

AGGIS: The Swiss Regulatory Framework and International Sports Organisations

By Michael Mrkonjic, January 2013

Introduction

The formal and international recognition of the military neutrality of Switzerland in 1815 has been an essential (re)source of arguments for the development of its foreign policy. It has provided this small country of now eight million people a privileged position in international relations. Since more than one century, notably after the birth of the International Committee of the Red Cross (ICRC) in 1863 in Geneva, Switzerland has succeeded to offer the best conditions for International Non governmental organisations (INGOs), and many International Governmental Organisations (IGOs) such as the United Nations and its predecessor the League of Nations to develop their cross-border activities without restrictions. Baron Pierre de Coubertin has transferred the headquarters of the International Olympic Committee (IOC) to Switzerland, in 1915. He considered that “Olympism will find in the independent and proud atmosphere that we breathe in Lausanne, the guarantee of freedom that it needs to progress”⁽¹⁾. He was to be followed by many of the International Sports Federations (IFs), the majority of them having now their seat in Lausanne. Hence, Switzerland has become the “Queen of Sports”, as the Baron had predicted in 1906⁽²⁾. However, time passing, the relations between these international sporting organisations (ISOs) and the Swiss authorities have sometimes been characterised by mutual suspicion and threats. At several occasions, ISOs have expressed their desire to leave Switzerland if they do not obtain what they were asking for.

International sports organisations as non-profit associations

The IOC and IFs that are located in Switzerland have de facto an international status. But de jure, they are not incorporated as IGOs or international quasi-governmental organisations (IQGOs). They are associations subject to national private law whose terms of constitution and organisation are formalised in the Swiss Civil Code (SCC). The legal framework provided by the Code allows a large freedom of arrangement, but is also imposing certain general conditions.

Indeed, in order to be incorporated as association, the organisation should not have an economic purpose and demonstrate its willingness to be organised corporately in Statutes (art. 60.1). These Statutes must take the form of a written document and must contain provisions on the purpose, resources and the organisation of the association (art. 60.2). From a structural point of view, the association must be run by a general assembly (art. 64.1) and an appointed committee that represents the association and manages its affairs (art. 69). At the general assembly all members have equal voting rights⁽³⁾, and decisions are taken by a majority of the members present (art. 67). Is deprived of the right to vote any member whose decisions affect himself and his extended family (art. 68). Regarding the committee, this body is responsible for the convocation of the general meeting (art. 64.2) and to keep accounts (in a commercial manner and subject to the Code of Obligations, if the association is registered in the Commercial Register). Finally, the association must submit its accounts to an external ordinary audit, if during two successive years, two of the following values are exceeded: results: CHF 10 million; revenues: CHF 20 million; staff: 50 employees.

The IOC tax exemption case

Once installed on the shores of Lake Geneva, the Baron wanted as soon as possible to clarify the status of its Committee in order to be able to develop its international operations. However, the local authorities refused to consider the IOC as an association under Swiss law, unless it reformulated its Statutes and register in the Commercial Register. The Baron refused categorically considering that the IOC could not be compared with a “simple” association. The influence it offered to the city of Lausanne, the Canton of Vaud and more widely Switzerland, deserved the recognition of a special status similar to that of IGOs. In 1923, the city of Lausanne and the Canton slightly yielded to the pressure by providing its members with an exemption from cantonal and communal taxes, while the Swiss Federal Council (the Swiss Government) offered them some customs advantages⁽⁴⁾. For over 50 years, the IOC obtained sporadically very few privileges. And they were far from what the Committee expected compared to what was offered to INGOs notably in terms of immunities. In 1981, the Federal Council recognised it as an association under Swiss law, but offering some of the privileges of an IGO such as the exemption from direct federal tax and the lifting of the quota of foreign personnel. At the time, this decision was purely a matter of international relations since it was based on a (former) constitutional provision (art. 102.8) which stated that: “The Swiss Federal Council sees to the interests of the Confederation outside and is, in general, responsible for external relations”. The executive body argued in an opportunistic and pragmatic way that the IOC allows Switzerland to shine internationally, that one way or another its presence is important for Swiss athletes and finally that the international competition to host the IOC became too pressuring to allow such a symbol of universalism to leave the Helvetic ground. As a consequence, under the leadership of the charismatic National Councillor Adolf Ogi, it began to consider developing a (systematic) hosting policy for ISO’s (Concept du Conseil fédéral pour une politique du sport en Suisse, 2000)

For almost 15 years, nothing really happened. The boycotts of the Los Angeles Games in 1984 and the increasing commercialisation of the five interlaced rings might have brought Samaranch to other fields of concerns. It is only from the mid-1990s and not without reason that he reactivates the question of the “Swiss” status of the IOC. Indeed, the introduction of a new law fundamentally changes the relationships between the Federal Council and the IOC and the IFs as well. Knowing that the VAT would enter into force in 1995, the IOC immediately asked the Federal Administration of Finance to be exempted. But the proposition is quickly rejected and the threat of a relocation of the IOC, followed by other IFs, snaps back⁽⁵⁾. In 1997, the spirit of the Baron reappears as Samaranch asks for an intergovernmental status. Second defeat. However, the Department of Foreign Affairs and its Minister do not see these successive refusals with a very good eye since they are the biggest supporters of the specificity of the IOC. In 1998, under its leadership and that of the famous Adolf Ogi, the Federal Council recognises that the Committee pursues public purposes. More specifically, it declares that it promotes physical education, mutual understanding and peace, and that it has an important economic impact for the region where it is seated. Accordingly, it votes the renewal of the federal tax exemption and the VAT exemption. However, a couple of months later, facing heavy criticism during the “Salt Lake City scandal”, and fearing a refusal by the Parliament, the IOC withdraws its request for VAT exemption

The federal tax exemption of the IOC is formalised in 2000 through a mutual agreement between the Committee and the Council. And this decision will be extended to all IFs in 2008 considering that they foster mutual understanding between cultures, promote peace and positive values (fair-play, fight against racism and xenophobia, and integration). Finally, the entry into force of the Host State Act (HSA) in 2008 and that of the Swiss Federal Law on the Promotion of Sport and Physical

Education (LPSPE) in 2012 will consolidate the status of ISOs in Switzerland. Both stipulate that the Confederation may facilitate the establishment or the activities of an ISO in Switzerland (Federal Council's Message on the Host State Act; art. 24.2, HSA; art. 4, LPSPE). It may accord financial subsidies and other support measures such as tax exemptions. However, they "are not eligible for the privileges, immunities and facilities contemplated by the [Host State Act]" (art. 24.3, HSA), for example the "inviolability of the person, premises, property, archives, documents, correspondence and diplomatic bag" (art. 3.1.a, HSA).

The FIFA corruption cases

FIFA has its seat in Zurich since 1932 and, like the other IFs, is a non-profit association under Swiss Law. But on the contrary to many of them (notably those that are located in the canton of Vaud) it pays taxes (more or less 5 million \$ in 2011). The two highly mediatised scandals its officials faced during the 2000s - the ISL case (1989-2012) and the bidding and election scandals (2010-2011) - have generated an interesting and quite important debate in the Swiss political and legal spheres. Indeed, it seemed that the regulatory framework was not framed to resolve such corruption issues. Several loopholes in the law hindered the possibility to open a case before courts (notably in the second case, the ISL case having been opened in a relatively complex manner). A quick overview of the Swiss regulatory environment regarding the fight against corruption allows us to understand the situation.

Until 2000, corruption of foreign public agents was not prosecuted in Switzerland. Offering bribes was the usual way of doing business and they were deductible from corporate tax. But since then, under international pressure from the OECD with the Anti-Bribery Convention (2000), the Council of Europe Criminal Law Convention on Corruption (2006), the United Nations Convention against Corruption (2009), and GRECO's critical third evaluation cycle on Switzerland (2011) recommending that private corruption should no longer be prosecuted upon complaint but automatically and extend the offence of private sector bribery to sports associations, MPs stressed that something should change in relation to the latter. Accordingly, two main solutions were proposed through two parliamentary initiatives, one by Mrs. Thanei and Mrs. Leutenegger (2010) and one by Mr. Sommaruga (2010).

The first solution was to work on the interpretation of the Swiss Criminal Code in its art. 322septies on corruption of foreign public agents (2006). Per se, this article is not applicable to ISOs since they are not considered as IGOs (built on Treaties, under immunities or VAT exemptions), or, in other words, members of ISOs are not considered as foreign public agents (although we have seen that ISOs are considered as public service providers). On this basis, the proposition stressed the importance of considering ISOs as IGOs, i.e. consider officials as foreign public "sports" agents. Unfortunately, the proposal was quickly tackled by the Parliament. Probably for the simple reason that, as we have seen, the Host State Act formally recognised that ISOs cannot be considered as IGOs.

The second solution was to work on the Swiss Unfair Competition Act, and more precisely, art. 4.a and art. 23.1 on active and passive corruption (2006). Again, the Act is not applicable to ISOs because bribery of officials for votes is not considered as creating an unfair economic competition, and in any case, an individual can only be prosecuted on complaint. On this basis, the proposition stressed the importance to transfer the article in the Swiss Criminal Code (Title 19 on corruption) and remove the complaint requirement. Both Chambers of the Parliament accepted the initiative and

it now the duty of the Department of Justice and Police to prepare a preliminary draft amendment to the law for the beginning of 2013.

Last (but not least), under art. 102.2 of the Swiss Criminal Code on criminal liability (2006), an organisation can be sanctioned for not having taken all reasonable organisational measures necessary to prevent such offenses (i.e. art. 322septiès SCC, art. 4a UCA, art. 23/1 UCA). This article has not generated much political debate since it is directly applicable to ISOs. However, notably due to interpretation issues of “all reasonable organisational measures”, it had a limited impact so far. Only a very few corporations have been sentenced on the basis of this article.

Conclusions

This overview on the Swiss regulatory framework on fiscal and corruption issues shows many interesting points in relation to the autonomy of ISOs. With the Host State Act, ISOs that have their seat in Switzerland are formally recognised as INGOs. On a fiscal perspective they are considered as public service providers. On a criminal perspective, mechanisms of compliance with the law are still not effective. To some extent, if we consider FIFA, the organisation can somehow protect itself from the threat of art. 102.2 of the Swiss Criminal Code by reforming its internal structures, but the potential modification of the Swiss Unfair Competition Act (i.e. the amendment to the Swiss Criminal Code) could diminish the legal autonomy of ISOs towards Switzerland. Finally, excluding the “institutional rooting effect” and the “network effect”, the future of ISOs in Switzerland will hold in a bargaining between what Switzerland offers (federal tax exemptions), what it refuses (diplomatic immunities), what it imposes (conditional external audit), what it allows (corrupt activities without criminal complaints) and finally what ISOs offer to Switzerland (international prestige).

Notes:

1. Author’s translation from French. City of Lausanne, 2012 accessed on www.lausanne.ch/view.asp?DocId=29881
2. At the time, Coubertin argued that among different reasons justifying such a status, the high level of participation in sport of Swiss citizens was the most evident one.
3. Non imperative legal disposition. Some sports organisations, such as SwissOlympic, follow a proportionality rule.
4. Informations based on Morath Pierre, 2000. Le CIO à Lausanne, 1939-1992. Cabedita.
5. L’Hebdo, 1999. La Suisse a absous les fraudes fiscales du CIO. http://www.hebdo.ch/la_suisse_a_absous_les_fraudes_fiscales_du_7470_.html