make use of their rights. To ensure this, it is paramount that the associations-related mechanisms work, and are applied correctly.¹¹

Summarizing, good governance in sports associations starts with a strict adherence to formal rules on the decision making process. The importance of these rules is also

Zivilgesetzbuch I, Art. 1–456 ZGB (Basel, Helbing Lichtenhahn, 4th edn., 2010), Art. 65 N 1 et seqq.

⁷ See sec. 12 et seq., 22 und 26 Swiss Code of Best Practice for Corporate Governance; BÖCKLI, *supra* n 6, 1993 et seqq., 2002–3, 2005–6.

⁸ Switzerland: ZGB Art. 64 par. 1; HEINI/SCHERRER, *supra* n 6, Art. 64 N 16 et seqq.

⁹ Switzerland: ZGB Art. 65; HEINI/SCHERRER, *supra* n 6, Art. 65 N 1 et seqq.; MEIER-HAYOZ/FORSTMOSER, *supra* n 2, 682–83.

¹⁰ HEINI/SCHERRER, *supra* n 6, Art. 65 N 1; RIEMER, *Berner Kommentar*, Bd. 1/3/2: Die Vereine, Systematischer Teil und Kommentar zu Art. 60–79 ZGB (Bern, Stämpfli Verlag AG, 1990), Vorbem. zu Art. 64–69 N 21.

¹¹ See PACHMANN, *Sportverbände und Corporate Governance*, dissertation (Zurich, Dike Verlag, 2007), 178.

shown by the fact that resolutions, which ignore these rules, are null and void¹², which means that their nullity can be brought up at any time.

3. 'Top to down'-structure and 'down-to-top'-structure

Another difference between commercial companies and sports associations can be seen in the corporate structure. Commercial corporations are organized from top to down. They are often lead by a holding company, which has control over the general assembly as well as over the subsidiary's management.¹³

Further, the consolidated financial reports include all entities, which belong to the company group.¹⁴ All financial situations are known by the holding company.¹⁵ Thus, the financial controls reach down to each subsidiary of the group.

Sports associations are organized the other way around – 'down to top', not 'top to down'. It all begins with the sports club that is a member of a national sports association, which in turn is a member of the international sports association. Member associations are independent¹⁶ and are not included in a consolidated balance sheet. The international sports association has no institutional financial control on their member associations. In some specific areas the member organizations are certainly influenced by the international sports association,¹⁷ however, the general assembly is not affected.

For sports organizations, it is more difficult to apply specific standards within the sport association and its members. Their structural influence on the member associa-

¹² Switzerland: ZGB Art. 75; HEINI/SCHERRER, *supra* n 6, Art. 75 N 1 et seqq.; RIEMER, *supra* n 10, Art. 75 N 1 et seqq.

¹³ HANDSCHIN, *Der Konzern im geltenden schweizerischen Privatrecht*, habil. (Basel/Zurich, Schulthess; 1994), 42 et seqq.

¹⁴ Switzerland OR Art. 663e respectively OR Art. 963; HANDSCHIN, *Rechnungslegung im Gesellschaftsrecht* (Basel, Helbing Lichtenhahn, 2013), 433 et seqq.

¹⁵ HANDSCHIN, *supra* n 14, 427, 430.

¹⁶ HEINI/SCHERRER, *supra* n 6, Art. 64 N 10 et seqq.

¹⁷ See, eg UEFA Financial Club Licensing and Financial Fair Play Regulations.

tions is very limited mainly because of the missing influence on their general assemblies. Commercial corporate groups can more easily exercise their influence upon subsidiaries than sports organizations. This can be illustrated with the fight against doping. To implement an anti-doping policy it was not enough to declare from top to down that such a behavior is not tolerated. An international organization had to be set up and be given the respective competences.¹⁸

4. Preliminary conclusion

These two examples show that it is impermissible to slavishly apply corporate governance rules and compliance systems, which were developed for commercial corporations to international sports associations. The applicability of commercial corporate governance rules to sports associations has to be looked-at for each issue individually. Corporate governance rules and compliance systems for sports associations have to be developed based on the law for associations.

B. ANTI-CORRUPTION COMPLIANCE

1. Basics

There is a broad consensus that corruption is inadmissible and that corporate structures should be organized in such a way that would reduce the risk of corruption.¹⁹

Two different risks have to be considered when talking about corruption-risks. First, the corporate structures have to ensure that the corporation itself does not bribe. Secondly, the corporate structures have to ensure that outside parties do not bribe specific influential persons within a sports association²⁰, and influence the decision making process.

¹⁸ The World Anti-Doping Agency (WADA) was established on November 10, 1999.

¹⁹ PIETH, *supra* n 3, 9 et seqq.

²⁰ Switzerland: UWG Art. 4a.

In the commercial area the main risk is the first. In the past such practices were standard within many companies. In some countries bribery payments were even allowable expenses for tax purposes.²¹ This specific risk is the dominant corruption risk within commercial enterprises. However, it is atypical for sports associations, because there is a low risk that sports associations are bribing foreign officials. Therefore, Anti-corruption compliance, which has been developed for commercial companies, cannot be transferred and applied to sports associations one-to-one.

The alleged cases of corruption within sports associations refer not to active bribery, but to passive bribery. The bribery-risk of sports associations is that outside parties bribe specific influential persons within a sports association to exercise an undue influence on the decision making process. This affects internal processes, including e.g. the election of the president, the decision on the venue of championships, the decision regarding commercial agreements, etc.

Governance regulations for sports associations, therefore, have to tie in with their internal decision making process. Certain legislations exist, which could limit the risk of undue influence if correctly and consistently applied. Furthermore, statutory rules can minimize the aforementioned risk.

2. The democratic principle of association law

In sports associations the principles of good corporate governance and anti-corruption compliance address the same issues. The correct decision-making within the association is not only required by association law, but is also an important tool of anti-corruption compliance. The 'core-rules' regarding the correct decision-making in the Swiss Civil Code are Art. 67 par. 2 CC, "Resolutions require a majority of the votes of the members present", and the notice rules foreseen in Art. 67 par. 3 CC.²²

²¹ Switzerland: In accordance with DBG Art. 58 par. 2 this is forbidden since 1 January 2001.

²² EGGER, Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, Einleitung, Art. 1–10, Das Personenrecht, Art. 11–89 (Zurich, Schulthess, 2nd ed., 1930), Art. 66/67 N 1 et seqq.; HEINI/SCHERRER, *supra* n 6, Art. 67 N 8 et seqq., 18 et seqq.; MEIER-HAYOZ/FORSTMOSER, *supra* n 2, 677; RIEMER, *supra* n 10, Art. 67 N 49 et seqq., 73 et seqq.

In addition, there are strong references in association law to the principles of democracy.²³ The Civil Code refers to it explicitly in Art. 67 par. 1 CC ("All members have equal voting rights at the general assembly"). Furthermore, in 1912, when the association law was codified as federal law, a democratic environment was already preeminent. For this reason, the rules regarding the taking of resolutions which are applicable for example to town meetings or other public democratic institutions can be applied to the general assembly by analogy.²⁴

Procedures within the association must ensure that each member association can exercise his participation rights properly. To guarantee this, the participation rights, in particular related to the general assembly, have to be respected. It is argued that such procedures should not be overly formalized, since many (small) associations lack the professional structures to uphold such a sophisticated procedural organisation. But: if the association is able to cope with such procedures, it is inadmissible to allow the association to deviate from such rules, only with the "justification", that other smaller associations may have already done so. In this case it is: *Quod licet bovi non licet iovi*.

The standard, which has to be applied to the decision-making within an association, depends on the size and the function of the association and its risks (including the corruption risk). If the discussed resolution has an economic impact (which is also true for elections), it is important to make sure, that all rules regarding the decision making process are observed. In this respect, procedural rules for the formation of the general assembly of commercial companies can be applied.²⁵ This arises from the fact that the purpose of such formal rules is exactly the same as the one for sports associations.

²³ HEINI/PORTMANN/SEEMANN, *supra* n 1, 98–9; RIEMER, Stämpflis Handkommentar SHK, Vereins- und Stiftungsrecht (Art. 60–89^{bis} ZGB); mit den Allgemeinen Bestimmungen zu den juristischen Personen (Art. 52–59 ZGB) (Bern, Stämpfli Verlag, 2012), Art. 67 N 23, 25.

²⁴ EGGER, *supra* n 22, Art. 66/67 N 3; see, eg HEINI/SCHERRER, *supra* n 6, Art. 66 N 10.

²⁵ Switzerland: OR Art. 699 et seqq.; HEINI/SCHERRER, *supra* n 6, Art. 66 N 10; see, eg for the execution of the general assembly RIEMER, *supra* n 10, Art. 65 N 28 et seqq.

3. The composition of the executive committee

The democratic principle allows two different systems on how to elect the members of a committee. When using the majority principle, all members of the committee are elected by majority vote. This means, that the members of the association who control more than 50% of the votes have the potential to elect all members of the executive committee. In contrast, the proportional system leads to a better representation of the associations' members. A group of members, that for example controls 20% of all members, would be allowed to elect its candidates to the executive board proportionally to its size.

The advantages of the majority rule are that each member of the committee is elected by a majority vote, which increases his legitimacy and ensures certain homogeneity within the committee. However, this principle includes the risk that a shift of power within the association may lead to an exchange of all the members of the committee. This can constitute an incentive 'to profit' from their mandate, within their limited time of office. The proportional system on the other hand has the advantage that all major groups of members are represented in the committee. A better mutual control within the committee is the positive result of this proportional representation.

The temptations of absolute power can best be controlled by avoiding absolute power. Hence, the proportional system is a strong tool to reduce the risk of unfaithful decision-making and corruptive practices within the committee. A representative formation of the committee is a better instrument than the inclusion of outside members. Being elected by the inside members, such outsiders are put in a problematic loyalty situation from the very beginning. However, most sports associations follow the majority rule and include only regional proportional elements.²⁶

²⁶ See, eg IOC (International Olympic Committee): Art. 19.2.1 IOC-Statutes: "All members of the IOC Executive Board are elected by the Session, in a secret ballot, by a majority of the votes cast."; IIHF (International Ice Hockey Federation): Art. 36 IIHF-Statutes: "Elections"; IHF (International Handball Federation): Art. 12.5.5 IHF-Statutes: "Elections require an absolute majority of votes present. [...]"; FIS (International Ski Federation): Art. 21.2 FIS-Statutes: "The Congress normally makes its decisions by a simple majority vote, [...]"; UCI (International Cy-

4. Assembly of delegates

Association law allows the establishment of an assembly of delegates²⁷ who are elected by the member associations. The assembly of delegates can be compared to a parliament. The composition of the assembly of delegates usually follows the representative method, which leads to a proportional representation of all members of the association.

An assembly of delegates can also exist next to a general assembly, which can still keep some competences. Also the complete replacement of the general assembly by the delegates' assembly is possible.²⁸

An advantage of the assembly of delegates is its small size.²⁹ Thus, meetings can take place more frequently, which allows the assembly of delegates to be made into a supervisory body on a small executive committee. In case of a delegates' assembly composed by the proportional method, the impact of a committee elected by majority vote would be less grave.

5. Delegate decisions to larger bodies

Undue influences on the decision-making within the association (including the corruption risk) can be avoided if large bodies are competent for the respective decision, and if members may vote secretly.

cling Union): Art. 39.1 UCI-Constitution; FIFA (International Federation of Association Football): Art. 27.4 FIFA-Statutes: "Unless otherwise stipulated in the Statutes, a simple majority is sufficient for a vote to be valid. [...]"; Art. 30.3 FIFA-Statutes: "The members of the Executive Committee shall be appointed by the respective Confederations, with the exception of the vice-president representing the four British Associations, who is elected by the latter. [...]".

²⁷ HEINI/PORTMANN/SEEMANN, *supra* n 1, 121–23; HEINI/SCHERRER, *supra* n 6, Art. 64 N 29 et seq.; MEIER-HAYOZ and FORSTMOSER, *supra* n 2, 682–83; RIEMER, *supra* n 10, Art. 66 N 33 et seqq.

²⁸ HEINI/SCHERRER, *supra* n 6, Art. 64 N 29; MEIER-HAYOZ/FORSTMOSER, *supra* n 2, 682–83; PACHMANN, *supra* 11, 267.

²⁹ See HEINI/PORTMANN/SEEMANN, *supra* n 1, 121–2.

The smaller the deciding body is, the easier it is to bribe members of such a body in view of a specific decision. Where large sums are at hand, the briber will expect control on his “investment” and, therefore, he will seek to ensure that the bribed official votes the way he was paid for. In a small body, it is much easier to influence the decision-making by bribing a key person. In addition, it is much easier to control if this key person has “fulfilled” his promise. Influencing the decisions of large bodies, which have a secret voting procedure, is significantly harder. First, the impact of one single bribe is reduced due to the large amount of members. Second, it is not possible to control the bribed individual.

Undue influence on large bodies is not so much exercised by bribing their members, but by trying to influence the conduct of the meeting (e.g. by handing out incomplete presentation of the information on which members’ opinion is built, by ignoring dissident votes, etc.).³⁰ However, these risks can be controlled by the issuance of strict procedural rules that will have to be followed.

6. Nullity or voidability

If a resolution by the association violates procedural or substantive law, the resolution is either “voidable” or “null and void”. The difference between “voidable” and “null and void” refers to the rule of Art. 75 CC that entitles any member “to legally challenge, within a month of the day of which he had notice of it, the decisions which [...] are contrary to law or the statutes of the association.” If the resolution is null and void, its nullity can be raised at any time, even if the one-month period of Art. 75 CC has lapsed.³¹

³⁰ For this reason resolutions which violate procedural rules are null and void; see HEINI/PORTMANN/SEEMANN, *supra* n 1, 74; HEINI/SCHERRER, *supra* n 6, Art. 75 N 36; RIEMER, *supra* n 10, Art. 75 N 95 ff.

³¹ Switzerland: ZGB Art. 75; HEINI/PORTMANN/SEEMANN, *supra* n 1, 74–5; HEINI/SCHERRER, *supra* n 6, Art. 75 N 34; RIEMER, *supra* n 10, Art. 75 N 91.

A resolution is null and void if it is afflicted with a severe deficiency; both procedural and substantive.³² The rules, which assume nullity, also have the function of controlling the executive body of the association by creating a strong incentive to adhere to these formal rules. Hence, nullity is a sanction and ensures the correct decision-making within an association. This is important, when the principle of proportionality is applied. The principle of proportionality means that a legal consequence must be reasonable, considering the competing interests of the other party. Although this is a principle of public law, it can also be applied in private law³³. Its application to the question of nullity would require an analysis of the interests at hand and relating them to each other. If, for example, the interests of the claimant are small, but the damage which would occur to the association if the alleged resolution was found to be null and void would be large, the principle of proportionality would weigh the two interests and – and if the interests of the claimant are disproportionate – deny nullity. However, all interests must be included in this analysis. Since nullity also serves as a sanction for non-compliance with formal rules regarding the taking of resolutions, we not only relate the personal interests of the claimant to the damage of the association if nullity is assumed, but also the general interest of the law (including the public interest that the decision-making within the sports-association is free of corruption) that formal rules on resolution-taking should be observed.

7. Relation to Article R49 of the CAS-Code

According to Article R49 of the CAS-Code, the deadline to file an appeal shall be twenty-one days from the receipt of the decision appealed against”. In a recent, problematic decision³⁴, the CAS has ruled that the Article R49 applies even if the decision at stake is null and void. The CAS assumes that the rule whereby nullity can be

³² See HEINI/PORTMANN/SEEMANN, *supra* n 1, 74–5; HEINI/SCHERRER, *supra* n 6, Art. 75 N 21; MEIER-HAYOZ/FORSTMOSER, *supra* n 2, 678–79; RIEMER, *supra* n 23, Art. 75 N 21.

³³ HONSELL, in HONSELL/VOGT/GEISER (eds.), *Basler Kommentar, Zivilgesetzbuch I*, Art. 1-456 ZGB (Basel, Helbing Lichtenhahn, 4th edn., 2010), Art. 2 N 21.

³⁴ CAS 2011/A/2360 and CAS 2011/A/2392, *English Chess Federation and Georgian Chess Federation v. FIDE*.

claimed at any time is a procedural rule, which has been superseded by the arbitration rules. The question remains if the rules on nullity are really procedural and are not substantive in nature. The nullity-rules ensure correct decision-making as well and are an important element of anti-corruption compliance.