Interplay Between Doping Sanctions Imposed by a Criminal Court and by a Sport Organization*

by **Lauri Tarasti****

1. Introduction

Doping has originally been an internal problem of sport. Anti-doping rules have been included into other competition rules and their content has varied from one sport to another. When it became evident that doping is a problem in all top sports, the battle against doping needed stronger measures and harmonization both between different sports and between different countries. At the same time sports organizations became aware of their insufficient possibilities to battle against doping without the juridical means of public power.

In a world-wide anti-doping conference organized at the intiative of the International Olympic Committee in Lausanne in 1999 sport organizations and governments decided to establish a new international organisation World Anti Doping Agency (WADA) for the battle against doping. The WADA is a private foundation whose domicile is in Switzerland and headquarters in Montreal in Canada. This unique international foundation is based on the cooperation between sport organizations and governments, and the WADA is financed and lead half by sport organisations and half by governments.

The biggest achievement of the WADA has so far been the first world-wide anti-doping code World Anti Doping Code (WADC) which was accepted in Copenhagen in 2003 and which is just now under the revision.

As the governments could not be signatories of the WADC with its doping sanctions accepted by the juridically private foundation WADA, it was necessary to bind the governments with this international policy through other means. This took place under the auspices of the UNESCO and in accordance with the International Convention Against Doping in Sport which came into force in February this year.[1]

2. Doping in legislation and in sport rules

The state gives its norms by legislation. The state has a monopoly to make laws. Lower-level norms can be issued by municipalities, if a law allows it. Thus only public power can issue generally binding norms. If somebody breaks these binding norms, he/she will be sentenced in a state criminal court if the violation of the norms is considered a crime.

Authorities have the right to use coercive powers as seizure and search as well as internet search in accordance with law when it is needed for the detection a crime, to study on the case by hearing whomever etc. Authorities can also execute the punishments with force, for example collect fines through execution.

Doping has been criminalized in many countries, especially in Europe, but only seldom outside Europe. A special act on doping has been issued in some countries of the member states of the Council of Europe and also in other member states some forms of doping are punishable as drug abuse, smuggling of medicines or in some other way. A criminal court imposes sanctions in these cases. A usual punishment is a fine and in some cases imprisonment. Doping has, however, not been usually defined in criminal code exactly in the same way as in sport. Doping in the criminal code is often more limited than in sport.

Doping matters in legislation belong to public law.

Sport rules are formulated by sport organizations themselves. They are not generally binding, but only applied to own activity. They can concern not only the athletes but also other people taking part in one or other way in the sport concerned. If these rules will be broken, the question is not of a crime but of a violation of the rules. The doping offence in the WADC is called an anti-doping rule violation.

A sport organization can impose a sanction for this violation in accordance with its rules. This is not a punishment in the same sense as in the criminal code, but a disciplinary consequence. These sanctions can include consequences only within the power of a private organisation.

Sport organiations do not have such coercive powers as authorities. Their means are limited within their sport, for example they can prevent the athlete to compete. Likewise the execution of the sanctions is limited.

All major sport federations have today their own anti-doping rules. The WADC obliged them to apply the obligatory articles of the WADC as such and also otherwise to follow the principles of the WADC. A sport tribunal established by a national or international sport federation or in some cases the sport organization itself imposes sanctions, normally ineligibility and loss of medals, prize money etc. The last instance to which it is usually possible to apply is the Court of Arbitration for Sport (CAS).

Anti-doping rules of sport organizations belong to the area of private law.

These two systems carried out on one hand in criminal courts applying the state law concerning doping punishments and on the other hand in the sport organizations or their tribunals applying their anti-doping rules with disciplinary sanctions have acted so far nearly totally separately. The difference between public law and private law has kept these two procedures far from each other.

What has been said above is juridically generally accepted and also the CAS has followed and indicated these principles in many decisions.

3. Doping sanctions imposed by a criminal court and a sport organization or its tribunal

The same anti-doping violation can be, and often is punishable both as a crime in a criminal court and as a disciplinary offence in a sport organization or its tribunal. These cases have increased strongly last years for many reasons. More countries have included doping crimes into their criminal code, the supervision of doping offences has expanded and, when previously only athletes were punished, today also coaches, doctors and other support people have been convicted guilty of doping crime.

The consequence has been that the same person has been sanctioned twice, in two separate processes, for one act of doping. We have many examples of that.

In Sweden Ljudmila Enqvist, a hurdler and later a bobsleigher, was sanctioned by her national sport federation for life after being detected twice for anti-doping rule violations.

Later she was also punished in the local criminal court with a fine for the possession of doping substances which is a crime in accordance with the Swedish legislation.

In Finland Kari-Pekka Kyrö, a coach in skiing, was sanctioned by the Finnish Ski Association for life after providing his skiers with substances for blood manipulation, and later he was punished with a fine (about 500 euros) in a criminal court for smuggling of drugs. In addition he was imposed to compensate trial costs about 16.000 euros.

Stephane Desaulty, a French athlete in 3000 m steeplechase, was arrested in possession of EPO by the French Police and was sentenced by a French criminal court to 4 months suspended imprisonment after having used medical prescriptions which he had forged. The athlete admitted doping and the matter was subsequently dealt with as an anti-doping rule violation first in the French Athletic Association and then in the CAS. The sanction was two years ineligibility.

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* The basis of this article has been the lecture w*hich* Mr Tarasti presented in the Sports and Law Berlin 2007 Conference in May 2007.

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1 The Council of Europe´s Anti-Doping Convention is already from 1989.

Ridouane Es-Saadi, a Belgian athlete in 5000 m, was arrested in possession of doping substances, including EPO, growth hormone and clenbuterol. He was banned at a sporting level by a Disciplinary Commission of the Belgian Ministry according to the Belgian legislation. After his return to competition he tested positive and was sanctioned therefore for life.

A cyclist, Mr Johan Museeuw, was sanctioned in Belgium under the international federation UCI`s rules. Afterwards the public prosecutor initiated criminal proceedings, because the doping offence was also a crime according to the Belgian legislation. At the end of the investigation, the examining chamber decided that the rider had to appear before the criminal court. Mr Museeuw appealed this decision arguing that the court no longer had jurisdiction, because the case had already been determined, but the appeal was dismissed.

When looking at these processes it can be noticed that as a rule the sanction of a sport organization or its tribunal has been made first and the conviction of a criminal court thereafter. However, in the Stephane Desaulty case the situation was opposite. In addition, the police investigation often starts the process, but the sanction has been imposed by a sport organization or its tribunal before the punishment imposed by a criminal court due to the speed of the first mentioned procedure. One might say that this order is not of major importance as they are two separate procedures, but the reality is another.

When the first sanction has been imposed, it can have a great significance as evidence in the latter process. When Stephane Desaulty had admitted in the criminal court doping, this was the main and convincing evidence in his federation´s decision to impose ineligibility. This issue has also been of relevance in the Balco doping cases in the USA where some athletes have chosen not to give evidence before the CAS evidently for fear of repercussions before the national authorities and/or court.

4. Influence of a criminal court´s conviction

In the Aissa Ddhoughi case, this Moroccan athlete in 10 000 m was first arrested in possession of doping substances and sentenced therefore to 4 months suspended imprisonment. This resulted in no consequence from the sport organizations´ side, he was not at that time a licensed athlete. But later when he again committed an anti-doping rule violation, the conviction of the criminal court was adduced as the evidence of his prior record and he was banned for 3 years by the Moroccon Federation.

This raises a question, whether the conviction for a doping crime by a criminal court has to be taken into account when estimating multiple violations in another case in accordance with the World Anti-Doping Code. If the answer is positive, the sanction is much harder. The WADC itself gives no clear answer. We could think that these two systems to impose sanctions are also in this point totally separate systems.

Doping crimes can in some special cases differ from anti-doping rule violations in the WADC, especially concerning doping substances, the division of the burden of proof or the level of required evidence. Normally the requirements for a doping crime in a criminal court are a bit higher than for a doping offence in a sport organization or its tribunal. This makes it easier for the sport organization or its tribunal to accept the results achieved in a criminal court than the criminal court to accept the decision and its arguments presented by the sport organization or its tribunal.

Articles 10.2 and 10.3 of the WADC mention only second violation and third violation without any explanation which violations must be taken into account when determining the second and third violation, but it is quite evident that here it has been considered only anti-doping rule violations in accordance with the WADC, not doping crimes imposed by a criminal court.

However, Article 15.4 includes regulation on Mutual recognition as follows:

> Subject to the right to appeal provided in Article 13, the Testing, therapeutic use exemptions and hearing results or other final adjucations of any Signatory which are consistent with the Code and are within that Signatory´s authority, shall be recognized and respected by all other Signatories. Signatories may recognize the same actions of other bodies which have not accepted the Code if the rules of those bodies are otherwise consistent with the Code.

Governments or criminal courts are not signatories of the WADC, but it might be possible to make an analogical interpretation that they are considered as the above mentioned other bodies whose rules (i.e. legislation) are consistent with the WADC. However, the comment under Article 15.4.2 of the draft for the revised WADC shows that this possibility has not been considered in this connection. Therefore it should be reasonable to clarify this article or the comment under it to consist of criminal courts.

In accordance with Article 3.1 of the UNESCO´s International Convention Against Doping in Sport, States Parties undertake to adopt appropriate measures at the national and international level which are consistent with the principles of the Code (WADC) and according to Article 4.1 the States Parties commit themselves to the principles of the Code, as the basis for the measures provided for in Article 5 of this Convention.

Taking into account what has been said above, it seems to me well argued that the sport organization or its tribunal can approve that the question is of the second or third anti-doping rule violation when a previous violation has been shown in the decision of a criminal court. This is of great importance when imposing the sanction. But I think in addition that the sport organization or its tribunal should explicitly mention in its decision that it has recognised the previous decision of a criminal court before imposing a sanction for the second or third violation. This course of action offers to the athlete concerned - when appealing against the decision of the sport organization or its tribunal - a possibility to show that the conviction of the criminal court has not been correct related to the matter according to the sport organization´s anti-doping rules.

In favour of this interpretation is Article 3.2.3 in the draft of the revised WADC:

> The facts established by a conviction or finding of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence of the substance of the conviction unless the Athlete or other Person establishes that the conviction violated principles of natural justice.

5. Some comparisons

If we compare the punishments in a criminal court and the sanctions in a sport organization or its tribunal including the CAS, we can notice that a normal punishment for a doping crime has been a fine or in some cases suspended imprisonment and a normal sanction for an anti-doping rule violation has been two years ineligibility.

For the top-athlete the last mention sanction is much stricter than a fine or suspended imprisonment because it interrupts the athlete´s carrier and prevents him/her to carry on his/her occupation. This results in often big economic losses compared with relatively low fines.

But for many athlete´s support persons the situation can be opposite. For them two years ineligibility in sport is often only minor consequence, but a fine and especially suspended imprisonment can be of major importance. This can have a great impact on their civil profession.

This is one reason why in some countries the use of doping substances is not a crime in criminal code but trafficking in any prohibited substance or prohibited method and administration or attempted administration of a prohibited substance or method to any athlete are punishable. This results in a situation where the athletes (if only using doping substances) are mainly imposed sanctions for anti-doping rule violations in a sport organization or its tribunal, and other persons involving doping affairs are mainly imposed punishments for doping crimes in a criminal court. This division seems to be rational in many respects. Germany has this year accepted this kind of the solution in its new doping act and in Finland this system has been included into the criminal code some years ago.

Special difficulties can arise if the decisions made by a criminal court and by a sport organisation or its tribunal are opposite i.e. one indicates the guilt of the athlete and another the innocence of the athlete. In the famous Butch Reynolds case the Arbitration Panel of the IAAF[2] considered Butch Reynolds guilty of doping offence but Mr Reynolds home court, federal district court in Ohio exonerated him and ordeded the IAAF to compensate 27,3 milj. dollars to Mr Reynolds. The IAAF announced that it will not accept this conviction and appealed to the federal appellate court which decided that the local court had had no jurisdiction in the case and dismissed totally the action of Mr Reynolds. In the Torino Winter Olympic Games in 2006 an Austrian skiing coach Mr Walter Mayer was sanctioned for life for an anti-doping rule violation, but an Austrian court was of the opinion that Mr Mayer had not been shown guilty of any crime according to the Austrian legislation.

When the sanctions are different or deal with different kinds of sanctions, it can be possible to execute both decisions, even though opposite. The question is of two separate processes also in the execution. The execution of the conviction of a criminal court is naturally enforcable in the country of the court. But it depends on international conventions, especially between the countries concerned, whether the conviction is enforcable in other countries.

The decisions made by a sport organization or its tribunal will be executed in all countries and in all sports in accordance with the WADC, but it can be difficult to enforce these decisions outside sport. The international conventions (Lugano, Brussels and New York) on jurisdiction and the enforcement of judgements in civil and commercial matters can have a great influence also on the decisions made by sport organizations or their tribunals including the decisions of the CAS. The Swiss Federal Court has confirmed twice that the CAS is an internationally accepted arbitration court whose jurisdiction is exclusive under these above mentioned conventions.[3] The same conclusion was reached by the US Supreme Court in the Mary Decker Slaney case.[4] However, all these conventions are binding only for the state parties to the conventions and even in some contracting parties it has been unclear how to apply these conventions.

The international sport federation cannot demand its member federations to stand against the decision made by the court, civil or criminal, of the federation´s own country, because naturally all athletes, clubs and national federations are bound by their own country´s law and are under the jurisdiction of the national courts. But the international sport federation can keep its decisions in all other countries, where the decision of a court of another country is not entitled to recognition and enforcement. The international sport federation can normally be refused to do so only in its own domicile´s civil court.

6. Ne bis in idem

One of the leading principles in criminal law is that in one and the same crime only one punishment can be imposed, "*Ne bis in idem*". Can or ought it to be applied also in doping sanctions?

Theoretically the answer is clear and generally accepted. A punishment in a criminal court and a doping sanction in a sport organization or its tribunal are not against the principle Ne bis in idem. The question is of two separate matters. Only the punishment by a criminal court is a punishment in the sense of criminal law. The doping sanction by a sport organization or its tribunal is a disciplinary measure. The first one belongs to the area of public law, the last one of private law.

Many examples of this separateness has been presented under Point 3 above. An example to opposite direction is just pending in Belgium. In this case a cyclist Mr Frank Vandenbroucke was sanctioned for doping in a disciplinary proceedings of the sport federation. He was also prosecuted before the criminal court for the same facts. Mr Vandenbrouke pleaded that he already had been sanctioned with a disciplinary sanction and that any criminal proceedings had to be dismissed. The criminal court of first instance did not accept this defence and imposed a punishment, but the court of appeal accepted the appeal, based on Vandenbroucke´s argumentation. The case is now pending in the Supreme Court "Cour de Cassation".

This distinction between a punishment imposed by a criminal court and a sanction imposed by a sport organization or its tribunal has so far been easily noticable. Fine and imprisonment have been measures by courts and ineligibility and loss of prize money measures by sport organizations or their tribunals. In fact, it would be strange, if public power would start to determine ineligibility in sport as long as the sport has its more or less autonomous position.

This situation is not unique in society. For example, doctors have their licenses to carry on their profession. If a doctor makes himself/herself guilty of a crime, he/she will be punished in a criminal court according to the criminal code, but he/she can lose his license in a separate process, in an administrative procedure.

But this answer will not be anymore easy to accept, if the draft of the revised WADC will be brought into force. In accordance with its Article 10.12 Imposition of Financial Sanctions

> Anti-Doping Organizations may, in their own rules, provide for financial sanctions on account of anti-doping rule violations. However, no financial sanction may be considered a basis for reducing the period on Ineligibility or other sanction which would otherwise be applicable under the Code.

If this happens, in a same doping offence there can be two fines, one imposed by a criminal court and another imposed by a sport organization or its tribunal. The first fine goes to the state and the latter to the sport organization depending on its rules. Can the separateness of these two sanctions still stay?

I am doubtful. Regarding the athlete he/she has to pay twice for one act, only the address is separate. From his/her point of view there is no difference in fines between public and private law because the consequence is same. However, Ne bis in idem -principle has been valid as a part of human rights only in criminal processes, not related to disciplinary sanctions. If this kind of situation would arise, the civil court or the execution authority would be obliged to deal with and to solve whether Ne bis in idem -principle shall be applied or not. The fine imposed by a state court can be executed directly by execution authorities, but the fine imposed by a sport association or its tribunal can not be executed without a separate decision, normally of the civil court. When making this decision the court should accept the ground for execution and at the same time whether or not to apply Ne bis in idem -principle.

But the same result or more from the point of view of doping control´s effectiveness can be obtainable by purely means of private law. Very often the top athletes have made or make an agreement with their sport federation for different kinds of economic and other benefits and rights. In these agreements it is possible and often used, that the athlete commit himself/herself to compensate to his/her federation the image and/or economic losses in the case of doping offence of which he/she is guilty. This kind of a contractual penalty can be quite high. Contractual penalties are normal in business contracts.

7. Cooperation in detecting doping offences

Cooperation is not possible between courts and sport organizations, when a matter has reached the stage of court handling. The court must decide the case independently. However, the WADA has filed in the Operatio Puerto Case in Spain a formal request to be accepted as a civil party in the court. The WADAs request was firstly dismissed on 27 March 2007, but after the appeal it was accepted which can be internationally an important precedent. The aim of the WADA was to get all material in the case to be used as evidence later before the CAS.

Instead cooperation is very useful at the earlier stages in the investigation process. Before a doping case is dealt with before a criminal court, the police has conducted its investigations and the prosecutor

2 I was the chairman of this Panel.

3 The judgements 15 March 1993 and 31 October 1996.

4 The New York Convention was the main reason to dismiss Ms Decker Slaney´s claims in the Southern District Court of Indiana, Indianapolis Division Nov. 5, 1999.

decided to prosecute. They have strong powers for these purposes. Police can hear whomever person as witness, make home search, confiscate property, take samples, conduct telephone and internet surveillance including email etc. depending on the severity of the case. Doping procedures in sport organizations have today started from police investigations more often than previously as a result of more active involvement by the police.

A sport organization´s or its tribunal´s powers are limited to measures in connection of sport. The athletes are obliged to give samples in doping control whenever and they can be requested to give necessary evidence and come to a hearing with the consequence that if they do not fulfil their obligations they will be sanctioned for an anti-doping rule violation. These powers are still more limited related to the athlete´s support personnel.

This imbalance in means has resulted in that sport organisations have needed and need in many cases investigation help. Such cases are numerous and most important.

The Tour de France doping scandal in cycling in 1998 started from police investigations, and the Chinese doping scandal in swimming in 1998 started from Australian customs´ seizure. Obscurities in the Balco laboratorium began to be detected in the USA originally in the tax authorities´ investigations. The Operatio Puerto in Spain is the investigation conducted by the Spanish authorities into doping practices that followed the seizure of prohibited substances and other material by the Spanish police in 2006. It has concerned so far mainly cycling. In the Athens Olympic Games in 2004 two Greek sprinters, Kenteris and Thánou, escaped from doping control. The IAAF waited as long as possible for the results of police investigations with the purpose to get better evidence before imposing sanctions.

It can be pointed out from these examples that many major disclosures have happened and evidently will happen from inquiries and investigations conducted by police or other governmental agencies. They have sufficient powers for that. The sport organizations are not able to detect effectively trafficking, smuggling, distribution etc. of doping substances. They do not have any mandate to conduct necessary investigations outside sport. On the other hand police has usually not sufficient resources nor interest to take urine or blood samples from individual athletes. This part of doping contol is and will stay in the hands of sport organisations. Anti-doping organisations in the whole world have conducted nowadays about 180.000 tests yearly.

The lack of powers to make investigations is a big problem for the sport organizations and for the WADA. In the last publication of the WADA "Play true" (1/2007) is a strong appeal: "The challenge put before the anti-doping movement now is, in what ways can cooperation and the sharing of information - between governments agencies and law enforcement on the one hand, and sport and anti-doping authorities on the other - be improved to bring greater efficiency to the fight against doping in sport."

The aim to achieve better cooperation between governments and sport organizations can be seen in some new articles of the revised WADC when the WADC will be accepted in a big doping conference in Madrid in November this year. According to its Article 3.2.3 mentioned already above

> The facts established by a conviction or finding of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence of the substance of the conviction unless the Athlete or other Person establishes that the conviction violated principles of natural justice.

The sport organizations´ obligation to announce significant anti-doping rule violations to the public authorities has been determined in the last sentence of Article 10.3.2 of the draft. In the Comment to this sentence it has been said that "Since the authority of sport organizations is generally limited to Ineligibility for credentials, membership and other sport benefits, reporting Athlete Support Personnel to competent authorities is an important step in the deterrence of doping." In fact, already Article 10.4.2 in the present WADC includes the same rule but only in the milder form "may be reported".

The information exchange from the opposite direction i.e. from governments to sport organizations has been regulated in Article 22.1.1 of the draft as follows:

> Each government shall encourage all of its public services or agencies to share information with Anti-Doping Organizations which would be useful in the fight against doping where to do so would not otherwise be legally prohibited.

Article 13 in the UNESCO Convention Against Doping in Sport includes a respective principle.

These are steps towards closer cooperation, but not at all sufficient in the battle against doping. In all circumstances certain powers, such as those of house search, seizure, internet surveillance etc. will remain in the realm of law enforcement. It seems to be juridically very difficult to give any such kind of powers to private organs such as a sport organization or its tribunal. Consequently, the sport organizations´ large scale anti-doping investigations are possible also in the future only through cooperation and coordination with state agencies. The cooperation between the police and other governmental authorities and the sport organizations seems to be the most effective way to improve the battle against doping.